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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service	)	WT Docket No. 98-169

THIRD ORDER ON RECONSIDERATION OF THE REPORT AND ORDER AND MEMORANDUM OPINION AND ORDER

Adopted: April 29, 2002 **Released: May 8, 2002**

By the Commission:

I. INTRODUCTION

1. We have before us the Ad Hoc Coalition's ("Coalition")[1] second Petition for Reconsideration.[2] The Coalition seeks reconsideration of the *218-219 MHz Second Reconsideration Order*[3] that denied the Coalition's first Petition for Reconsideration.[4] We dismiss the second Petition for Reconsideration for the reasons set forth below.

II. BACKGROUND

2. On July 28 and 29, 1994, the Commission conducted an auction in the 218-219 MHz Service[5] ("Auction No. 2").[6] The applicable rules at the time included provisions to encourage participation by small businesses and minority- and women-owned entities.[7] Small businesses were

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1 The Coalition is comprised of Celtronix Telemetry, Inc. (previously called Community Teleplay, Inc.) ("Celtronix"); TV-Active, LLC ("TV-Active"); Texas Interactive Network, Inc. ("TI"); Hispania & Associates ("Hispania"); Zarg Corporation ("Zarg"); IVDS Interactive Acquisition Partners ("Interactive"); United Interactive Partners, Inc. ("United"); and G. Ray Hale ("Hale").

2 Petition for Reconsideration, filed by the Coalition on March 3, 2001 ("Second PFR").

3 Amendment of Part 95 of the Commission's Rule to Provide Regulatory Flexibility in the 218-219 MHz Service, *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 25020 (2000) ("*218-219 MHz Second Reconsideration Order*").

4 Petition for Reconsideration, filed by the Coalition on December 3, 1999 ("First PFR").

5 The 218-219 MHz Service was formerly known as the Interactive Video Data Service ("IVDS").

6 Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, Mimeo No. 44160 (rel. August 2, 1994) ("*IVDS Closing PN*"); Erratum to August 2, 1994 Public Notice Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, Mimeo No. 44265 (rel. August 9, 1994) ("*IVDS Closing PN Erratum*").

7 47 C.F.R. § 95.816(d)(1) (1995); Implementation of Section 309(j) of the Communications Act –

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entitled to pay eighty-percent of their winning bids in installments[8] while businesses owned by minorities and/or women were entitled to a twenty-five percent bidding credit that could be applied to one of the two licenses available in each market.[9] Bidders that were both small businesses and minority- and/or women-owned entities could use installment financing as well as bidding credits.[10]

3. At the time our rules were adopted for Auction No. 2, the standard of review applied to federal programs designed to enhance opportunities for racial minorities and women was an "intermediate scrutiny standard."[11] In June 1995, almost a year after the conclusion of Auction No. 2, the U.S. Supreme Court decided *Adarand Constructors v. Pena*, holding that racial classifications are subject to "strict scrutiny" and will be found unconstitutional unless "narrowly tailored" and in furtherance of "compelling governmental interests."[12]

4. On December 5, 1995, the Coalition filed a Petition for Relief that alleged that the bidding credits in Auction No. 2 were unconstitutional and sought a twenty-five percent reduction of its members' winning bids to match the bidding credits provided to minority- and women-owned entities.[13] At the same time, members of the Coalition sought judicial review as petitioners and intervenors in appeal of the Commission's *IVDS Omnibus Order* in which the Commission denied a challenge to race- and gender-based bidding credits brought by Graceba Total Communications.[14] The Commission held the Petition for Relief in abeyance pending the outcome of this case.

5. On June 26, 1996, the U.S. Supreme Court decided *United States v. Virginia*, which held that to successfully defend a gender-based program, the government must demonstrate an "exceedingly

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Competitive Bidding, *Fourth Report and Order*, 9 FCC Rcd 2330, 2336, ¶ 36 (1994) ("*Competitive Bidding Fourth Report and Order*").

8 *Id.*

9 47 C.F.R. § 95.816(d)(1) (1995) ("A bidding credit is available for a license for either frequency segment A or frequency segment B in each service area. A bidding credit, however, may be applied to only one of the two licenses available in each service area").

10 *Competitive Bidding Fourth Report and Order*, 9 FCC Rcd at 2337-39, ¶¶ 46-47. The members of the Coalition were small businesses and therefore eligible to participate in the installment payment plan. *IVDS Closing PN*, Mimeo No. 44160; *IVDS Closing PN Erratum*, Mimeo No. 44265; Community Teleplay, Inc., et. al. Petition for Relief of Application Bidding Credits in the Interactive Video and Data Service Auction, *Order*, 13 FCC Rcd 12426, 12427 n. 5 (1998) ("*Community Teleplay Order*"). Additionally, TI, Interactive, and Zarg were minority- or women-owned businesses and therefore eligible for the twenty-five percent bidding credit. *Id.* As noted in footnote 9, whether a minority- or women-owned entity received the credit was dependent upon the availability of the bidding credit. 47 C.F.R. § 95.816(d)(1)(1995). Accordingly, TI and United received the credit on some licenses and Zarg did not receive the credit on its one license. *IVDS Closing PN*, Mimeo No. 44160; *IVDS Closing PN Erratum*, Mimeo No. 44265; *Community Teleplay Order*, 13 FCC Rcd at 12427 n. 5. Finally, Hispania failed to make its second down payment in February 1995 and, accordingly, never became a licensee. Letter to Hispania and Associates, Inc. from Robert H. McNamara, Chief, Private Wireless Division (undated) ("*Hispania Letter*").

11 *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 564-65 (1990) (". . . benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.").

12 *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

13 Petition for Relief, filed by Community Teleplay, Inc. ("Community"), TV-Active, TI, Hispania, Zarg, Interactive, United, and Hale on December 5, 1995 ("Petition for Relief").

14 Interactive Video and Data Service (IVDS) Licensees, Various Requests by Auction Winners, *Order*, 11 FCC Rcd 1282, 1285 (1995) ("*IVDS Omnibus Order*"). The case was consolidated as *Graceba Total Communications, Inc. v. FCC*, Case Nos. 95-1599, 96-1003, 96-1004 (D.C. Cir.).

persuasive justification" for the program.[15]

6. On November 21, 1996, the Commission released the *Competitive Bidding Tenth Report and Order* which modified certain competitive bidding provisions concerning the treatment of small businesses, businesses owned by members of minority groups and women, and rural telephone companies for the then-planned second IVDS auction, in order to address the legal requirements of the Supreme Court's decisions in *Adarand* and *VMI*.[16] Additionally, in order to avoid undue delay of future auctions in other services, the Commission eliminated the race- and gender-based provisions for those auctions and instead employed a similar provision for small businesses.[17]

7. On June 20, 1997, the D.C. Circuit dismissed the Coalition's challenge to the *IVDS Omnibus Order*, finding that the appeal was not ripe due to the Coalition's Petition pending before the Commission.[18] Subsequently, on January 9, 1998, the Coalition filed with the Commission a Supplement to its Petition for Relief that claimed that: (1) failure to provide the twenty-five percent reduction in the license payments amounts to an unconstitutional taking of property without due process of law; and (2) finality-related concerns do not bar the retroactive application of *Adarand*.[19] The Coalition also expanded its requested remedy to include all Auction No. 2 winning bidders who did not receive a 25 percent bidding credit.[20]

8. On May 28, 1998, the Wireless Telecommunications Bureau ("Bureau") issued the *Community Teleplay Order*, which denied the Coalition's requests based on its finding that members of the Coalition had sufficient opportunity to raise a challenge in a timely manner, but failed to do so.[21] On June 29, 1998, the Coalition filed an Application for Review.[22]

9. On September 10, 1999, the Commission released the *218-219 MHz Order*,[23] which,

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15 *United States v. Virginia (VMI)*, 518 U.S. 515, 531 (1996).

16 Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Tenth Report and Order*, 11 FCC Rcd 19974, 19975-77, ¶¶ 1-3 (1996) ("*Competitive Bidding Tenth Report and Order*"); *see* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 19341, 19369, ¶ 67 (1996) (proposed rules for the then-planned second IVDS auction).

17 Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Sixth Report and Order*, 11 FCC Rcd 136, ¶ 1, 161, ¶ 47, and 167, ¶ 59 (1995) (C block rules); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10475, ¶ 37, and 10492, ¶ 84 (2000).

18 *See Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997).

19 Supplement to Petition for Relief, filed by Community, TV Active, TI, Hispania, Zarg, Interactive, United, and Hale on January 9, 1998 ("Petition for Relief Supplement").

20 *Id.* at 16

21 *Community Teleplay Order*, 13 FCC Rcd at 12428-29, ¶¶ 5-6 (holding that the Coalition could have: (1) filed comments objecting to the proposed IVDS bidding credit rule in the proceeding that resulted in the *Competitive Bidding Fourth Report and Order*; (2) challenged the adoption of the Commission's rules by filing a Petition for Reconsideration of the *Competitive Bidding Fourth Report and Order*; (3) raised its constitutional challenge at the conclusion of the auction; or (4) timely objected to the payment conditions attendant to their licenses grants, pursuant to section 1.110 of the Commission's rules).

22 Application for Review, filed by Community, TV Active, TI, Hispania, Zarg, Interactive, United, and Hale on June 29, 1998 ("Application for Review").

23 Amendment of Part 95 of the Commission's Rules to provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum and Opinion and Order*, 15 FCC Rcd 1497 (1999) ("*218-219 MHz Order*"). On November 24, 1999, the Commission, on its own motion, adopted the *218-219 MHz Reconsideration*

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among other things, dismissed the Coalition's Application for Review as moot because the *218-219 MHz Order* eliminated from the Commission's rules the bidding credit for minority- and women-owned businesses.[24] Thus, all minority- and women-owned businesses lost the bidding credit they had previously received in Auction No. 2.[25] At the same time, to fulfill the Commission's statutory mandate of encouraging participation by small businesses, rural telephone companies, and businesses owned by members of minority groups and women, the Commission granted a retroactive twenty-five percent bidding credit to the accounts of "every winning bidder in the 1994 auction of what is now the 218-219 MHz Service that met the small business qualifications for that auction."[26] The Commission noted that this approach minimized the disruption to entities that have previously received a bidding credit and the public,[27] and that similar bidding credits had been provided to bidders in other services.[28] The Commission also rejected the Coalition's takings argument.[29]

10. On December 3, 1999, the Coalition filed its first Petition for Reconsideration ("First PFR") alleging that the remedial bidding credit adopted in the *218-219 MHz Order* represented a "conversion" of an unconstitutional race- and gender-based preference to a small business preference[30] and that the new credit did not resolve its constitutional claims and should be subject to strict scrutiny.[31] The Coalition requested that the Commission extend the remedial bidding credit to all Auction No. 2 bidders regardless of size.[32]

11. On December 13, 2000, the Commission denied the Coalition's First PFR in the *218-219 MHz Second Reconsideration Order*.[33] The Commission rejected the argument that the remedial bidding credit was impermissibly motivated[34] and found that the remedial bidding credit satisfied rational basis review[35] because it was adopted to further Congress's objective to disseminate licenses among a wide

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Order, which made a minor modification to the restructuring options contained in the *218-219 MHz Order*. Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Order on Reconsideration*, 14 FCC Rcd 21078 (1999) ("*218-219 MHz Reconsideration Order*").

24 *218-219 MHz Order*, 15 FCC Rcd at 1533-35 ¶¶ 61-64; 47 C.F.R. § 95.816(g).

25 *218-219 MHz Order*, 15 FCC Rcd at 1533-34 ¶¶ 60-61.

26 *Id.* at 1533, ¶ 61.

27 *Id.* at 1534, ¶ 63.

28 *Id.* at 1533-34, ¶¶ 61- 62; The remedial bidding credit was granted to winning bidders based solely on size. This is consistent with the approach to bidding credits taken in other post-*Adarand* auctions. *See, e.g.*, 47 C.F.R. § 90.910 (800 MHz Specialized Mobile Radio); 47 C.F.R. § 90.810 (900 MHz Specialized Mobile Radio); 47 C.F.R. § 90.1017 (Phase II 220 MHz Service); 47 C.F.R. § 90.1103 (Location Monitoring Service); 47 C.F.R. § 80.1252 (VHF Public Coast Service); 47 C.F.R. §§ 24.712, 24.717 (C, D, E and F Broadband PCS); 47 C.F.R. § 101.1107 (Local Multipoint Distribution Service); 47 C.F.R. § 27.209 (WCS).

29 *218-219 MHz Order*, 15 FCC Rcd at 1532 n. 198.

30 First PFR at 5-10 (citing *Hunt v. Cromartie*, 526 U.S. 541 (1999) ("a law that is facially neutral with respect to race classification warrants strict scrutiny under the Equal Protection Clause only if it can be proved that the law was motivated by a racial purpose or object, or if it is unexplainable on grounds other than race")).

31 *Id.* at 5.

32 *Id.* at 10.

33 *218-219 MHz Second Reconsideration Order*, 15 FCC Rcd at 25038-43, ¶¶ 41-48.

34 *Id.*

35 *Id.*, at 25042, ¶ 46 (citing *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990); *Bowen v. Gilliard*, 483 U.S. 587, 600-603 (198); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-79 (1980); *Dandrige v. Williams*, 397 U.S.
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variety of applicants.[36] Finally, the Commission determined that there was no evidence to support the allegation, previously raised by Kingdon Hughes (another Petitioner), that the original bidding credits inflated the prices paid by auction participants.[37] The Commission declined to expand the remedial bidding credit to all winning bidders in Auction No. 2.[38]

12. On February 15, 2001, the Bureau exercised its delegated authority and issued a *Refund Procedures PN* explaining the procedures relating to the remedial bidding credit.[39] The Commission is presently processing[40] the refund requests of all eligible requestors.[41]

13. On March 9, 2001, the Coalition filed its second Petition for Reconsideration ("Second PFR") seeking reconsideration of the Commission's *218-219 MHz Second Reconsideration Order*.[42] The Coalition, in its Second PFR, argued that the remedial bidding credit was unconstitutional and that the

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471, 484-85 (1970)).

36 *Id.* at 25042, ¶¶ 46-47.

37 *Id.*

38 *Id.* at 25041-43, ¶¶ 43-48.

39 218-219 MHz Service (formerly known as IVDS) Refund Procedures, *Public Notice*, 16 FCC Rcd 3453 (2001) ("*Refund Procedures PN*"); *see* Implementation Procedures for the Report and Order and Memorandum Opinion and Order Addressing the 218-219 MHz Service (formerly known as Interactive Video and Data Service (IVDS)), *Public Notice*, DA 00-900 (rel. April 20, 2000); Frequently Asked Questions Regarding the Restructuring Rules of the 218-219 MHz Service, *Public Notice*, 15 FCC Rcd 7305 (2000); Wireless Telecommunications Bureau Announces Preliminary Implementation Procedures for 218-219 MHz Service (formerly known as Interactive Video and Data Service (IVDS)), *Public Notice*, 15 FCC Rcd 22 (1999).

40 Once the requests of eligible entities are approved, the Department of Treasury is notified and issues the refund.

41 All members of the Coalition submitted a refund request. Letter to Mr. Putnam, Office of Managing Director from James Keller, Vice President, Celtronix (March 12, 2001); Letter to Mr. Putnam, Office of Managing Director from Thomas Gutierrez, Counsel for TV-Active (October 26, 2001); Letter to Mr. Putnam, Office of Managing Director from Jay N. Lazrus, Counsel for TV-Active (June 15, 2001); Letter to Mr. Putnam, Office of Managing Director from Jay N. Lazrus, Counsel for TI (May 11, 2001); Letter to Mr. Putnam, Office of Managing Director from Jay N. Lazrus, Counsel for Hispania (June 15, 2001); Letter to Mr. Putnam, Office of Managing Director from John Grazioli, President, Zarg (May 20,2001); Letter to Mr. Putnam, Office of Managing Director from Jay N. Lazrus, Counsel for Zarg Corporation (May 11, 2001); Letter to Mr. Putnam, Office of Managing Director from Richard K. Diamond, Chapter 7 Trustee of Interactive (April 5, 2001); Letter to Mr. Putnam, Office of Managing Director from Stephen E. Coran, Counsel for United (July 20, 2001); Letter to Mr. Putnam, Office of Managing Director from Jay N. Lazrus, Counsel for United (June 15, 2001); Letter to Mr. Putnam, Office of Managing Director from Jay N. Lazrus, Counsel for Hale (March 15, 2001); Letter to Ms. Susan Donahue, Chief, Revenues & Receivables Operations Group from Jay N. Lazrus (October 24, 2001). The Commission has processed Celtronix, Interactive, TV-Active, United, and Hale's requests and is presently processing Zarg's request. We note, however, that TI and Hispania are ineligible for a refund. As noted in the *Refund Procedures PN*, the refunds generated by the remedial bidding credit will be paid to the payor of record of the upfront, first and second down payments. *Refund Procedures PN*, 16 FCC Rcd at 3453. TI acquired its license from the original licensee and payor of record of the upfront, first and second down payment, Dr. Joseph Zavaletta. Accordingly, because TI was not the payor of record of the upfront, first, or second down payments it was not the appropriate entity to apply for the refund. Finally, Hispania failed to make its second down payment and accordingly never became a licensee. Having failed to make these payments, Hispania cannot seek a refund based upon such payments. *Hispania Letter* (undated) (assessing default payments on License Numbers IVM091B, IVM147B, and IVM202B). We note that Hispania is subject to the default payment provisions set forth in section 1.2104(g) of the Commission's rules. 47 C.F.R. § 1.2104(g).

42 *218-219 MHz Second Reconsideration Order*, 15 FCC Rcd 25020.

price inflation argument (previously raised by Kingdon Hughes in his Petition for Reconsideration of the *218-219 MHz Order*)[43] was not "wholly speculative."[44] The Coalition also raised, for the first time with sufficient particularity, the argument that the remedial bidding credit violated the notice and comment provisions of the Administrative Procedures Act ("APA")[45] because the remedial bidding credit was not included in the *218-219 MHz Notice of Proposed Rule Making*.[46]

III. DISCUSSION

14. As we explain below, we dismiss as repetitious the Coalition's Second PFR with respect to the constitutional and price inflation arguments because these arguments were previously the subject of reconsideration[47] and fully considered in the *218-219 MHz Second Reconsideration Order*.[48] We also dismiss the Coalition's untimely APA argument because the Coalition does not plead or otherwise establish new facts, changed circumstances, or public interest considerations that would merit review of this untimely request for reconsideration.

15. **Repetitious Arguments.** The Commission does not grant reconsideration for the purpose of allowing a petitioner to reiterate arguments already presented.[49] This is particularly true, where a petitioner advances arguments that the Commission previously considered and rejected in a prior order on reconsideration. If this were not the case, the Commission "would be involved in a never ending process of review that would frustrate the Commission's ability to conduct its business in an orderly fashion."[50] However, the Commission will entertain a petition for reconsideration if it is based on new evidence or changed circumstances or if reconsideration is in the public interest.[51] In this case, a comparison of the Coalition's Second PFR with the Coalition's First PFR and the Petition of Kingdon Hughes establishes that the Coalition's constitutional and price inflation arguments were previously raised and fully addressed in the *218-219 MHz Second Reconsideration Order*.[52]

16. In its First PFR, the Coalition argued that the remedial bidding credit adopted in the *218-*

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43 Petition for Reconsideration, filed by Kingdon R. Hughes on Dec. 3, 1999 ("Hughes Petition").

44 Second PFR at 14-16.

45 5 U.S.C. §§ 553(b)(3), (c).

46 Second PFR at 5.

47 The Coalition raised the constitutional argument in its petition for reconsideration of the *218-219 MHz Order*. First PFR at 5-10. Kingdon Hughes raised the price inflation argument in his petition for reconsideration of the *218-219 MHz Order*. Hughes Petition at 1-4.

48 *218-219 MHz Second Reconsideration Order*, 15 FCC Rcd at 25038-43, ¶¶ 40-48.

49 Policies Regarding Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations, *Memorandum Opinion and Order*, 4 FCC Rcd 2276, 2277 (1989); Simplification of the Licensing and Call Sign Assignment Systems for Stations in the Amateur Radio Service, *Memorandum Opinion and Order*, 87 FCC.2d 50, 505 (1981) (citing *WWIZ, Inc.*, 37 FCC 685 (1964)); 47 C.F.R. § 1.429(i) ("any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. Except in such circumstances, a second petition for reconsideration may be dismissed by the staff as repetitious.").

50 Applications of Warren Price Communications, Inc. Bay Shore, New York et al., For a Construction Permit for a new FM Station on Channel 276 at Bay Shore, New York, *Memorandum Opinion and Order*, 7 FCC Rcd 6850 (1992) (stating that a second petition for reconsideration is not contemplated by the rules and may be dismissed as repetitious) (citing VHF Drop-Ins, 3 Rad. Reg. 2d 1549, 1551 n.3 (1964)).

51 47 C.F.R. § 1.429(b).

52 *218-219 MHz Second Reconsideration Order*, 15 FCC Rcd at 25041-43, ¶¶ 43-48.

219 MHz Order represented a "conversion" of an unconstitutional race- and gender-based preference to a small business preference.[53] The Coalition argued that this "conversion" failed to resolve its constitutional claims.[54] Additionally, the Coalition contended that the remedial bidding credit was impermissibly motivated, violated *Hunt v. Cromartie*,[55] and should be subject to strict scrutiny review.[56] The Commission rejected these arguments in the *218-219 MHz Second Reconsideration Order*.[57] The Commission explained that the remedial bidding credit was adopted not to remedy the race- and gender-discrimination that allegedly occurred in 1994.[58] Rather, the Commission explained that the extent of any "remedy" for the alleged race- and gender-discrimination was the elimination of the race and gender-based bidding credit. The remedial bidding credit was accorded to small businesses to fulfill the Commission's statutory mandate of encouraging participation by small businesses and to make the rules consistent with those in other services. Thus, the Commission resolved a multi-faceted and complex set of regulatory issues by leveling the bidding credit upward.[59] Because the remedial bidding credit was not based on race- or gender-classifications, the Commission found that it is not subject to strict scrutiny review and satisfied rational basis review.[60] In its Second PFR, the Coalition reiterated its constitutional arguments concerning the remedial bidding credit.[61] Because these arguments were fully addressed by the Commission in a prior order, we dismiss them here as repetitious.

17. The Coalition also raised, in its Second PFR, an argument previously raised by Kingdon Hughes in his Petition for Reconsideration of the *218-219 MHz Order*, which asserted that the bidding credits inflated the prices paid by licensees.[62] The Commission rejected this argument as wholly speculative in the *218-219 Second Reconsideration Order*.[63] Again, because this argument was previously raised by another petitioner, and fully addressed by the Commission in the *218-219 MHz Second Reconsideration Order*, we dismiss it here as repetitious.[64]

18. **APA Argument.** The Coalition's APA argument is untimely. Although the Commission did not previously address this argument, it was not originally made with enough particularity in the Coalition's First PFR to merit the Commission's attention. The Coalition's inclusion of this argument in its Second PFR does not correct its earlier failure or obviate the fact that the argument is now untimely.

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53 First PFR at 5-10.

54 *Id.* at 5.

55 526 U.S. 541. For a discussion of *Cromartie*, *see supra* note 29.

56 First PFR at 5-6. The Coalition also claimed that the Bureau's application of the doctrine of waiver amounted to an unconstitutional taking because the rulemaking process that led to the remedial bidding credit did not satisfy due process requirements. First PFR at 8-10.

57 *218-219 MHz Second Reconsideration Order*, 15 FCC Rcd at 25038-43, ¶¶ 41-48.

58 *Id.* at 25042, ¶ 44.

59 *218-219 MHz Order*, 15 FCC Rcd at 1533, ¶ 61; *218-219 MHz Second Reconsideration Order*, 15 FCC Rcd at 25041, ¶ 44; *see also* Hill & Welch and Myers Keller Communications Law Group Request for Attorney Fees in Connection with the 218-219 MHz Service Proceeding and Regional Narrowband PCS Service, *Order*, 15 FCC Rcd 20432, 20436, ¶ 7 (WTB 2000), *aff'd*, 16 FCC Rcd 9485 (WTB 2001).

60 *218-219 MHz Second Reconsideration Order*, 15 FCC Rcd at 25042, ¶¶ 45-47.

61 Second PFR at 3-14.

62 *Id.* at 14-16.

63 *218-219 MHz Second Reconsideration Order*, 15 FCC Rcd at 25043, ¶ 48

64 47 C.F.R. § 1.429(i) (limiting subsequent reconsiderations to modifications made to original order on reconsideration).

19. The Commission's rules require that petitioners state with particularity the grounds on which reconsideration of a Commission action is sought.[65] The precedent is clear that the Commission "'need not sift pleadings and documents' to identify arguments that are not 'stated with clarity' by a petitioner. It is the petitioner that has the burden of clarifying its petition before the agency."[66] The mere mention of a legal concept is insufficient to properly raise an argument for review. As the Court of Appeals for the D.C. Circuit has noted "even where an issue has been 'raised' before the Commission, if it is done in an incomplete way . . . the Commission has not been afforded a fair opportunity [to pass on the issue]."[67] In the First PFR, the Coalition's passing reference to the APA in a section devoted to the constitutionality of the remedial bidding credit does not meet the standard.[68] Although the Coalition characterized the adoption of the remedial bidding credit as "dubious" under the APA, it did not develop any argument or cite any authority. Indeed, the Coalition did not even specifically claim that the remedial bidding credit violated the APA.[69] Thus, this passing reference in the First PFR did not comport with the requirement that the basis for a petition for reconsideration be stated with particularity and, accordingly, the issue was not properly raised for our review.[70]

20. As we have previously noted, "[t]he Communications Act, our rules, and the need for administrative orderliness require petitioners to raise issues in a timely manner."[71] Accordingly, unless the public interest would be served by reconsideration, section 1.429(i) of our rules limits subsequent reconsideration to modifications made to the original order on reconsideration.[72] The *218-219 MHz Second Reconsideration Order* did not modify the remedial bidding credit. Thus, a petition for reconsideration of the *218-219 MHz Second Reconsideration Order* that challenges the remedial bidding credit is precluded under section 1.429(i).[73] This result is particularly appropriate where, as here, the Coalition's Second PFR did not establish that the public interest would be served by review of the

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65 47 C.F.R. § 1.429(c) ("The petition for reconsideration shall state with particularity the respects in which petitioner believes the action taken should be changed.").

66 *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279-80 (D.C. Cir. 1997) (citations omitted).

67 *Time Warner Entertainment Co. v. FCC*, 144 F.3d 75, 79 (1998) (*citing Northwestern Ind. Tel. Co. v. FCC*, 824 F.2d 1205, 1210 n. 8 (D.C. Cir. 1987). The Coalition's passing reference to the APA also fails to meet the requirement, in the judicial context, that legal arguments be developed to be considered properly raised. *See Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1982) ("We will not resolve [an] issue on the basis of briefing and argument of counsel which literally consisted of no more than an assertion of violation of due process rights, with no discussion of case law supporting that proposition or of the statutory text and legislative history relevant to the central question."); *see also Washington Ass'n. for Television and Children v. FCC*, 712 F.2d 677, 681 (D.C. Cir. 1983) (appellant "never explicitly" made its argument); *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 739 (D.C. Cir. 1976) (the "gist" of appellant's argument was there, but "nothing was made of it").

68 First PFR at 5 ("The FCC's conversion of the race/gender credit to small business credit, aside from its dubious lawfulness under the Administrative Procedure Act (APA), which requires notice and comment proceedings for the adoption of new rules, does not resolve the constitutional issue.").

69 *Id.*

70 47 C.F.R. § 1.429(i) (limiting subsequent reconsiderations to modifications made to original order on reconsideration); *see also* Application of WGBH Educational Foundation for Renewal of License of Station WGBH-FM, Boston, Massachusetts, *Memorandum Opinion and Order*, 62 FCC 2d 334 (1977) (holding that new allegations raised for the first time in a second petition for reconsideration are "of course, untimely" under 1.106).

71 Implementation of the AM Expanded Band Allotment Plan, *Memorandum Opinion and Order*, 13 FCC Rcd 21872, 21784, ¶ 7 (1998).

72 *Id.*; 47 C.F.R. § 1.429(i).

73 47 C.F.R. § 1.429(i).

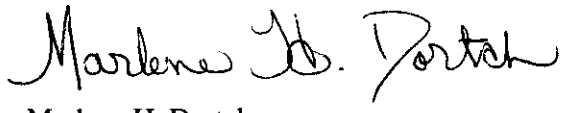
untimely APA argument.[74] Accordingly, we dismiss the Coalition's APA argument.[75]

IV. ORDERING CLAUSE

21. For the reasons set forth above, IT IS ORDERED that, pursuant to the authority of section 4(i), 257, 303(b), 303(g), 303(h), 303(q), 303(r), 309(j) and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(b), 303(g), 303(h), 303(q), 303(r), 309(j) and 332(a), and Section 1.429 of our rules, 47 C.F.R. § 1.429, the Second Petition for Reconsideration filed by the Ad Hoc Coalition is DISMISSED.

22. IT IS FURTHER ORDERED that this *Third Order on Reconsideration of the Report and Order and Memorandum Opinion and Order* is adopted and that a copy of this *Third Order on Reconsideration of the Report and Order and Memorandum Opinion and Order* be sent to the Ad Hoc Coalition via certified mail, return-receipt requested.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

[74] Second PFR at 6-7. Merely because the Coalition asserts an APA challenge does not establish that the public interest would be served by reconsideration. This is particularly true where the Coalition does not explain how review of its APA argument would serve the public interest thereby demonstrating that the public interest exception to 1.429(i) is met. *See Beehive Telephone Co. v. FCC,* 180 F.3d 314, 320 (1999) (noting that the Commission did not abuse its discretion in refusing to admit evidence under the "public interest" standard where the petitioner "does not even argue that [the] standard is satisfied"), *rev'd on other grounds, Entravision Holdings, LLC v. FCC,* 202 F.3d 311 (2000); *see also,* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Scranton and Surfside Beach, South Carolina), *Memorandum Opinion and Order,* 4 FCC Rcd 2366 (1989).

[75] 47 C.F.R. § 1.429(b), (i).