

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

WT Docket No. 95-131

In the Matter of

Amendment of Part 95 of the  
Commission's Rules to Modify  
Construction Requirements for  
Interactive Video and Data  
Service (IVDS) Licenses

### REPORT AND ORDER

Adopted: December 14, 1995; Released: January 16, 1996

By the Commission:

#### I. INTRODUCTION

1. On July 31, 1995, the Commission adopted a *Notice of Proposed Rule Making (Notice)* proposing to eliminate the one-year construction "build-out" requirement for Interactive Video and Data Service (IVDS)<sup>1</sup> licensees.<sup>2</sup> No change was proposed concerning the three-year and five-year construction requirements. We initiated the *Notice* in response to requests by several IVDS licensees,<sup>3</sup> that won their licenses in the IVDS auction held July 28-29, 1994. This *Report and Order* amends Section 95.833(a) of the Commission's Rules<sup>4</sup> to eliminate the one-year build-out requirement as proposed. This action will allow the IVDS industry additional time to develop and deploy new and innovative applications, such as commercial data distribution services and inventory monitoring services.

#### II. BACKGROUND

2. Section 95.833(a) of the Commission's Rules specifies that each IVDS licensee must make service available to at least ten percent of the population or geographic area within the licensee's service area within one year of the grant of the license, thirty percent within three years, and

fifty percent within five years. As indicated in the *Notice*,<sup>5</sup> Section 95.833(a) was crafted in 1992 when it was anticipated that licenses would be awarded by lottery.<sup>6</sup> These build-out requirements were intended "to reduce the filing of speculative applications by entities that have no real intention of implementing [IVDS] systems and to avoid the potential for warehousing of IVDS spectrum."<sup>7</sup> We stated in the *Notice* that the use of auctions to award licenses reduces the incentives for speculation, and therefore, tentatively concluded that the one-year benchmark is unnecessary.<sup>8</sup> The Commission received six comments and two reply comments in response to the *Notice*.<sup>9</sup>

#### III. DISCUSSION

3. *Comments.* Generally, the commenters favor the elimination of the one-year construction requirement. Erwin Aguayo, Jr. (Aguayo), the Coalition of IVDS Licensees<sup>10</sup> (Coalition) and EON Corporation (EON) agree that the auction rules preclude the need for the one-year build-out requirement.<sup>11</sup> Aguayo states that by amending the rules as proposed, the Commission will provide IVDS licensees with the necessary opportunity for flexibility in establishing their IVDS services.<sup>12</sup> EON states that the introduction of auctions to assign IVDS licenses has created significant short-term incentives for licensees to begin service as quickly as possible, and has reduced the risk of speculation in the IVDS license application process.<sup>13</sup> Moreover, the Coalition of IVDS Licensees (Coalition) asserts that not only is the one-year benchmark unnecessary, but it will also impede the viability and evolutionary development of the IVDS spectrum. By requiring IVDS licensees to construct facilities prior to the full development of commercially viable services, the Coalition believes that the construction requirement will impede the development of new and innovative services.<sup>14</sup> ITV, Inc. (ITV) and IVDS Affiliates, LLC (IALC) support eliminating the one-year deadline, but at the same time, recommend that the Commission establish a two-year, ten percent deadline for lottery and auction winners.<sup>15</sup> They argue that two years would be sufficient for lottery winners to demonstrate the function of their respective IVDS systems and competing technologies, but not halt IVDS development. Secondly, ITV and IALC assert that such an amendment will permit auction winners to initiate service in a timely fashion.<sup>16</sup>

4. While supporting the proposal, EON, ITV and IALC assert that lack of equipment should not be the rationale for the proposed rule change. EON claims that its equipment will be commercially available before the one-year

<sup>1</sup> IVDS is a point-to-multipoint, multipoint-to-point, short distance communications service in which licensees may provide information, products, or services to individual subscribers at fixed locations within a service area, and subscribers may provide responses.

<sup>2</sup> *Notice of Proposed Rule Making (Notice)*, WT Docket No. 95-131, 10 FCC Rcd 8700 (1995).

<sup>3</sup> *Id.* at footnote 5.

<sup>4</sup> 47 C.F.R. § 95.833(a).

<sup>5</sup> *Notice* at para. 3.

<sup>6</sup> The eighteen IVDS licensees that received their licenses as a result of a lottery held September 15, 1993, have already passed their one year build-out deadline. We waived the one year deadline for 17 of the 18 licenses. These 17 licenses are required to meet the three year/30 percent construction deadline in March, 1997.

<sup>7</sup> See *Report and Order* in GEN Docket No. 91-2, 7 FCC Rcd

1630, 1640 ¶ 73 (1992); see also *Memorandum Opinion and Order* in GEN Docket No. 91-2, 7 FCC Rcd 4923, 4925 ¶ 13 (1992).

<sup>8</sup> *Notice* at para. 3.

<sup>9</sup> A list of the commenting parties is provided in Appendix A.

<sup>10</sup> Coalition members are listed in Appendix A.

<sup>11</sup> Aguayo comments at 1-2; Coalition comments at 3; EON comments at 1-2.

<sup>12</sup> Aguayo comments at 2.

<sup>13</sup> EON comments at 1-2.

<sup>14</sup> Coalition comments at 2-4.

<sup>15</sup> ITV and IALC reply comments at 2-3.

<sup>16</sup> *Id.*

construction benchmark,<sup>17</sup> but emphasizes that IVDS licensees' equipment choices and short-term deployment schedules should be based on market conditions, rather than arbitrary regulatory constraints.<sup>18</sup> Similarly, ITV and IALC state that they have developed a product line of IVDS equipment for data distribution, which they are marketing to licensees.<sup>19</sup> Radio Telecom and Technology, Inc. (RTT), a manufacturer of IVDS equipment, is the only commenter that takes no position as to the elimination of the one-year build-out requirement.<sup>20</sup>

5. Additionally, the *Notice* proposed to retain the three-year and five-year construction benchmarks. EON, the Coalition, ITV and IALC agree.<sup>21</sup> The Coalition believes that eliminating the one-year benchmark and retaining the other benchmarks strikes an appropriate balance between the licensees' ability to manage intelligently their investments, and the public's interest in receiving interactive service on a timely basis.<sup>22</sup> EON concurs that the three-year and five-year benchmarks are appropriate means for the Commission to meet its Congressional mandate to promote investment in and rapid deployment of new technologies and services.<sup>23</sup> ITV and IALC further emphasize that the IVDS equipment market cannot develop without strictly enforced three and five-year construction deadlines.<sup>24</sup> Alternatively, Richard L. Vega (Vega) argues that the three-year benchmark should also be eliminated.<sup>25</sup> According to Vega, it too has become an outdated, unnecessary, and unduly burdensome requirement for license holders. Vega states that the public, as well as the fledgling IVDS industry, would benefit from a one-time, five-year, build-out requirement, allowing licensees an opportunity to focus completely on the technology selection process.

6. *Decision.* We are adopting the proposal to eliminate the one-year, ten percent construction requirement. As the Coalition states, the one-year construction requirement impedes the viability and evolutionary development of the IVDS spectrum. Aguayo also points out that amending the rules, as proposed, will provide IVDS licensees with the necessary opportunity for flexibility in establishing their IVDS services. EON further emphasizes that IVDS licensees' equipment choices and short-term deployment schedules should be based on market conditions, rather than arbitrary regulatory constraints. We conclude that eliminating the one-year construction requirement will provide licensees with greater flexibility in selecting service options, obtaining financing, selecting equipment, and other considerations related to construction of their systems. Such action will, in turn, promote the development of the IVDS industry. Moreover, we believe the one-year construction benchmark is unnecessary to prevent spectrum warehousing. The use of auctions, rather than lotteries, to award licenses reduces the potential for spectrum warehousing and, as EON indicates, the introduction of auctions to assign IVDS licenses creates significant short-term incentives for licenses to begin service as quickly as

possible. Finally, all of the commenters support this action except RTT, who takes no position regarding the one-year build-out.

7. Further, as proposed, we will retain the three-year and five-year build-out benchmarks. These benchmarks are consistent with the statutory requirement for performance benchmarks for licenses obtained through competitive bidding,<sup>26</sup> and will ensure the timely delivery of service to the public. At the same time, we decline to adopt the suggestions offered by Vega, ITV and IALC. We believe that Vega's request to eliminate the three-year benchmark would not promote rapid delivery of new technologies and services to the public. Additionally, we believe ITV's and IALC's suggestion to create a two-year, ten percent benchmark in lieu of the one-year, ten percent benchmark, while retaining the three-year benchmark, is unnecessary. Imposing the first benchmark at two years, rather than three years, would give auction winners less time and flexibility to make the critical business decisions described above. Further, a two-year, ten percent build-out requirement, in light of our auction framework and the three-year and five-year requirements, is unnecessary to prevent speculation and warehousing.

#### IV. PROCEDURAL MATTERS

8. Pursuant to the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1165, 5 U.S.C. § 603, *et seq.* (1981)), the Commission attached an Initial Regulatory Flexibility Analysis (IRFA) as Appendix A to the *Notice of Proposed Rule Making* in WT Docket No. 95-131. Written comments on the IRA were requested. The Commission's Final Regulatory Flexibility Analysis is as follows:

*A. Need and Purpose of the Action.* Our objective is to allow IVDS licensees greater flexibility in equipment and construction decisions, while meeting the Congressional mandate for specific performance standards in auctionable services.

*B. Issues Raised in Response to the Initial Analysis.* There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

*C. Significant Alternatives Considered and Rejected.* All significant alternatives have been addressed in this *Report and Order*.

*D. Description, Potential Impact, and Number of Small Entities Involved.* These adopted rule changes will allow greater business opportunities and greater flexibility in the business decisions of IVDS licensees, many of which are small businesses.

<sup>17</sup> EON comments at 2.

<sup>18</sup> *Id.*

<sup>19</sup> ITV and IALC comments at 3.

<sup>20</sup> RTT's comments at 1-2.

<sup>21</sup> Coalition comments at 3-4; EON comments at 2-3; ITV and

IALC comments at 5-6.

<sup>22</sup> Coalition comments at 3-4.

<sup>23</sup> EON comments at 3.

<sup>24</sup> ITV and IALC comments at 4-6.

<sup>25</sup> Vega comments at 2-4.

<sup>26</sup> Section 309(j)(4)(B) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(j)(4)(B).

**V. ORDERING CLAUSES**

9. Accordingly, IT IS ORDERED that Part 95 of the Commission's Rules and Regulations IS AMENDED as specified below. This action is taken pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j).

10. IT IS FURTHER ORDERED that these amendments are effective immediately upon publication in the Federal Register. These rule changes relieve a restriction and, therefore, are not subject to the 30-day effective date provision of the Administrative Procedure Act. See 5 U.S.C. § 553(d)(1).

11. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

12. For further information, contact Donna L. Kanin, Federal Communications Commission, Wireless Telecommunications Bureau, Private Wireless Division, 2025 M Street, N.W., Room 8010, Mail Stop 2000-F, Washington, D.C. 20554; (202) 418-0680.

**FEDERAL COMMUNICATIONS COMMISSION**

William F. Caton  
Acting Secretary

**APPENDIX A****COMMENTS AND REPLY COMMENTS FILED IN WT DOCKET NO. 95-131***Comments*

- 1) Erwin Aguayo, Jr. (Aguayo)
- 2) Coalition of IVDS Licensees (Coalition)
  - Remote Vision Interactive, Inc.
  - American Interactive East, Inc.
  - America 52 West, Inc.
  - American Interactive West, Inc.
  - On-Screen USA Interactive, Inc.
  - Premier Interactive, Inc.
  - America 52 East, Inc.
  - Ballpark Souvenirs, Inc.
  - Euphemia Banas
  - Whitehall Wireless Corporation
  - Trans Pacific Interactive, Inc.
  - New Wave Communications, Inc.
  - Multimedia Computer Communications, Inc.
  - Loli, Inc.
  - Imaginative Communications, Inc.
  - IVDS On-Line Partnership
  - Vision TV, Inc.
  - MAR Partnership
  - KMC Interactive TV, Inc.
  - Dunbar TV Corporation
  - ABR Communications
  - Robert Steele

- 3) EON Corporation (EON)
- 4) ITV, Inc. (ITV) and IVDS Affiliates, LLC (IALC)
- 5) Radio Telecom and Technology, Inc. (RTT)
- 6) Richard L. Vega Group (Vega)

*Reply Comments*

- 1) Coalition of IVDS Licensees (Coalition)
- 2) IVT, Inc. (ITV) and IVDS Affiliates, LLC (IALC)

**APPENDIX B****FINAL RULES**

Part 95 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

**Part 95-Personal Radio Services**

1. The authority citation for Part 95 continues to read as follows:

**Authority:** Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303.

2. Section 95.831 is revised to read as follows:

**§ 95.831 Service requirements.**

Subject to the initial construction requirements of Section 95.833, each IVDS system licensee must make the service available to at least 50 percent of the population or land area located within the service area.

2. Section 95.833 is revised to read as follows:

**§ 95.833 Construction requirements.**

(a) Each IVDS system licensee must make the service available to at least 30 percent of the population or land area within the service area within three years of grant of the IVDS system license, and 50 percent of the population or land area within five years of grant of the IVDS system license. Failure to do so will cancel the IVDS system license automatically. For the purposes of this section, a CTS is not considered as providing service unless that CTS and two associated RTUs are placed in operation.

(b) Each IVDS system licensee must file a progress report at the conclusion of each of the two benchmark periods to inform the Commission of the construction status of the system. The report must be addressed to: Federal Communications Commission, Wireless Telecommunications Bureau, Special Services Branch, 1270 Fairfield Road, Gettysburg, PA 17325-7245. The report must include:

- (1) A showing of how the system meets the benchmark; and
- (2) A list, including addresses, of all component CTSs constructed.