

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

In the Matter of)
)
Community Teleplay, Inc., *et al.*)
)
Petition for Relief of)
Application of Bidding Credits in the)
Interactive Video and Data Service Auction)

ORDER

Adopted: May 28, 1998

Released: May 28, 1998

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. Before the Wireless Telecommunications Bureau ("Bureau") is a Petition for Relief ("Petition") filed on December 5, 1995, and a Supplement to Petition for Relief ("Supplement") filed on January 9, 1998, by Community Teleplay, Inc., TV-Active, LLC, Texas Interactive Network, Inc., Hispania & Associates, Inc., Zarg Corporation, IVDS Interactive Acquisition Partners, United Interactive Partners, Inc., and G. Ray Hale (collectively referred to as "Petitioners"). Petitioners challenge one of the rules under which the Commission held the July 1994 Interactive Video and Data Service ("IVDS") auction.¹ For the reasons stated below, we dismiss the Petition and its Supplement.

II. BACKGROUND

2. On July 28 and 29, 1994, the Commission conducted an auction consisting of two IVDS licenses in each of 297 Metropolitan Statistical Areas ("MSAs"), pursuant to rules and procedures adopted in the *Competitive Bidding Fourth Report and Order*.² One of those rules allowed bidding entities owned by

¹ Public Notice, Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, Mimeo No. 44160 (released Aug. 2, 1994), *erratum*, Public Notice, Mimeo No. 44265 (released Aug. 9, 1994). IVDS is a point-to-multipoint, multipoint-to-point, short distance communications service in which licensees may provide information or services to individual subscribers within a service area, and subscribers may provide interactive responses. 47 C.F.R. § 95.803(a).

² Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994) (*Competitive Bidding Fourth Report and Order*), *on recon.*, *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 19341 (1996) (*Competitive Bidding Sixth MO&O*).

minorities or women to apply a 25 percent bidding credit to the purchase price of one license in each MSA.³ On January 18, 1995 and February 28, 1995, the Commission granted licenses to the winning bidders, conditioned on the bidders' fulfillment of the terms of the auction rules, including timely payment of the full bid amount (subject to bidding credit adjustment, if applicable).⁴ Petitioners were among the winning bidders who were ineligible to utilize the bidding credit on one or more of their conditionally granted licenses.⁵

3. On June 12, 1995, the Supreme Court held in *Adarand Constructors, Inc. v. Peña* that any federal program in which the "government treats any person unequally because of his or her race" must satisfy the "strict scrutiny" constitutional standard of judicial review.⁶ Almost six months later, on December 5, 1995, Petitioners filed their Petition alleging that the *Adarand* decision renders the July 1994 IVDS auction bidding credit unconstitutional.⁷ Relying on *Harper v. Virginia Department of Taxation*,⁸ Petitioners contend that *Adarand* should be applied retroactively to the results of the IVDS auction.⁹ Therefore, Petitioners seek a 25 percent reduction of their auction bids, to match the bidding credit provided to minority- and women-owned businesses.¹⁰

4. At the same time, Petitioners brought their grievance to court through their involvement as petitioners and intervenors in an appeal of the Commission's *IVDS Omnibus Order* denying similar relief to Graceba Total Communications, Inc. ("Graceba").¹¹ On February 20, 1996, Petitioners filed a motion with the Commission to hold their petition in abeyance pending the outcome of the court proceeding. On June 20, 1997,

³ *Competitive Bidding Fourth Report and Order*, 9 FCC Rcd at 2338-39, *on recon.*, *Competitive Bidding Sixth MO&O*, 11 FCC Rcd at 19359-60. *See also* 47 C.F.R. § 95.816(d)(1) (1994).

⁴ *See* News Release, Interactive Video and Data Service (IVDS) Applications to be Granted January 18, 1995, Mimeo No. 51403 (released Dec. 29, 1994) (listing first group of license grants); Public Notice, Interactive Video and Data Service (IVDS) Applications to be Granted February 28, 1995, 10 FCC Rcd 3388 (1995) (listing second group of license grants).

⁵ Specifically: Community Teleplay, Inc., TV-Active, LLC, IVDS Interactive Acquisition Partners, and G. Ray Hale were not eligible minority- or women-owned bidding entities. Texas Interactive Network, Inc. and United Interactive Partners, Inc. were eligible entities that received bidding credits on some licenses, but not others, because the bidding credit was granted to the other winning bidder in those MSAs. Zarg Corporation, also an eligible entity, was unable to receive a bidding credit on its one license because the credit was granted to the other winning bidder in that MSA. Hispania & Associates, Inc. defaulted on its second down payment in February 1995; its licenses were automatically cancelled, *see* 47 C.F.R. § 1.2110(e)(4)(iii) (1994), and therefore, it had no licenses for which to make a claim when the Petition was filed in December 1995.

⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229-30 (1995).

⁷ Petition at 5-9.

⁸ 509 U.S. 86 (1993).

⁹ Petition at 9-11.

¹⁰ *Id.* at 11.

¹¹ 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.).

the D.C. Circuit dismissed Petitioners' filings because their Petition, still pending before the Commission at their request, precluded a court challenge.¹² As a result, Petitioners renewed their arguments at the Commission by filing the Supplement on January 9, 1998. Petitioners assert that under *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*,¹³ the Commission's failure to provide the requested 25 percent reduction in license payments amounts to an unconstitutional taking of property without due process of law.¹⁴ Petitioners then argue that finality-related concerns do not bar the retroactive application of *Adarand*,¹⁵ and expand their requested remedy to include all IVDS winning bidders who did not receive the 25 percent bidding credit.¹⁶

III. DISCUSSION

5. Petitioners' instant challenge to the IVDS bidding credit is barred by the doctrine of waiver, *i.e.*, a party with sufficient opportunity to raise a challenge in a timely manner, but who fails to do so, is deemed to have waived the challenge and is precluded from raising it in subsequent proceedings.¹⁷ Petitioners acknowledge that they had the opportunity to file comments objecting to the proposed IVDS bidding credit rule in the proceeding resulting in the *Competitive Bidding Fourth Report and Order*, and did not do so.¹⁸ Petitioners also acknowledge that adoption of the Commission's rules provided an opportunity to challenge the adoption of the bidding credit rule,¹⁹ yet Petitioners were not among those filing timely petitions for reconsideration of the *Competitive Bidding Fourth Report and Order*.²⁰ Petitioners also could have attempted to raise the constitutional issue upon conclusion of the auction in August 1994.²¹ Indeed, as described above, Graceba raised the issue of constitutionality of the bidding credit in that proceeding, albeit in a post-*Adarand* supplement to its timely-filed petition for reconsideration of the public notice announcing the IVDS auction results. Under that unique procedural history, a panel of the U.S. Court of Appeals for the D.C. Circuit held that Graceba's claim

¹² *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997) (citing *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994) (party that remains before the agency cannot also bring challenge in court)).

¹³ 496 U.S. 18 (1990).

¹⁴ Supplement at 3-8.

¹⁵ *Id.* at 8-12.

¹⁶ *Id.* at 12-16.

¹⁷ *See Adelfia Communications Corp. v. FCC*, 88 F.3d 1250, 1256 (D.C. Cir. 1996); *Northwestern Indiana Telephone Co., Inc. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989); *Jerome Thomas Lamprecht*, 7 FCC Rcd 6794, 6794 (1992).

¹⁸ Petition for Relief at 11 n.10.

¹⁹ Supplement at 6-7.

²⁰ *See Competitive Bidding Sixth MO&O*, 11 FCC Rcd at 19342 n.1 (list of filings) & 19359-60 (discussing a non-constitutional objection to the IVDS bidding credit rule).

²¹ *See IVDS Omnibus Order*, 11 FCC Rcd 1282 (disposing of numerous post-auction petitions and requests filed by winning bidders), *recon. denied, Memorandum Opinion and Order*, 11 FCC Rcd 12994 (1996).

was a "properly presented constitutional claim."²² In contrast, Petitioners' belated constitutional claim, in the form of an informal request for Commission action submitted under Section 1.41, would be considered untimely even under the *Graceba* opinion.

6. Petitioners also could have timely objected to the payment conditions attendant to their license grants in January or February 1995. In that regard, Petitioners' challenge to the payment terms -- a condition of the license grant -- is similarly barred by Section 1.110 of the Commission's rules,²³ "which indicates that if the Commission grants an application with conditions, the applicant must accept those conditions unless it rejects them within thirty days."²⁴ Even the *Adarand* decision date provides no milestone of timely objection, since Petitioners filed their Petition almost six months later, and in any event, as described above, Petitioners had numerous occasions to raise timely constitutional challenges prior to *Adarand*.²⁵ In view of Petitioners' failure to properly raise their constitutional challenge despite repeated opportunities to do so, Petitioners have waived the opportunity to raise this issue now.

IV. ORDERING CLAUSES

7. Accordingly, for the foregoing reasons, IT IS ORDERED that the Petition for Relief filed on December 5, 1995, and its associated Supplement filed on January 9, 1998, ARE HEREBY DISMISSED.

8. This action is taken pursuant to authority delegated by Section 0.331(a)(2) of the Commission's Rules, 47 C.F.R. § 0.331(a)(2).

FEDERAL COMMUNICATIONS COMMISSION

Daniel B. Phythyon
Chief, Wireless Telecommunications Bureau

²² *Graceba*, 115 F.3d at 1041-42.

²³ 47 C.F.R. § 1.110.

²⁴ *Nextwave Personal Communications Inc.*, 12 FCC Rcd 6543, 6546 n.17 (WTB 1997). *See also Tribune Company v. FCC*, 133 F.3d 61, 66 (D.C. Cir. 1998) ("We have squarely held that the plain language of § 1.110 implies an exhaustion requirement that does not allow applicants first to accept a partial grant, yet later to seek reconsideration of its conditions.") (citation omitted).

²⁵ Prior to *Adarand*, parties in other services brought timely constitutional challenges to provisions similar to those adopted in the IVDS rules. *See, e.g., Telephone Electronics Corp. v. FCC*, No. 95-1015 (D.C. Cir. Mar. 15, 1995) (order staying the broadband Personal Communications Services C block auction).