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February 14, 2000

J. Jeffrey Craven
(202) 457-6077
JCraven@pattonboggs.com

VIA COURIER

EX PARTE OR LATE FILED

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Ex Parte Presentation
WT Docket 98-169

Dear Ms. Salas:

By this letter and pursuant to Section 1.1206 of the Commission's Rules, I hereby notify the Commission that on February 11, 2000, on behalf of clients who are 218-219 MHz licensees, I met with Mark Bollinger, Rita Cookmeyer, and Ben Freeman of the Wireless Telecommunications Bureau to discuss the status of various clients' eligibility status as 218-219 MHz licensees, including the issues contained in the attached letter sent to Rachel Kazen, also of the Wireless Telecommunications Bureau.

If you should have any questions, please contact the undersigned counsel.

Sincerely yours,

J. Jeffrey Craven

J. Jeffrey Craven

cc: Mark Bollinger, Esq.
Rita Cookmeyer, Esq.
Mr. Ben Freeman

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February 4, 2000

J. Jeffrey Craven
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VIA HAND DELIVERY

Ms. Rachel Kazan
Chief
Auctions, Finance and Market Analysis Branch
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Eligibility Status of IVIDCO, L.L.C. and Contingent Waiver Request

Dear Rachel:

Thank you again for taking time to meet with me concerning IVIDCO's eligibility. During the past week, I have given further thought to our conversation about the utilization of waiver requests as a basis for protecting one's eligibility against missed payments thereafter. After reviewing IVIDCO's files, it is apparent that IVIDCO did, in fact, have on file with the Commission – well before the March 1997 missed payment date – a series of requests that separately or collectively clearly constitute a standing waiver request.

1. The April 1996 Waiver Letter.

On April 18, 1996, IVIDCO filed a letter with the Secretary of the FCC and Regina Dorsey seeking a waiver of the first installment payment date because the Commission's database contained incorrect cost/payment data as well as an incorrect address for IVIDCO (the "Waiver Letter", Attachment A hereto). While the letter was not styled formally as a waiver request, it is clear from the context that this was, in fact, a waiver request since IVIDCO sought FCC approval to make a payment after the first installment payment deadline. This waiver request is analogous to a grace period request; a vehicle that the Commission has already found to be a basis for sustaining a licensee's eligibility. The letter also notes that, on April 15, 1996, counsel

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
	)	
Amendment of Part 95 Extend the Terms of Interactive Video Data Service Licenses from Five to Ten Years	))))	RM - ______

RECEIVED
SEP - 4 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: Chief, Wireless Telecommunications Bureau

PETITION FOR RULEMAKING

Pursuant to Section 1.401 of the Commission's Rules, 47 C.F.R. § 1.1401, Euphemia Banas, Trans Pacific Interactive, Inc., Wireless Interactive Return Path, L.L.C., New Wave Communications, L.L.C., Loli, Inc., Multimedia Computer Communication, Inc., Southeast Equities, Inc., Robert H. Steele, MAR Partnership, IVDS On-Line Partnership, A.B.R. Communications Inc., IVIDCO, L.L.C., Vision TV, Dunbar TV, Corp., and Legacy TV, Inc., all of which are Interactive Video and Data Service ("IVDS") licensees (the "Licensees" or "Petitioners"), request that the Commission: (a) extend the license term for IVDS providers from five (5) to ten (10) years and; (b) allow licensees that qualify for installment payments under the current FCC rules to extend the installment payment period from five (5) to ten (10) years.

Background

IVDS is a point-to-point short distance communications service that provides two-way interactive communication to subscribers located at fixed and mobile locations. 47 C.F.R. § 95.803(a); Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and

Data Service Licensees to Provide Mobile Services to Subscribers, 11 FCC Rcd 6610 (1996). The FCC awards two IVDS licenses per Metropolitan Statistical Area ("MSA") and Rural Statistical Area ("RSA"). Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules to Provide Interactive Video and Data Services, 7 FCC Rcd 1630 (1992); 47 C.F.R. § 95.803(b). Currently, the Commission issues IVDS licenses for a five-year term. 47 C.F.R. § 95.811(d).

IVDS technology is designed to provide real-time response to information displayed on a television set, pager, or personal computer screen through the use of a wireless remote control. Potential applications for IVDS include interactive messaging as well as commercial and two-way telemetry services, such as remote monitoring of utility services, vending machines, cable television, and home security systems. IVDS technology allows businesses to automate data collection tasks that have previously required manual readings. For example, a utility company can use an IVDS network to take readings from electricity meters several times a day; or even several times an hour. This allows the utility to offer time-of-day usage discounts and allows for more accurate billing and power demand estimation. Without IVDS technology, such constant monitoring would not be economically feasible. See Henderson, Electric Utilities Plug into Telecom, Phone +, June 1995, at 76; Reeves, The Emerging Utility Paradigm, Wireless, February 1996, at 14.

I. The Commission Has Authority To Grant a License Term of Ten (10) Years

The Commission has authority to grant a ten-year license term for IVDS. Section 154(j) of the Communications Act of 1934, as amended, allows the Commission to conduct proceedings "in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j) (1995). Further, Section 307(c) sets a maximum license period for certain classes of providers. Any station other than a radio or television broadcasting station may have a license term of up to ten (10) years. 47 U.S.C. § 307(c). The Commission also has authority to modify the provisions of existing licenses by rulemaking. National Broadcasting Co., Inc. v. United States, 319 U.S. 190 (1943); California Citizens Band Assoc., Inc. v. United States, 375 F.2d 43 (9th Cir.), cert. denied 389 U.S. 844 (1967). Thus, the Commission has the authority to grant a ten-year license period for IVDS licensees.

II. The License Period For IVDS Providers Is Substantially Shorter Than For Providers With Similar Technologies And Market Areas

The FCC has designated a five-year licensing period for IVDS providers. 47 C.F.R. § 95.811(d). This contrasts with longer licensing periods for similar technologies. For example, broadcasting stations feature eight-year licenses. 47 U.S.C. § 307(c)(1)(Supp. 1996). Licenses for stations in Point-to-Point Microwave Radio, Local Television Transmission, Multipoint Distribution Service ("MDS"), and Digital Electronic Message Services are issued for a period of ten (10) years. 47 C.F.R. § 21.45(a). Similarly, the recently auctioned Personal Communication Services ("PCS") licenses are assigned for a ten-year period. 47 C.F.R. § 24.15.

Cellular systems, which are technologically very similar to IVDS, and are licensed using the same geographic boundaries, are awarded a ten-year license term. The Commission decided to grant all common carrier and fixed satellite licenses for a ten-year period because: (1) common carrier and fixed satellite service are rarely contested and are granted relatively routinely, (2) the public is adequately protected by regulatory tools other than renewal proceedings, and (3) longer license terms "would result in savings of Commission and licensee resources" by eliminating the cost of filing and processing renewal applications every five (5) years. Common Carriers and Satellite Licensing Procedures Pursuant to the Communications

Amendments Act of 1982, 53 RR 2d 1514. 1515 (1983) ("Common Carrier Licensing Report and Order"). Accordingly, for the same reasons that the Commission has provided for ten-year licenses for other MSA and RSA area providers. IVDS licensees should likewise have a ten-year license.

The FCC originally adopted a five-year license term for IVDS in order to deter trafficking in licenses that were granted by lottery. The FCC said the five year term "strikes a reasonable balance between the administrative burden on both the Commission and the applicant. and our desire to track the status of licensed IVDS operations. These rules will help to reduce any potential for trafficking in licenses by persons who have no real interest in constructing IVDS systems." Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules to Provide for Interactive Video and Data Service, 7 FCC Rcd 1630, 1641, (1992). The need to monitor the IVDS industry to deter the trafficking and unjust enrichment that accompanied lotteries was eliminated when the Commission decided to award IVDS licenses by auction. ("The strongest measure to deter future instances of unjust enrichment in the lottery context has already been taken by Congress when. in the Budget Act. it granted the Commission auction authority . . ." Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 9 FCC Rcd 7373, 7375 (1994). Since the main purpose for the five year license period no longer exists, the Commission should extend the IVDS license term to ten years.

If the Commission finds a continued need to track the status of the IVDS industry, it can do so using other existing IVDS rules. IVDS licensees are required to file applications with the Commission to propose modifications to their systems (47 C.F.R § 95.815(e), (f)), to assign or transfer control of their licenses (47 C.F.R. § 95.819, 95.821), and to provide three- and five-year benchmark coverage reports (47 C.F.R. § 95.833). If the Commission needs further information. the existing reporting rules should be modified. rather than requiring a renewal filing.

III. The Short Five-Year License Period For IVDS Providers Inhibits Competition And Will Delay The Development Of IVDS

a. A Ten Year Term Will Help Assure Winning Bidders a Return on Their Investment

In the MDS context. the Commission has said that winning bidders "should be assured of receiving . . . licenses of a duration sufficient so that they may have a reasonable period of time to construct their systems and earn a return on the amounts they invested." Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service, 10 FCC Rcd 9589 (1995)("MDS Report and Order"). Like MDS bidders. IVDS service providers took part in a competitive bidding process that resulted in expensive acquisitions of license rights. Due to these high costs and the delay in developing IVDS technology, a period longer than five (5) years is necessary for bidders to meet build-out projections and recoup the initial investment. Further investment in the still-developing IVDS technology could be curtailed if the license period is not extended. as individuals and corporations will hesitate to invest in a technology with such limited license periods.

As noted above. the Commission has also recognized the savings that will be realized by both providers and the Commission as a result of a ten-year term: "the longer license terms would result in savings of Commission and licensee resources." Common Carrier Licensing Report and Order at 1515. Potential savings include the cost of licensee personnel needed to complete renewal applications. legal costs. and filing fees. The FCC is well aware of the substantial demand imposed upon its staff by such filings. If a licensee needs to apply only once every ten (10) years instead of once every five (5) years, the licensee's and the Commission's costs are cut in half.

b. A Ten-Year License Period Will Facilitate Financing Agreements

The Commission has also noted that "bidders who must arrange financing will need to assure lenders that they will have possession of their station licenses for a reasonably lengthy period of time." MDS Report and Order at ¶ 156. Likewise, IVDS providers must assure lenders that they will hold a license for a sufficient period to warrant financial investment. If a ten (10) year license is appropriate for MDS, so it should be for IVDS. Indeed, extending the IVDS license period to ten (10) years would help ensure that small enterprises who wish to compete in the IVDS market will be able to secure financing by convincing financial backers that an investment will have a sufficient period to turn profitable. This will have the added benefit of increasing the number of potential operators in the market, thereby advancing the public interest.

c. A Ten-Year Term Is Especially Helpful To Small Businesses and Entrepreneurs

As the Commission noted, awarding licenses with ten-year terms rather than shorter time spans "serves both prospective bidders and the Commission well." Id. at ¶ 157. The Commission determined that the ten-year period is "of sufficient certainty and length to be fair to parties who must now pay considerable sums, and perhaps obtain outside financing" in order to acquire licenses. Id. This is particularly true for small businesses, since they are more likely to require outside financing. The Commission has acknowledged the difficulty of small and start-up businesses in obtaining private funds. Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 9 FCC Rcd 2348, 2389-90 (1994). Due to this added difficulty in obtaining outside financing, small businesses in particular would benefit from an extension of the licensing period. As the Commission has noted, financing is easier to obtain over a longer licensing period. Id. This is particularly true in the IVDS service, where delays in availability of equipment and service implementation have contributed to difficulty in attracting financing. Increasing small business participation will increase competition within each market and ensure that consumers receive a choice of IVDS providers. The 1993 Budget Act requires the Commission to encourage small businesses attempting to enter into the wireless industry. Omnibus Budget Reconciliation Act of 1993, P.L. 103-66 § 6002(j)(3)(B). Section 257 of the Telecommunications Act of 1996 ("Act") directs the Commission to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services . . ." Pub. L. 104-104, Section 203, 110 Stat. 56, 112. The Commission must also promote a national policy "favoring diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity." Id.

d. A Ten-Year License Period Will Facilitate Expansion of Coverage and Development of Regional and National IVDS Networks

No one at the FCC or in the wireless business would have predicted that two years after the IVDS MSA licensing auction, only a handful of IVDS systems would have been constructed and even those operate on only a trial basis. The delay is due to equipment manufacturing, and is clearly beyond the control of IVDS licensees. Therefore, it is particularly important to increase the duration of the IVDS license term so as to allow sufficient time for the development of the new service. Extension of the license term would allow expansion of IVDS networks and the development of regional systems. IVDS licensees, poised on the cutting edge of the nascent interactive multimedia industry, face challenges in constructing local, regional and national systems that integrate wireless technologies with other technologies to provide new services for the public. With two years already expended, companies will need additional time to concentrate on constructing and servicing IVDS systems and expanding coverage to form national and regional IVDS networks.

The Commission has not yet conducted auctions to distribute IVDS licenses in RSAs, which are critical for establishing regional IVDS coverage. In other contexts, the Commission has recognized that carriers and the public benefit from MSA/RSA market consolidation. The Commission has said that MSAs and RSAs are "too small for the efficient provision of regional or nationwide mobile service" and that "cellular carrier's efforts have frequently been directed towards geographic aggregation to provide wider service areas for consumers and to lower costs of providing service." Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 4957, 4987 (1994). Such regional coverage is essential for utilities and other potential IVDS customers that need comprehensive regional coverage. There is less incentive to form important alliances with utility companies and others if the shorter license period unnecessarily restricts the potential profits and usefulness of IVDS networks. Firms may decide that the cost and administrative burden of creating national networks is not justified if the network will be viable for less than five (5) years. IVDS consumers will be less willing to use IVDS and change out existing equipment if license terms expire in a few years.

The encouragement of regional and national networks will facilitate the realization of another Commission goal: stability and continuity of service in the marketplace. The Commission has made clear, both in cellular and related technologies such as IVDS, that stability and continuity of service to the public is vital. Amendment of Part 22 of the Commission's Rules from a five-year to a ten-year period would benefit the licensees, the Commission, and the consumer public.

The Petitioners have charted a positive, practical course of seeking a longer licensing term and a longer period of time to pay-off its obligations. The Commission should promptly and enthusiastically embrace this proposal and expedite the Rulemaking process.

WHEREFORE, it is respectfully requested that the Commission issue a Notice of Proposed Rulemaking to amend Section 95.811(d) of the Commission's Rules to extend the license period for IVDS system licenses to ten (10) years. Further, the Commission is requested to keep the plain language of Section 95.816(d)(3) and allow the use of installment payments over the length of the ten (10) year license period.

Respectfully submitted,

Euphemia Banas
Trans Pacific Interactive, Inc.
Wireless Interactive Return Path, L.L.C.
New Wave Communications, L.L.C.
Loli, Inc.
Multimedia Computer Communication, Inc.
Southeast Equities, Inc.
Robert H. Steele
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A.B.R. Communications Inc.
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Vision TV
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Legacy TV, Inc.

J. Jeffrey Craven
Janet Fitzpatrick
PATTON BOGGS, L.L.P.

Dated: September 4, 1996

<u>Proposed Revised Rule - 47 C.F.R. § 95.811(d)</u>

"The term of each IVDS system license and each CTS license is **<u>ten</u>** years."

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Data Service Licensees to Provide Mobile Services to Subscribers, 11 FCC Rcd 6610 (1996). The FCC awards two IVDS licenses per Metropolitan Statistical Area ("MSA") and Rural Statistical Area ("RSA"). Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules to Provide Interactive Video and Data Services, 7 FCC Rcd 1630 (1992); 47 C.F.R. § 95.803(b). Currently, the Commission issues IVDS licenses for a five-year term. 47 C.F.R. § 95.811(d).

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The FCC originally adopted a five-year license term for IVDS in order to deter trafficking in licenses that were granted by lottery. The FCC said the five year term "strikes a reasonable balance between the administrative burden on both the Commission and the applicant, and our desire to track the status of licensed IVDS operations. These rules will help to reduce any potential for trafficking in licenses by persons who have no real interest in constructing IVDS systems." Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules to Provide for Interactive Video and Data Service, 7 FCC Rcd 1630, 1641, (1992). The need to monitor the IVDS industry to deter the trafficking and unjust enrichment that accompanied lotteries was eliminated when the Commission decided to award IVDS licenses by auction. ("The strongest measure to deter future instances of unjust enrichment in the lottery context has already been taken by Congress when, in the Budget Act, it granted the Commission auction authority . . ." Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 9 FCC Rcd 7373, 7375 (1994). Since the main purpose for the five year license period no longer exists, the Commission should extend the IVDS license term to ten years.

If the Commission finds a continued need to track the status of the IVDS industry, it can do so using other existing IVDS rules. IVDS licensees are required to file applications with the Commission to propose modifications to their systems (47 C.F.R § 95.815(e), (f)), to assign or transfer control of their licenses (47 C.F.R. § 95.819, 95.821), and to provide three- and five-year benchmark coverage reports (47 C.F.R. § 95.833). If the Commission needs further information, the existing reporting rules should be modified, rather than requiring a renewal filing.

III. The Short Five-Year License Period For IVDS Providers Inhibits Competition And Will Delay The Development Of IVDS

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As noted above, the Commission has also recognized the savings that will be realized by both providers and the Commission as a result of a ten-year term: "the longer license terms would result in savings of Commission and licensee resources." Common Carrier Licensing Report and Order at 1515. Potential savings include the cost of licensee personnel needed to complete renewal applications, legal costs, and filing fees. The FCC is well aware of the substantial demand imposed upon its staff by such filings. If a licensee needs to apply only once every ten (10) years instead of once every five (5) years. the licensee's and the Commission's costs are cut in half.

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The Commission has not yet conducted auctions to distribute IVDS licenses in RSAs, which are critical for establishing regional IVDS coverage. In other contexts, the Commission has recognized that carriers and the public benefit from MSA/RSA market consolidation. The Commission has said that MSAs and RSAs are "too small for the efficient provision of regional or nationwide mobile service" and that "cellular carrier's efforts have frequently been directed towards geographic aggregation to provide wider service areas for consumers and to lower costs of providing service." Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 4957, 4987 (1994). Such regional coverage is essential for utilities and other potential IVDS customers that need comprehensive regional coverage. There is less incentive to form important alliances with utility companies and others if the shorter license period unnecessarily restricts the potential profits and usefulness of IVDS networks. Firms may decide that the cost and administrative burden of creating national networks is not justified if the network will be viable for less than five (5) years. IVDS consumers will be less willing to use IVDS and change out existing equipment if license terms expire in a few years.

The encouragement of regional and national networks will facilitate the realization of another Commission goal: stability and continuity of service in the marketplace. The Commission has made clear, both in cellular and related technologies such as IVDS, that stability and continuity of service to the public is vital. Amendment of Part 22 of the Commission's Rules from a five-year to a ten-year period would benefit the licensees, the Commission, and the consumer public.

The Petitioners have charted a positive, practical course of seeking a longer licensing term and a longer period of time to pay-off its obligations. The Commission should promptly and enthusiastically embrace this proposal and expedite the Rulemaking process.

WHEREFORE, it is respectfully requested that the Commission issue a Notice of Proposed Rulemaking to amend Section 95.811(d) of the Commission's Rules to extend the license period for IVDS system licenses to ten (10) years. Further, the Commission is requested to keep the plain language of Section 95.816(d)(3) and allow the use of installment payments over the length of the ten (10) year license period.

Respectfully submitted,

Euphemia Banas
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J. Jeffrey Craven
Janet Fitzpatrick
PATTON BOGGS, L.L.P.

Dated: September 4, 1996

Proposed Revised Rule - 47 C.F.R. § 95.811(d)

"The term of each IVDS system license and each CTS license is **ten** years."

Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, 7 FCC Rcd. 719 (1992). A ten-year license term will help produce the strong networks necessary to realize this goal.

IV. Extension Of Installment Payments To The Entire Length Of A Ten-Year License Term

Currently, small businesses may elect to pay the full amount of their IVDS license bid in installments over the term of their licenses. 47 C.F.R. § 95.816(d)(3). This allows a small business to spread the cost of acquiring the IVDS license over the length of the license period. The current rules recognize the utility of such an approach. Without installment payments, many companies could not raise the initial investment necessary to enter the IVDS industry.

Petitioners ask the Commission to expand this common-sense installment payment plan to the new ten-year license period. For the reasons that the Commission found dispositive in initiating the installment payment option for the five-year license period, expansion of the installment payment plan makes sense over the ten-year period as well. This extension would require no change in the current wording of the regulation. The Commission can simply issue to each licensee a revised IVDS Auction Payment Schedule, and thereby enhance IVDS licensees' ability to operate a successful business by stretching the repayments over a longer licensing term, and thus allowing the licensees to direct resources to the development of IVDS services to the public. This approach would also enable the Commission to re-program its auction payment database, which is consistently unreliable.

Conclusion

The Commission deemed a ten-year license period beneficial for the cellular, MDS, and other market-based wireless services. For the same reasons, extending the IVDS license period for IVIDCO met with Ms. Dorsey to seek a waiver of the payment deadline and that the letter was a memorialization of that meeting.

Despite repeated requests, the FCC never responded to the Waiver Letter. Accordingly, the Waiver Letter should be considered a pending waiver request and treated like other waiver requests; as a shield against later occurring payment errors.

2. IVIDCO's September 1996 Petition for Rulemaking.

On September 4, 1996, IVIDCO joined with other IVDS licensees in filing a Petition for Rulemaking, Attachment B hereto, which requested, inter alia, that the FCC (a) extend the license term for IVDS providers from five (5) years to ten (10) years and (b) allow licensees that qualify for installment payments under the current FCC rules to extend the installment payment period from five (5) to ten (10) years. This request was made in the context of Section 1.2110(e)(4)(ii) of the Commission rules that permitted the FCC to "grant[ ] a grace period, or otherwise approve[ ] a *restructured payment schedule*. . . " (emphasis added). IVIDCO's Petition is, effectively, a waiver request, seeking a restructured payment schedule.

Like the Waiver Letter, the Commission failed to timely answer IVIDCO's Petition. Indeed, this entire Petition for Rulemaking went unanswered until the Commission issued an Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking ("NPRM") on September 17, 1998 (two years after the Petition for Rulemaking, and well after the March 1997 missed payment date) agreeing to reconsider the IVDS rules, including the issues presented by IVIDCO[1]. Thus, like the Waiver Letter, this Petition establishes the fact that IVIDCO had on file with the FCC a waiver/restructured payment schedule request prior to the missed March 31, 1997 payment date.

3. The November 1996 On-Going Payment Records Discrepancy Letter.

On November 18, 1996, counsel for IVIDCO, acting at its request, again wrote to Ms. Dorsey, (Attachment C hereto) indicating that

[1] Simultaneously with the NPRM, the Commission released a Public Notice (DA Number 98-1897) titled "Wireless Telecommunications Bureau Provides Guidance on Grace Period Requests and Installment Payment Rules". That Public Notice – a clear acknowledgement that there was a need for guidance on these two subjects – also noted that Section 1.2110 was amended significantly on March 16, 1998. The rulemaking that resulted in this amendment to Section 1.2110 began on February 28, 1997; a month prior to the March 1997 missed payment date. Thus, this key rule section was being changed by the Commission at precisely the same time as IVIDCO's delinquency. IVIDCO filed a Petition for Reconsideration of the Part 1 Rules regarding Installment Payments on February 17, 1998.

> [w]e have been attempting to contact you over the course of the past two weeks to request a meeting with you and your staff to resolve what we see as a series of discrepancies between our payment records for several of our IVDS clients and the FCC's records of their payment histories. We have attached hereto a list of clients whose IVDS payment histories are not fully reflected in your records.

(IVIDCO is listed in the letter as one of the clients seeking to correct the FCC's database of payments.) Thus, as IVIDCO's December 31, 1996 payment neared (the payment that created the ineligibility when not made on March 31, 1997), IVIDCO continued to struggle with the FCC's database to insure proper amounts and crediting.

4. <u>IVIDCO's February 1997 Request for Clarification of Section 1.2110(2)(4)(ii) and Suspension of Installment Payments.</u>

On February 17, 1997 counsel for IVIDCO, on behalf of IVIDCO and other similarly situated IVDS clients, met with Mr. Jerome Fowlkes, then the Chief Financial Analyst of Wireless Telecommunications Bureau, to acknowledge his "willingness to work with us to clarify the Commission's treatment of Section 1.2110(e)(4)(ii) of its rules, in the context of requests for further grace periods for making IVDS installment payments." (See Attachment D hereto which includes Patton Boggs February 1997 invoice to IVIDCO, evidencing IVIDCO's participation in the Fowlkes meeting and correspondence.) Specifically, it was raised with Mr. Fowlkes, in the meeting and in the letter, that "there is quite a bit of sentiment among IVDS licensees that installment payments should be suspended during the pendancy of the upcoming rulemaking proceeding which, we understand, could result in potentially fundamental changes to the IVDS rules." It was also noted, that

> some members of the Commission staff have publicly suggested that the changes borne of the NPRM could include bandwidth relocation; different licensing arrangements for MSAs and RSAs; and even the reclamation of IVDS licenses by the Commission. In light of these statements, absent a prompt and unambiguous clarification of the methodology for implementing Section 1.2110(e)(4)(ii) it would be inequitable for the Commission to require further payments for spectrum which may or may not resemble that which they purchased in July 1994.

The letter goes on to list five (5) other sub-issues as to which IVIDCO and other clients sought clarification, including a request that the Commission "provide some guidance as to the type of documentation you would deem appropriate as a basis for demonstrating financial distress".

Despite the request for a prompt reply, IVIDCO's letter, requesting both a suspension of installment payments and clarification of the proper method for demonstrating financial distress, was never answered; leaving IVIDCO and other IVDS licensees to interpret for themselves the status of grace period requests, and equally importantly, the proper method for demonstrating financial distress.

5. Other Factors Compelling Treatment of IVIDCO's Filings as Waivers.

In addition to the several filings that form the basis for the fact that IVIDCO had on file with the Commission a waiver request prior to March 31, 1997, other factors weigh in favor of recognizing IVIDCO's filings as a waiver or a series of waivers. IVIDCO, perhaps more than any of the other clients represented by this law firm, had enormous difficulty getting the FCC to correct its payment records. On no fewer than 10 occasions, IVIDCO principals and counsel corresponded or met with the Commission staff in a never-ending battle to correct the FCC's database.

Attached hereto as Attachment E is a list of IVIDCO communications with the FCC and copies of those pleadings, letters and faxes.

IVIDCO has struggled mightily to be a participant in the birth of the IVDS industry. IVIDCO wants to develop its licenses and is poised to partner with U.S. Telemetry Corporation ("USTC"), a company led by Thomas L. Siebert, former U.S. Ambassador to Sweden (1994 – 1998) and former Chairman (as the lead-U.S. representative) to the 1998 International Telecommunications Union Plenipotentiary Conference. Ambassador Siebert's company has developed technology suitable to provide telemetry services and IVIDCO has committed to partnering with USTC if it is deemed an "eligible" licensee.

6. Alternatively the Commission Should Simply Waive the Rule.

Section 1.925 establishes the standards for waiver of the Commission's rules and regulations. Specifically, this section provides that a waiver is appropriate if (i) the underlying purpose(s) of the rule would not be served or would be frustrated buy the application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. As illustrated herein, IVIDCO meets both criteria.

Moreover, the Commission may waive a rule on its own motion or pursuant to a waiver request. 47 C.F.R. § 1.3; Application for Review of Ad Hoc Telecommunications Users Committee, California Bankers Clearing House Association, New York Clearing House Association, MasterCard International Incorporated, and VISA, U.S.A., Inc., 13 F.C.C. Rcd 23801, 23806 (1998), citing Northeast Cellular Telephone Co. v. F.C.C., 897 F.2d 1164, 1166 ("Waiver of a Commission rule is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.")

Special circumstances surely exist in this case. The Commission badly mishandled the payment notice and debt collection process. The record also demonstrates that the FCC's evolving grace period rules and policies created significant confusion over what was due and when. Compounding these difficulties, the Commission staff literally took years to respond to requests for clarification, when they responded at all. Clearly, equity and fairness dictate that IVIDCO's failure to make one quarterly payment should not, under these circumstances, permit the Commission to terminate IVIDCO's IVDS licenses.[2] Accordingly, waiver of the rule is appropriate, in this unique context.

In conclusion, the record is clear: IVIDCO did in fact have *at least* one waiver request on file with the Commission *prior* to the missed March 1997 payment date. Accordingly, IVIDCO met the Commission's requirement for a waiver that would protect IVIDCO's eligibility, notwithstanding the March 31, 1997 payment failure. If it is determined that IVIDCO's filings do not meet the standard for a waiver request, IVIDCO hereby requests that the Commission waive the rule on its own motion based on "special circumstances" of incorrect payment records, IVIDCO's diligent efforts to correct the records, and the Commission's own failure to manage

[2] It is well established that if the Commission is going to hold applicants or licensees to a regulatory standard it must inform them beforehand what are the components of that standard. See Bamford v. F.C.C., 535 F.2d 78, 82 (D.C. Cir.), cert. denied, 429 U.S. 895 (1976) ("elementary fairness requires clarify of standards sufficient to apprise an applicant of what is expected"). This is particularly the case where the Commission expects strict adherence to those standards. See Salzer v. F.C.C., 778 F.2d 869, 875 (D.C. Cir. 1985); see also, Radio Athens, Inc. (WATH) v. F.C.C., 401 F.2d 398, 404 (D.C. Cir. 1968). Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a regulatory standard without first providing adequate notice of the substance of the rule. Satellite Broadcasting Co., Inc. v. F.C.C., 824 F.2d 1, 3 (D.C. Cir. 1987). The Commission may not reject an application for failing to meet a standard of which the applicant was never previously notified. See Maxcell Telecom Plus, Inc. v. F.C.C., 815 F.2d 1551, 1560 (D.C. Cir. 1987). See also CHM Broadcasting Limited Partnership v. F.C.C., 24 F.3d 1453, 1457 (D.C. Cir. 1994) ("An agency commits reversible error when it penalizes an applicant based on standards of which the agency failed to provide notice."). See, Petroleum Communications, Inc. v. F.C.C., 22 F.3d 1164, 1172 (D.C. Cir. 1994) ("we have long held that an agency must provide adequate explanation before it treats similarly situated parties differently".) (See also, Green Country Mobilephone, Inc. v. F.C.C., 765 F.2d 235, 237 (D.C. Cir. 1985).

effectively the application of the grace period rules as well as the entire IVDS payment and collection process. IVIDCO's consistent efforts to comply with the FCC's rules, and its pending USTC joint venture agreement, are evidence of its desire to provide service to the public. Waiver of the rule will allow service to be provided sooner than if the license is reauctioned. Therefore, grant of the waiver is in the public interest.

I look forward to speaking with you at your very first opportunity.

With best wishes, I am

Very truly yours,

J. Jeffrey Craven

Attachments

cc: Mr. James Enochs
Mrs. Marilyn Smith
Rita Cookmeyer, Esquire
Andrea Kelly, Esquire
Mr. Ben Freeman

3/11 11am

ClearCOMM DCO M Bollinger

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waiver is in public interest

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wireless cable precedent? Jim Blitz?

Green County

Waiver

· First letter; waiver re late payment } did every Granted Bod / Ringwood / the same

· 9/96 req 4 Rulemaking 5/10/ [illegible]

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· 11/96 Payment / Debt Service data still screaming

· 2/97 req 4 Clarification 1.2110(e)(4)(ii)

· did it, hands

· Waiver 1.925 underlying purpose frustrated

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2B turnery.

· Payment Reduction Act

· Tell an all 2 turn licenses in ; [illegible]

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