

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re the Matter of)
)
Amendment of Part 1 of the) WT Docket No. 97-82
Commission's Rules --)
Competitive Bidding Procedures)
)

To: The Commission

PETITION FOR RECONSIDERATION

**LOLI, INC., CYBERFORCE, L.L.C., IVIDCO, L.L.C., M&B XXXIX, INC.,
SOUTHERN WAVE, L.L.C, STAR INTERACTIVE VIDEO INC., TEXAS
INTERACTIVE NETWORK, INC. and TRANS PACIFIC INTERACTIVE, INC.**

(collectively "Petitioners"), acting through their counsel and in accordance with Section 1.429 of the Commission's rules. hereby jointly petition the Commission to reconsider its *Third Report & Order And Second Further Notice of Proposed Rule Making*, in the Matter of *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures* (WT Docket 97-82); *Amendment of Spectrum Below 5 GHz Transferred from Federal Government Use* (ET Docket 94-32), _____ FCC Rcd _____ (1998) (FCC 97-413, released December 31, 1997) ("*Report & Order*").

Specifically, Petitioners request clarification and reconsideration of the change to Section 1.2110 of the Commission's rules governing the FCC's installment payment plan for small businesses.

In support of their joint petition the Petitioners set forth the following:

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I. PARTIES AND STANDING

Petitioners are Interactive Video and Data Service ("IVDS") licensees, some of whom participated in the Commission's Part 1 rulemaking proceeding.¹ Each IVDS licensee has made timely down payments and installment payments until financial hardship caused each to request a Grace Period under Section 1.2110(e)(4) of the current Commission rules. Consistent with the Commission's existing rule, each Petitioner requested a "work out" of their existing installment payment schedule, as well as a clarification of which payment is due to the FCC on particular dates. As existing licensees subject to the Commission's installment payment rules, each Petitioner is directly affected by the Commission's elimination of the rule allowing licensees to file Grace Period requests as well as the Commission's adoption of an "automatic default" rule.

II. ARGUMENT

A. **The Commission Should Clarify That IVDS Licensees May Continue To File Grace Period Requests Under The "Old Rules" And That They Will Not Be Deemed In Default On Their *Future* Installment Payments Until The Commission Acts On Pending Or Future Grace Period Requests.**

Petitioners are among many IVDS Licensees who have submitted Grace Period requests for past installment payments as to which the Commission has not yet acted. Furthermore, Petitioners are among the group of IVDS Licensees who petitioned the Commission in September, 1996 for a rulemaking to extend IVDS installment payments to 10-year terms and

¹ Comments and Reply Comments were filed jointly in the Commission's Part 1 rulemaking proceeding by Airadigm Communications, Inc., Loli, Inc., New Wave Communications, Inc., KMC Interactive TV, Inc., MAR IVDS, Inc., New Wave PCS, Inc. and Euphemia Banas.

re-amortize existing license debt.² The Commission has not yet acted on the Petition for Rulemaking, but has publicly committed to doing so. See, FCC Public Notice DA 97-209, released January 29, 1997 (wherein the FCC delayed commencement of the IVDS Rural Service Area auction "to give the Commission an opportunity to consider a Petition for Rulemaking and numerous informal requests of potential bidders and license holders seeking to obtain additional flexibility for the service.")

The FCC's Report and Order states "we further clarify that such licensees [that have previously filed grace period requests] are not deemed to be in default on these licenses until such time as the Bureau issues a decision on these Grace Period requests."³ The Petitioners seek clarification that it is the Commission's intention to allow IVDS licensees, who have previously filed Grace Period requests, to continue to file Grace Period requests under the current Grace Period rules, rather than the newly adopted Grace Period provisions. Such a result would be procedurally efficient in that, once the Commission acts on the Grace Period requests, they would be doing so based upon the same underlying procedures and rules.

Indeed, the fairest and most equitable resolution for addressing this subject would be to suspend all payments until the FCC issues an Order in response to the Petition for Rulemaking, which would have the effect of finalizing the technical rules, thus freeing the industry to complete the development of IVDS equipment and services. As noted supra, this result would

² Petition For Rulemaking, filed September 4, 1996, by 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. Letter Amendment to Petition for Rulemaking filed January 28, 1997.

³ Report and Order at 69, ¶ 113.

also be consistent with the Commission's decision to suspend relevant deadlines while a relevant policy decision is underway.⁴

B. The Commission's Change to the Grace Period Rule is Arbitrary and Capricious because it Imposes An Unfair Burden Upon IVDS Licensees.

a. *IVDS Licensees Who Are Unable to Make Their Installment Payments Have Not Been Afforded the Same Remedies as Have PCS Licensees.*

Under Section 706(2)(A) of the Administrative Procedures Act ("APA"), agency actions may be set aside when the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." The FCC's failure to accord IVDS licensees the same remedies as those given to PCS licensees is "arbitrary and capricious." Illinois Bell Telephone Co. v. FCC, 740 F.2d 465 (1984) (stating that an agency's application of a regulation is arbitrary and capricious when it can be shown that the agency's standards were inconsistently applied in similar situations.) As a result of this disparate treatment, IVDS licensees will disproportionately bear the burden of the Commission's new default rules.

PCS licensees had payments suspended for one year after they sought help from the FCC concerning their payment schedules.⁵ IVDS licensees requested similar treatment, but the FCC did not act upon this request.⁶ Further, PCS licensees were recently granted a range of options

⁴ See footnote 12, supra.

⁵ Installment Payments for PCS Licenses, Order, DA 97-649 (rel. March 31, 1997).

⁶ See, April 3, 1997 letter from J. Jeffrey Craven and Stephen Coran to Mr. William F. Caton, Acting Secretary and Daniel W. Phythyon, Acting Chief, Wireless Telecommunications Bureau.

for alleviating their financing difficulties.⁷ Two of these options, prepayment and amnesty, allow PCS licensees to eliminate their debt to the federal government. IVDS licensees have not been offered any option to cancel or otherwise negotiate their government debt. Thus, the Commission's new grace period rules, providing for one 180 days grace period and automatic installment payment default, disproportionately impacts IVDS licensees who have not been accorded the same payment suspensions or exit strategies.

Under the "arbitrary and capricious" standard, the first "step is to consider whether the agency has considered the relevant factors involved and whether there has been a clear error of judgment."⁸ The agency must also "articulate a 'rational connection between the facts found and the choice made.'"⁹ The Commission has not considered all of the relevant factors for IVDS licensees when it adopted a 180-day grace period and automatic default rule. The IVDS industry is unique among spectrum licensees that have installment payments.¹⁰ Indeed, IVDS is the only one without operational equipment and without firmly-established technical rules. For the past two to three years the IVDS industry has been working with the Commission to obtain relief

⁷ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Service ("PCS") Licensees, Second Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 97-82, 62 Fed Reg 55348 (rel. October 16, 1997).

⁸ Citizens to Preserve Overton Park, Inc. v. Volpe, 401 US. 402 (1971).

⁹ Cincinnati Bell Telephone Co. v. FCC., 69 F.3d 752 (6th Cir. 1995) (quoting City of Brookings Mun. Tel. Co. v. FCC., 822 F.2d 1153, 1165 (DC. Cir. 1987)).

¹⁰ The Commission has provided installment financing in six auctions: regional narrowband PCS, IVDS, MDS, 900 MHz SMR, and broadband PCS C and F Block. FCC Report to Congress on Spectrum Auctions, FCC 97-353, released October 9, 1997.

from burdensome technical rules.¹¹ However, the Commission not yet acted on, nor even issued a Notice of Proposed Rulemaking for the IVDS licensees' Petition for Rulemaking, despite its express commitment to do so.

The Commission itself recognized that IVDS licensees should not be forced to invest in further equipment development and deployment until the IVDS rules are finalized.¹² In light of the unique difficulties facing the IVDS industry, the Commission's decision to eliminate the filing of Grace Period requests evidences a lack of consideration of relevant factors and a clear error of judgment with respect to IVDS licensees.

C. Equity Requires that the Commission Modify the Grace Period and Default Rules for IVDS Licensees.

a. IVDS Licensees Should, At a Minimum, Be Offered Options Similar to Those Granted to PCS Licensees

As noted above, the FCC was able to find options for PCS licensees in or on the brink of default, granting them a choice of feasible remedies. Failure to extend such options to IVDS licensees means that the Commission's new rules prohibiting Grace Period requests beyond 180

¹¹ For example, Loli, Inc. has consulted with FCC counsel on numerous occasions over the past three years regarding IVDS equipment selection and technical issues.

¹² "Requiring IVDS licensees to comply with rules which are under Commission review would not further the public interest in this instance, since the subject rules directly impacts IVDS system planning and implementation . . . [O]ur approach here is consistent with prior Commission action suspending a deadline while a relevant policy is subject to pending rule making proceedings." Requests by Interactive Video and Data Service Auction Winners to Waive the January 18, 1998 and February 28, 1998 Construction Deadlines, Order, DA 98-59, released January 14, 1998.

days, and failure to consider the financial information of individual licensees, will inevitably cause many IVDS Licensees to default as early as June 1998.¹³

Absent relief from current installment obligations and new Commission rules, IVDS licensees will be forced to file for bankruptcy during their 180 day automatic grace period, or after 180 days, default on their licenses. Either course of action further diverts resources from developing a workable business for the IVDS frequencies. This result would be particularly unfair when the Commission itself agreed that IVDS licensees should not be required to commit resources to the IVDS industry until the technical rules are certain. See footnote 12, *infra*.

Before imposing the new grace period rule on IVDS licensees, the Commission should attempt to develop options for IVDS licensees as it did for PCS licensees. In the alternative, the Commission should grant IVDS licensees additional time, until the IVDS rulemaking is complete, to meet the new financial burdens placed upon them by the new Grace Period rules.

b. The Commission Should Allow IVDS Licensees to Continue to File Grace Period Requests and Requests for "Work-Outs"

Many IVDS licenses are held by minority- and women-owned small businesses who do not have the financial means to bring their installment payments current. To expect such licensees to be able to make current payments within 180 days is unrealistic, especially in light of uncertain technical rules. As noted above, all other Commission installment payment licensees have operational equipment and feasible, non fluid, technical rules. Since IVDS is still a development stage industry, the Commission should grant IVDS licensees the flexibility to

¹³ Many IVDS licensees have made their installment payments near the end of the 90 day grace period under the existing rules. Thus, the Petitioners' payment of their December 31, 1997 payment, is due on March 31, 1998. If the new rules are applied to this payment, Petitioners are lead to believe that the licenses will automatically default at the end of June, 1998.

continue to seek Grace Periods under the original rules, so that IVDS licensees can present their financial data on a quarterly basis and thereby permit the Commission may make a "case-by-case" evaluation of the licensee's progress.

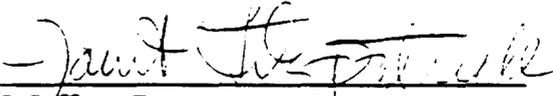
Indeed, if the Commission's new automatic default and license cancellation rule is imposed on IVDS licensees, a large number of IVDS licensees will be forced into default because they will be unable to meet the installment payment deadlines and late penalties will continue to mount, further frustrating the possibility of those licensees ever becoming current on payment obligations. Petitioners are hard-pressed to rationalize this result with the Commission's previously- stated recognition that "(r)equiring IVDS licensees to comply with rules which are under Commission review would not further the public interest." See footnote 12, *infra*.

Petitioners believe that factors, including the Commission's failure to act on its promise to review and revise IVDS' technical rules, have conspired to create a nightmare scenario for IVDS licensees. Unless the Commission agrees to suspend IVDS payments until the conclusion of the long- promised Rulemaking, or permits IVDS licensees to continue to file grace period requests under the old rules, IVDS licensees will be forced into a Hobson's choice: make payments on spectrum for which the technical rules are in flux; file bankruptcy; or default and risk retribution from the Commission over the balance owed. Certainly this is not the result that the Commission or the IVDS licensees intended four years ago when the IVDS Auction took place. Surely some balanced and equitable result can be achieved. Clarification of the grace period rules -- consistent with the comments herein -- would be a proper beginning.

WHEREFORE, in light of the foregoing, the Joint Petitioners request that the Commission reconsider its *Report & Order* consistent with this Petition.

Respectfully submitted,

**LOLI, INC.
CYBERFORCE, L.L.C.
IVIDCO, L.L.C.
M&B XXXIX, INC.
SOUTHERN WAVE, L.L.C.
STAR INTERACTIVE VIDEO
TEXAS INTERACTIVE NETWORK
TRANSPACIFIC INTERACTIVE**

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Dated: February 17, 1998

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EXHIBIT F

IVIDCO FCC PAYMENT FILING TIMELINES

January 5, 1995	M. Smith (IVIDCO) teleconference with Regina Dorsey regarding payment date and corrected data.
January 5, 1996	Letter from R. Dorsey/FCC regarding treatment of deadlines and standards.
March 29, 1996	Letter from R. Dorsey to IVIDCO clarifying IVDS payments.
April 11, 1996	J. Craven met with R. Dorsey regarding payment computation errors and erroneous address used by FCC for IVIDCO and requested waiver of first payment deadline.
April 18, 1996	Patton Boggs files letter and first Quarterly Payment with explanation, and requests waiver of first payment deadline.
April 25, 1996	Teleconference M. Smith (IVIDCO) and R. Dorsey. Letter from M. Smith (IVIDCO) to R. Dorsey regarding payment.
March 29, 1996	Letter from R. Dorsey to IVIDCO clarifying IVDS payments.
May 8, 1996	IVIDCO makes Quarterly Payment.
July 25, 1996	Petition for Reconsideration regarding 100 MilliWatt limits; IVIDCO co-sponsor.
September 25, 1996	IVIDCO makes Quarterly Payment.
November 18, 1996	Letter from IVIDCO's counsel to R. Dorsey in the form of a Request for Emergency Meeting to Resolve IVDS Accounts.
December 12, 1996	IVIDCO joins in meeting and follow-along letter to Catherine Sandoval, Director FCC's Office of Communications Opportunities, seeking assistance in the provision of grace periods.

January 28, 1997	IVIDCO joins in filing a Letter Amendment to its Petition for Rulemaking.
February 10, 1997	IVIDCO's counsel engages in meetings and letter to Jerome Fowlkes regarding suspension and request for clarification of grace period standards. (See Attachment D).
June 26, 1997	Request for Grace Period filed.
September 24, 1997	Request for Grace Period filed.
December 16, 1997	Request for Grace Period filed.
February 17, 1998	Petition for Reconsideration of Part 1 Rules regarding Installment Payments; objecting to changing Section 1.2110(e)(4).
March 13, 1998	Request for Grace Period and Formal Request for Work-Out.
March 19, 1998	Minor Adjustment to 3/13/98 Request for Work-Out.
June 4, 1998	Letter to FCC seeking to insure that WINCO does not seek the assignment of IVIDCO's licenses.