

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

In the Matter of)
)
Requests by Interactive Video and Data Service)
Auction Winners to Waive the January 18, 1998,)
and February 28, 1998, Construction Deadlines)

ORDER

Adopted: January 13, 1998

Released: January 14, 1998

By the Chief, Wireless Telecommunications Bureau:

1. *Introduction.* On November 26, 1997, LOLI, Inc. (LOLI), an IVDS auction winner, filed a Request for Rule Waiver (LOLI Waiver Request) seeking the waiver of the three-year construction benchmark set forth in Section 95.833 of the Commission's Rules as applied to the Interactive Video and Data Services (IVDS).¹ On December 12, 1997, a group of 51 IVDS auction winners filed a request incorporating the arguments presented in the LOLI Waiver Request and seeking a blanket waiver, or alternatively, a stay of the IVDS construction benchmark rule.² In addition, on January 7, 1998, Bellingham Corporation and Pueblo Communications, Inc. submitted a joint Request for Waiver of Section 95.833 of the Commission's Rules, in which it joins in the LOLI Waiver Request and also seeks relief for "all similarly situated IVDS licensees."³ Finally, Dee Ann Wunschel, the representative of the holder of several IVDS licenses won at auction, submitted a letter requesting an extension of the initial IVDS construction deadline for auction winners.⁴ By this *Order*, we grant the requests of these Petitioners to the extent described below.

¹ LOLI, Inc. Request for Rule Waiver (filed December 4, 1997) (LOLI Waiver Request); 47 C.F.R. § 95.833 (1996).

² Letter from Stephen E. Coran, Rini, Coran & Lancellotta, P.C., J. Jeffery Craven, Patton Boggs, L.L.P., and Denise B. Moline, Denise B. Moline, P.C., to Magalie Roman Salas, Secretary, Federal Communications Commission (Dec. 12, 1997) (Coran Petition).

³ Bellingham Corporation and Pueblo Communications, Inc. Request for Waiver of Section 95.833 of the Commission's Rules, 5 (January 7, 1998).

⁴ Letter from Dee Ann Wunschel to A. Jerome Fowlkes, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (received Dec. 5, 1997). Ms. Wunschel also requests that the Commission increase the amount of spectrum available to each IVDS licenseholder. This is a matter raised in the Petition for Rulemaking, cited *infra* at footnote 7 & 8.

2. *Background.* Section 95.833 of the Commission's Rules provides, *inter alia*, that IVDS licenses cancel automatically if a licensee does not make its service available to at least 30 percent of the population or land area located in its service area within three years of the grant of the system license.⁵ The Commission's Rules also require each IVDS licensee to file a progress report at the conclusion of the benchmark period to inform the Commission of the status of system construction.⁶ On July 28-29, 1994, the Commission auctioned two IVDS licenses in each of 297 Metropolitan Statistical Areas (MSAs) in the United States. As a result of that auction, the Commission issued 153 IVDS licenses on January 18, 1995, and 337 IVDS licenses on February 28, 1995.⁷ Pursuant to Section 95.833 of the Commission's Rules, the three-year construction benchmarks for these pools of licenses are January 18, 1998, and February 28, 1998, respectively.

3. We have once before acted on a petition for identical relief in the IVDS context. On September 4, 1996, Euphemia Banas, *et al.* filed a formal Petition for Rulemaking requesting that the Commission amend certain rules applicable to IVDS.⁸ On January 28, 1997, Euphemia Banas, *et al.* filed an amendment to its Petition for Rulemaking, seeking Commission review of additional IVDS rules, including the construction build-out requirements contained in Section 95.833 of the Commission's Rules.⁹ On March 13, 1997, the Bureau issued an Order (Lottery Order) suspending the three-year construction benchmark for the eighteen IVDS MSA licenses which were awarded by lottery and granted on March 28, 1994.¹⁰ The three-year benchmark of March 28, 1997, was suspended for these licensees while the relevant policy regarding construction build-out requirements remained subject to pending rulemaking proceedings.

4. *Decision.* Section 1.3 of the Commission's Rules provides that the Commission may waive a provision of its rules for good cause shown.¹¹ Good cause for a waiver exists "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."¹² Here, the IVDS three-year construction requirement was "intended to ensure that the [IVDS] system is actually built" and "to reduce the attractiveness of licenses to entities interested in them only as a

⁵ 47 C.F.R. § 95.833(a).

⁶ 47 C.F.R. § 95.833(b).

⁷ Interactive Video and Data Services (IVDS) Applications to be Granted January 18, 1995, *News Release*, Mimeo No. 51403 (Dec. 29, 1994); Interactive Video and Data Service (IVDS) Applications to be Granted February 28, 1995, *Public Notice*, 10 FCC Rcd 3388 (1995). The remaining licenses were not granted because the auction winner either submitted an unacceptable long-form application or defaulted on its first down payment obligation.

⁸ RM-8951, placed on Public Notice, Report No. 2166 (Nov. 22, 1996).

⁹ Letter Amendment to Petition for Rulemaking, RM-8951 (Jan. 28, 1997). See also Second Letter Amendment to Petition for IVDS Rulemaking, RM-8951 (Feb. 26, 1997).

¹⁰ In the Matter of Requests By Interactive Video and Data Service Lottery Winners to Waive the March 28, 1997 Construction Deadline, *Order*, 12 FCC Rcd 3181 (WTB 1997) (Lottery Order).

¹¹ 47 C.F.R. § 1.3.

¹² *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WALT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)).

speculative vehicle."¹³ On the facts before us, we find that Petitioners have demonstrated that a waiver of Section 95.833 is warranted.

5. In part, the instant Petitioners base their requests for waiver on the Lottery Order.¹⁴ They argue that there is greater justification for waiver for auction winners than for lottery winners because auction winners who paid for their spectrum do not pose the same risk of speculation or warehousing as do the lottery winners.¹⁵ We need not reach the merits of this argument. In addition, LOLI points out that the Lottery Order was based in part upon the fact that there is a pending rulemaking proceeding which has the potential of creating "additional flexibility" for IVDS licensees.¹⁶ In sum, the Petitioners contend that it would be inequitable, burdensome, and contrary to the public interest for the Commission to require auction winners to meet the three-year construction benchmark, because it is likely that this requirement will be included in a rulemaking proceeding and because the rule has already been waived for lottery winners.

6. Today we reaffirm the reasoning behind our suspension of the three-year construction benchmark for the lottery licensees. We believe that the proposals set forth in the pending IVDS Petition for Rulemaking, including those regarding construction requirements, are inextricably tied to the construction requirements as they apply to these licensees. Requiring IVDS licensees to comply with rules which are under Commission review would not further the public interest in this instance, particularly since the subject rule directly impacts IVDS system planning and implementation. We believe, consistent with our rationale in the Lottery Order, that the public interest would be best served by a suspension of the IVDS construction benchmark for auction winners as well.

7. We therefore conclude that good cause exists to suspend the requirement that IVDS licensees meet the January 18, 1998, and February 28, 1998, build-out requirements. This will allow the Commission to evaluate, in the context of a rule making proceeding, the IVDS construction requirements and other related service rules. In addition, we note that our approach here is consistent with prior Commission action suspending a deadline while relevant policy is subject to pending rule making proceedings.¹⁷

¹³ Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video Data Services, GEN Docket No. 91-2, *Memorandum Opinion and Order*, 7 FCC Rcd 4923, 4925 (1992). See also Amendment of Part 95 of the Commission's Rules to Modify Construction Requirements for Interactive Video and Data Service (IVDS) Licenses, WT Docket No. 95-131, *Report and Order*, 11 FCC Rcd 2472, 2472 (1996); Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide Interactive Video and Data Services, GEN Docket No. 91-2, *Report and Order*, 7 FCC Rcd 1630, 1640-41 (1992).

¹⁴ LOLI Waiver Request at 11-12; Coran Petition at 2.

¹⁵ LOLI Waiver Request at 11-12; Coran Petition at 2.

¹⁶ LOLI Waiver Request at 8.

¹⁷ See, e.g., Lottery Order, 12 FCC Rcd at 3184; PR Docket No. 89-553, *Order*, 8 FCC Rcd 3974 (1993); Deferral of Rate of Return Represcription Filings Pursuant to Section 65.102(c) of the Rules, *Memorandum Opinion and Order*, 3 FCC Rcd 7220, 7222 (CCB 1988). Cf. *Channel 16 of Rhode Island, Inc. v. FCC*, 440 F.2d 266, 275-76 (D.C. Cir. 1971).

8. Accordingly, IT IS ORDERED that the requests of the Petitioners for waiver of Section 95.833 of the Commission's Rules ARE GRANTED. The January 18, 1998, and February 28, 1998, construction deadlines for all current IVDS auction licensees ARE SUSPENDED. This waiver will remain in effect pending resolution of the construction requirement by Commission or Bureau action. This action is taken pursuant to delegated authority under Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

FEDERAL COMMUNICATIONS COMMISSION



Daniel B. Phythyon
Chief, Wireless Telecommunications Bureau