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

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DISPATCHED

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act -) PP Docket No. 93-253
Competitive Bidding)
)

**SIXTH MEMORANDUM OPINION AND ORDER AND
FURTHER NOTICE OF PROPOSED RULE MAKING**

Adopted: August 6, 1996

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By the Commission:

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I. INTRODUCTION

1. In this *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, we resolve petitions for reconsideration¹ of our rules governing the methodology and procedure for auctions to provide interactive video and data service (IVDS), and propose modifications to our competitive bidding rules for the upcoming auction of IVDS licenses.² Specifically, we reexamine various aspects of the *Fourth Report and Order* concerning: (1) the establishment of our July 28-29 IVDS auction dates prior to a determination that mutual exclusivity existed; (2) the prohibition of settlement among mutually exclusive applicants; (3) modifications to our upfront and down payment provisions; and (4) provisions established for

¹ Petitions for Reconsideration were filed by ITV, Inc. (ITV), Phase One Communications, Inc. (Phase One), the Rural Cellular Association (RCA), and U.S. Intelco Networks, Inc. (USIN). Oppositions/Comments were timely filed by Quentin L. Breen (Breen) and the U.S. Telephone Association (USTA). In addition, the Interactive Television Association (ITA) filed a petition for rule making.

² IVDS is a point-to-multipoint, multipoint-to-point, short distance communications service. IVDS licensees may provide information, products, or services to individual subscribers located at fixed locations within a service area, and subscribers may provide responses. Examples of service offerings that licensees could offer include opportunities for real-time responses to polls, educational or pay-per-view programming, and commercial data applications, such as transmission of database information to point-of-sale terminals, home banking or downloading of data to personal computers, VCRs, or other consumer electronic products. See Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules to Provide Interactive Video and Data Services, *Report and Order*, GN Docket No. 91-2, 7 FCC Rcd 1630 (1992).

designated entities. We also make certain modifications on our own motion pertaining to our auction methodology. In addition, we propose certain changes in our designated entity rules in order to address legal requirements of the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña (Adarand)*.³ In proposing these modifications, we reiterate the Commission's statutory obligation to ensure that small businesses, businesses owned by women and minorities, and rural telephone companies (collectively, "designated entities") are afforded opportunities to participate in the provision of spectrum-based services.⁴ We remain committed to this goal. We also propose to increase the upfront payment amounts for bidding on IVDS licenses.

II. EXECUTIVE SUMMARY

2. This Executive Summary summarizes the principal decisions and proposals made regarding competitive bidding rules for IVDS in this *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making*.

A. Sixth Memorandum Opinion and Order

- Denies petition asserting that the Commission must determine that mutual exclusivity exists before establishing auction dates or publicizing auctions.
- Denies petition to permit applicants to communicate with one another following the short-form application deadline.
- Amends rules to enable the Commission to conduct future IVDS auctions using simultaneous multiple round bidding.
- Grants petition so that the Commission will refund upfront payment amounts to the extent that they exceed the required down payment.
- Denies petition to reduce the amount of the default payment from the smaller of three percent of the subsequent winning bid (or three percent of its own bid) to zero, if the subsequent winning bid exceeds the defaulting applicant's bid by three percent or more, otherwise the difference between the subsequent winning bid and 103 percent of the defaulting applicant's bid.
- Grants petition to make bidding credits available to both licenses in each IVDS service area.

³ ___ U.S. ___, 115 S.Ct. 2097, 132 L.Ed. 158 (1995).

⁴ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 388 (1993) (Budget Act).

- Eliminates the tax certificate program available to investors in women- and minority-owned businesses in accordance with Congressional action.
- Denies petition to not apply unjust enrichment provision for the transfer of a license obtained using bidding credits when the license is assigned or transferred at a loss, and to base the payment on a profitable transfer on the profits attributable to the license, and not the government's cost in providing the bidding credit.
- Denies petition to grant rural telephone companies special provisions beyond what they are eligible for under the other designated entity provisions.

B. Further Notice of Proposed Rule Making

- Tentatively concludes that the race-based provisions in our competitive bidding rules for the IVDS auction are not presently supported by a record that can withstand the strict scrutiny standard of judicial review required by the Supreme Court's ruling in *Adarand*, and seeks additional evidence to support these provisions.
- Tentatively concludes that the gender-based provisions in our competitive bidding rules are not supported by an adequate record, and seeks additional evidence to support these provisions.
- In the absence of sufficient supporting data, proposes to make our IVDS rules race- and gender-neutral.
- Seeks comment on whether our definition of small business continues to be appropriate.
- Seeks comment on whether and how we should extend bidding credits to small businesses.
- Tentatively concludes to increase the upfront payments from \$2,500 for every five licenses won to \$9,000 per Metropolitan Statistical Area (MSA) license won, and \$2,500 per Rural Statistical Area (RSA) license won.

III. BACKGROUND

3. In the Omnibus Budget Reconciliation Act of 1993 (Budget Act), Congress authorized the Commission to award licenses for certain spectrum-based services by

competitive bidding.⁵ In authorizing the use of auctions, Congress directed the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women [collectively known as 'designated entities'] are given the opportunity to participate in the provision of spectrum-based services."⁶ In the *Second Report and Order* in this proceeding, the Commission exercised its authority by determining that IVDS licenses should be awarded through competitive bidding and by prescribing general rules and procedures and a broad menu of competitive bidding methods to be used for all auctionable services.⁷ We reexamined certain aspects of these general rules and procedures in the *Second Memorandum Opinion and Order*.⁸

4. In the *Fourth Report and Order* in this docket, we established specific competitive bidding procedures for IVDS.⁹ As described more fully below, these rules set forth auction methodology, application procedures, payment and safeguard provisions. In addition, the *Fourth Report and Order* established provisions to ensure that designated entities are afforded a meaningful opportunity to participate in the auction.¹⁰ We adopted an installment payment plan to permit small businesses (including those owned by minorities and women) to pay 80 percent of their winning bid in quarterly installments over the course of the license term.¹¹ In addition, we established a 25 percent bidding credit for women- and minority-owned businesses. This bidding credit was intended to operate as a discount on the price a qualifying firm would actually have to pay to obtain an IVDS license.¹² The bidding credit was made available for one of the two licenses in each service area (i.e., for either frequency segment A or B).¹³ Finally, we implemented a tax credit program to help businesses owned

⁵ Budget Act, Pub. L. 103-66, Title VI, § 6002, 107 Stat. 312, 388.

⁶ 47 U.S.C. § 309(j)(4)(D).

⁷ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) (*Second Report and Order*).

⁸ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7245 (1994) (*Second Memorandum Opinion and Order*).

⁹ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fourth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2330 (1994) (*Fourth Report and Order*).

¹⁰ *Id.* at ¶¶ 34-54.

¹¹ *Id.* at ¶¶ 53-54.

¹² *Id.* at ¶¶ 39-47.

¹³ *Id.* at ¶ 39.

by women and minorities attract start-up capital from non-controlling investors.¹⁴

5. Utilizing the procedures adopted in the *Fourth Report and Order*, on July 28 and 29, 1994, we held an auction for IVDS licenses covering 594 MSAs.¹⁵ This auction generated more than \$200 million for the U.S. Treasury and resulted in the award of nearly 94 percent of the licenses to small businesses, including businesses owned by minorities and women. In anticipation of this future auction, we hereby reexamine certain aspects of our auction rules for IVDS. We anticipate that licenses with service areas based on the 428 RSAs¹⁶ will be auctioned in the coming year. At that time, the Commission also intends to reactivate any IVDS licenses where the winning bidders from the previous auction have been found in default.

6. In the *Fifth Report and Order* in this docket (establishing competitive bidding procedures for broadband personal communications services), we stated that the provisions we established for minorities and women are constitutional under the "intermediate scrutiny" standard of review articulated in *Metro Broadcasting, Inc. v. FCC*,¹⁷ On June 12, 1995, the Supreme Court decided in *Adarand* that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."¹⁸ The Court ruled that any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest.¹⁹ The Court overruled *Metro Broadcasting* "to the extent that *Metro Broadcasting* is inconsistent with" *Adarand*'s holding.²⁰

¹⁴ *Id.* at ¶¶ 48-52.

¹⁵ "MSAs" refer to "Metropolitan Statistical Areas". See Announcing High Bidders for 594 Interactive Video and Data Service Licenses, Public Notice No. 44160 (Aug. 2, 1994). The MSAs auctioned in IVDS, like the Rural Service Areas discussed *infra*, correspond with cellular radio service areas. See *Fourth Report and Order*, 9 FCC Rcd 2330 at ¶ 16.

¹⁶ "RSAs" refer to "Rural Service Areas".

¹⁷ 497 U.S. 547, 564-565 (1990). See also Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532 (1994) at ¶ 9 (*Fifth Report and Order*). In *Metro Broadcasting*, the Supreme Court ruled that the Commission's minority preference program for mutually exclusive applications for licenses for new radio or television broadcast stations and its distress sale program did not violate the equal protection component of the Fifth Amendment. The Court held that congressionally mandated minority programs (even if not directly remedial in the sense of being designed to compensate individual victims of past governmental or societal discrimination) "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." *Metro Broadcasting v. FCC*, 497 U.S. at 565.

¹⁸ *Adarand*, 115 S.Ct. at 2113.

¹⁹ *Id.*

²⁰ *Id.*

IV. SIXTH MEMORANDUM OPINION AND ORDER

A. Auction Methodology, Payments and Procedures

1. Establishment of Auction Dates

7. Background. In the *Fourth Report and Order*, the Commission adopted competitive bidding rules for selecting between mutually exclusive applicants for IVDS spectrum. By Public Notices issued on May 23, June 17, and July 5, 1994, we provided additional information concerning the IVDS auctions.²¹ In addition, on June 6, 1994, the Commission held an informational auction seminar regarding IVDS licenses.

8. Petition. Phase One argues that, because the Commission may only conduct an auction if there are mutually exclusive applications, it should not have established IVDS auction dates until mutual exclusivity had been determined.²² Phase One also maintains that interested parties did not have adequate time to plan their competitive bidding strategy for the IVDS auction.²³

9. Decision. We disagree with Phase One's assertion that the Commission may not establish auction dates or publicize auctions until we have determined that mutual exclusivity exists. While we recognize that we cannot conduct an auction for licenses for which there are no mutually exclusive applications, we note that scheduling and announcing auction dates are no more than preparatory measures. We indicated, in the *Fourth Report and Order*, that in the event the Commission receives only one application that is acceptable for filing for a particular frequency segment, then the pre-scheduled auction would be cancelled.²⁴ Moreover, we conducted the July 1994 auction for IVDS licenses only after mutual exclusivity had been established in all markets. Thus, we conclude that our pre-auction application procedures ensure that spectrum auctions will be conducted only in those circumstances authorized by the Communications Act.

²¹ "Notice and Filing Requirements for the First Auction of IVDS Licenses," Public Notice (May 23, 1994); "First Amendment to Bidder's Information Package and the May 23, 1994 Public Notice Announcing the Auction of Approximately 600 IVDS Licenses," Public Notice (June 17, 1994); "Clarification of the Requirement on Multiple Applicants Being Represented by the Same Bidding Agent at the Auction of Approximately 600 IVDS Licenses," Public Notice (July 5, 1994). See also "IVDS Information Packet" (May 1994); "FCC Informational Auction Seminar June 6, 1994," News Release (May 25, 1994); "Answers to Questions from the June 6, 1994 FCC Bidders Seminar for the Auction of IVDS Licenses," Public Notice (June 20, 1994).

²² Phase One Petition for Reconsideration (filed June 13, 1994) at 2, 5-6 (Phase One Petition). Phase One observes that advertisements for the IVDS auction appeared in the *Wall Street Journal*.

²³ *Id.* at 3-4.

²⁴ *Fourth Report and Order*, 9 FCC Rcd 2330 at ¶ 21.

10. We also disagree with Phase One's allegation that our auction schedule did not provide applicants adequate time to prepare for the IVDS auction. The Commission received more than 500 applications by the June 27, 1994 filing deadline for short-form applications (FCC Form 175). The large number of timely applications we received, along with our outreach efforts to disseminate information to the public about the IVDS auctions, through the initial May 23, 1994 Public Notice and subsequent public notices issued during the five week period prior to the filing deadline, evidence that a substantial number of parties found themselves aptly prepared to participate in the IVDS auction. As a result, we find Phase One's contention to be unpersuasive.

2. Rules Prohibiting Settlement and Collusion

11. Background. In the *Second Report and Order*, we adopted rules prohibiting collusive conduct in the context of competitive bidding.²⁵ Specifically, we determined that bidders would be prohibited from discussing the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on their short-form application. We also required bidders to identify on their short-form applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements relating to the competitive bidding process.²⁶ We also determined that auction applicants would not be permitted to make any ownership changes or changes in the identification of parties to bidding consortia once a short-form application is filed.²⁷

12. Petition. ITV argues that our rule prohibiting collusive conduct operates to preclude settlements between mutually exclusive applicants in violation of Section 309 subsections (j)(6)(A) and (E) of the Communications Act and the Commission's policy of allowing settlements.²⁸ ITV thereby requests that applicants be permitted to communicate

²⁵ See 47 C.F.R. § 1.2105(c); see also *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 at ¶¶ 50-53, *erratum*, Mimeo No. 50278 (Oct. 19, 1994).

²⁶ *Second Report and Order*, 9 FCC Rcd 2348 at ¶ 166.

²⁷ *Id.* at ¶ 167.

²⁸ ITV Petition for Reconsideration (filed June 13, 1994) at 4-11 (ITV Petition). Specifically, ITV refers to Section 309(j)(6) of the Communications Act, containing the following rules of construction:

(6) Rules of Construction -- Nothing in this sub-section, or in the use of competitive bidding, shall --

(A) alter spectrum allocation criteria and procedures established by the other provisions of this Act;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold

with one another following the short-form application deadline to pursue full-market settlements.²⁹

13. Decision. We reject ITV's contention that the Commission lacks the authority under the Communications Act to preclude settlements between mutually exclusive applicants for licenses in auctionable services. While the Commission has an established policy of favoring settlements in some contexts, it is within our statutory authority to restrict settlements if we find such agreements would not be in the public interest.³⁰ At this time, we find that prohibiting settlements after the short form filing deadline between mutually exclusive applicants for the same license in the IVDS competitive bidding process is necessary to deter collusive conduct and ensure a competitive auction, and is thereby in the public interest. Our collusion rules also prevent entities from filing applications solely for the purpose of demanding payment from other bidders in exchange for settlement or withdrawal.

14. Nevertheless, we take this opportunity to clarify certain aspects of our anti-collusion rules.³¹ We clarify that the anti-collusion rules apply where one applicant has a common ownership interest with another applicant.³² Specifically, unless the second applicant is expressly identified as an entity with whom the first applicant has an agreement concerning bidding, these parties may not communicate with each other concerning their bids or bidding strategies. This prohibition holds even where the other bidder is identified on the applicant's short-form application as having a common ownership interest with the applicant.³³ Further,

qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings; ...

Cf. 47 C.F.R. § 22.131(c)(4).

²⁹ *Id.* at 11.

³⁰ In the broadcast contexts, for example, while we have allowed settlements between applicants for construction permits, such agreements have been significantly restricted in recent years. *See Report and Order*, MM Docket No. 90-263, 6 FCC Rcd 85 (1990), *recon. Memorandum Opinion and Order*, 6 FCC Rcd 2901 (1991) (limiting settlements between mutually exclusive applicants for broadcast construction permits).

³¹ 47 C.F.R. § 1.2105(c). *See also Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 at ¶¶ 48-53; *In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fourth Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 6858 (1994) (*Fourth Memorandum Opinion and Order*) at ¶¶ 47-60; *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7684 (1994) (*Memorandum Opinion and Order*) at ¶¶ 812; *Public Notice*, "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules," DA 95-2244 (released October 26, 1995).

³² *Id.* at ¶ 53.

³³ *See Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 at ¶ 53. The Wireless Telecommunications Bureau released a Public Notice clarifying the Commission's anti-collusion rules. *See Public Notice*, *Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules*, DA 95-

consistent with the Wireless Telecommunications Bureau's (Bureau) approach in the Broadband PCS C Block auction, amendments to the short-form application must be filed with the Commission within ten business days of any such change.³⁴

3. Competitive Bidding Methodology

15. **Background.** In the *Second Report and Order*, we established the criteria to be used in selecting the competitive bidding methodology for each auctionable service. Generally, we concluded that awarding licenses to those parties that value them most highly will promote the rapid development and deployment of new services, and the efficient and intensive use of the spectrum.³⁵ In the *Fourth Report and Order*, the Commission adopted an oral outcry competitive bidding methodology for auctioning 594 MSA licenses in IVDS. For the remaining RSA licenses, the Commission concluded that a sealed bid competitive bidding mechanism was appropriate. The Commission observed that both methods appear suited to IVDS because they are relatively inexpensive for the Commission to administer and the costs of bidder participation are fairly low. Moreover, we noted that both methods are relatively simple for bidders to understand and generally can be completed quickly.³⁶ The issue of cost, for both the Commission and the applicants, was an especially important factor in making these choices, because we expected the value of IVDS licenses to be relatively low compared to the value of other auctionable services. We reserved discretion, however, to reconsider this competitive bidding design if, in view of our actual auctions experience, a change appears

2244 (Oct. 26, 1995). The anti-collusion rules were further clarified in a November 3, 1996 Order. See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act--Competitive Bidding, Order, DA 95-2292 (rel. Nov. 3, 1995).

We also note that applicants are subject to existing antitrust laws. For example, this prohibits discussions with respect to bid prices between any applicants who have applied for licenses in the same or overlapping geographic license areas. See *United States v. Champion Int'l Corp.*, 557 F.2d 1270 (9th Cir.), 434 U.S. 938 (1977); *c.f.*, *e.g.*, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898), *modified and aff'd* 175 U.S. 211 (1899). In addition, agreements between two or more actual or potential competitors to submit collusive, non-competitive or rigged bids are *per se* violations of Section One of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* See, *e.g.*, *United States v. MMR Corporation (LA)*, 907 F.2d 489 (5th Cir. 1990); *United States v. W.F. Brinkley & Sons Construction Co.*, 783 F.2d 1157 (4th Cir. 1986); *United States v. Finis P. Renest, Inc.*, 509 F.2d 1256 (7th Cir. 1975), *cert. denied*, 423 U.S. 874. Similarly, agreements between actual or potential competitors to divide or allocate territories horizontally in order to minimize competition are *per se* violations of the Sherman Act (*United States v. Topco*, 405 U.S. 596 (1972); *Affiliated Capital Corporation v. City of Houston*, 700 F.2d 226, 236), and such agreements are anticompetitive regardless of whether the parties split a market in which they both do business or whether they merely reserve one market for one and another for the other. See *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990).

³⁴ See *Public Notice*, Qualified Bidders and Bidding Instructions For December 18, 1995 Broadband PCS C Block Auction, Report No. AUC-95-05, Auction No. 5 at 3 (Dec. 8, 1995).

³⁵ *Second Report and Order*, 9 FCC Rcd 2348 at ¶ 5.

³⁶ *Fourth Report and Order*, 9 FCC Rcd 2330 at ¶ 11

warranted.³⁷

16. Decision. We anticipate that we will auction the remaining IVDS licenses using the oral outcry method. We used this method successfully to auction 594 MSA licenses on July 28 and 29, 1994, and find that auctioning IVDS licenses in this manner continues to serve the public interest. We amend our IVDS rules, however, to permit the use of simultaneous multiple round bidding as well. This method, with its remote bidding capabilities, has been successful in our PCS, Multipoint and/or Multichannel Distribution Service (MDS), and 900 MHz Specialized Mobile Radio (900 MHz SMR) auctions. As we continue to gain experience in conducting simultaneous multiple round auctions, the costs associated with this methodology decline. As a result, we reserve the option of using a simultaneous multiple round auction methodology for future IVDS auctions. We delegate authority to the Bureau to announce the type of auction and the procedures by Public Notice.

17. Simultaneous multiple round bidding permits remote bidding from personal computers throughout the country, with resultant flexibility and cost savings for both the public and the Commission.³⁸ This auction design can also be superior at yielding information to bidders during the course of the auction. The primary drawback to using the design is its cost, although this has decreased as the Commission has gained experience with auctions. Specific procedures are set forth below.

18. Bid Increments. In the event that we use the simultaneous multiple round auction methodology, we will specify minimum bid increments.³⁹ The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as valid in the current bidding round. The application of a minimum bid increment speeds the auction progress and, along with activity and stopping rules, helps to ensure that the auction closes within a reasonable period of time. Establishing an appropriate minimum bid increment is important in a simultaneous auction with a simultaneous closing rule, because all markets remain open until there is no bidding on any license and a delay in closing one market will delay the closing of all markets.

19. If we elect to use simultaneous multiple round auctions, we will conduct the auction in three stages and start the auction with large bid increments, reducing the increments as bidding activity falls. The minimum bid increment in Stage I of the auction will be 5 percent of the high bid in the previous round or \$.02 per bidding unit, whichever is greater.

³⁷ *Id.* at ¶ 16.

³⁸ In the *Fourth Report and Order* we noted that one commenter, ICC, favored sealed (or electronic) bidding over oral bidding because, it argued, some potential bidders could not afford to attend an auction in person. *Fourth Report and Order*, 9 FCC Rcd 2330 at ¶ 15 & n. 26.

³⁹ See *Second Report and Order*, 9 FCC Rcd 2348 at ¶¶ 124-126.

The Commission will reduce the minimum bid increment as the auction moves through its stages, with a minimum bid increment of the greater of two percent or \$.01 per bidding unit in Stage II, and the greater of one percent or \$.005 per bidding unit in Stage III.⁴⁰ The Commission, however, retains the discretion in IVDS auctions to vary the minimum bid increments for individual licenses, or groups of licenses, at any time before or during the course of an auction. The Commission delegates to the Bureau the authority to exercise such discretion.⁴¹

20. Stopping Rules. In multiple round auctions, a stopping rule must be established for determining when the auction is over.⁴² In simultaneous multiple round auctions, bidding may close separately on individual licenses, simultaneously on all licenses, or a hybrid approach may be used. Under a license-by-license approach, bidding closes on each license after a certain number of rounds pass in which no new acceptable bids are submitted for that particular license. With a simultaneous stopping rule, bidding generally remains open on all licenses until there is no new acceptable bid for any license. This approach provides bidders full flexibility to bid for any license as more information becomes available during the course of the auction, but it may lead to very long auctions unless an activity rule is imposed. Under a hybrid approach, we may use a simultaneous stopping rule (along with an activity rule designed to expedite closure for licenses subject to the simultaneous stopping rule) for the higher value licenses. For lower value licenses, where the loss from eliminating some back-up strategies is less, we may use the license-by-license approach.

21. If we decide to use simultaneous multiple round bidding for the IVDS auction, we intend to use a simultaneous stopping rule. Because of the large number of licenses likely to be auctioned at once, however, we will retain the discretion either to use a hybrid stopping rule or to allow bidding to close individually for these licenses. The specific stopping rule to conclude bidding on IVDS licenses will be announced by Public Notice prior to auction. The Commission also retains the discretion to declare at any point after 40 rounds that the auction will end after some specified number of additional rounds. We believe this number of rounds will ensure that the auction will not close prematurely, while providing bidders with fair assurance that the auction will be conducted as intended.⁴³ Bids will be accepted only on licenses where the high bid has increased in the last three rounds.⁴⁴ This will deter bidders

⁴⁰ In oral or electronic sequential auctions, the auctioneer may, within his or her sole discretion, establish and vary the amount of the minimum bid increments in each round of bidding.

⁴¹ See Amendment of Part 0 of the Commission's Rules to Reflect a Reorganization Establishing the Wireless Telecommunications Bureau and to Make Changes in the Delegated Authority of Other Bureaus, *Order*, 10 FCC Rcd 12751 (1995); see also 47 C.F.R. § 0.331.

⁴² See *Second Report and Order*, 9 FCC Rcd 2348 at ¶ 127.

⁴³ See *Fifth Report and Order*, 9 FCC Rcd 5532 at ¶ 48.

⁴⁴ *Id.* at ¶ 49.

from continuing to bid on a few low value licenses solely to delay the closing of the auction. It will also enable the Commission to end the auction when it determines that the benefits of terminating the auction and issuing licenses exceed the likely benefits of continuing to allow bidding. The Commission will announce by Public Notice the number of remaining rounds and other final bidding procedures. The Commission delegates to the Bureau the authority to exercise such discretion.

22. Duration of Bidding Rounds. In simultaneous multiple round auctions, bidders may need a certain amount of time to evaluate back-up strategies and develop their bidding plans. In the event we use the simultaneous multiple round auction methodology, we delegate to the Bureau the discretion to vary the duration of the bidding rounds or the interval at which bids are accepted (e.g., run more than one round per day) in order to move the auction toward closure more quickly. The Bureau will announce any changes to the duration of, and intervals between, bidding rounds, either by Public Notice prior to the auction or by announcement during the auction.

23. Activity Rules. As discussed above, in order to ensure that simultaneous auctions with simultaneous stopping rules close within a reasonable period of time and to increase the information conveyed by bid prices during the auction, it is necessary to impose an activity rule to prevent bidders from waiting until the end of the auction before participating. In the *Second Report and Order*, we adopted the Milgrom-Wilson activity rule as our preferred activity rule where a simultaneous stopping rule is used.⁴⁵ The Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. Bidders are required to declare their maximum eligibility in terms of bidding units, and to make an upfront payment proportional to that eligibility level.⁴⁶ In each round, bidders are limited to bidding on licenses encompassing no more than the number of bidding units covered by their upfront payment. Licenses on which a bidder is the high bidder at the end of the withdrawal period in the previous round, as well as licenses on which a new valid bid is placed, count toward this limit. Under this approach, bidders have the flexibility to shift their bids among any license for which they have applied so long as, within each round, the total bidding units encompassed by those licenses does not exceed the total number of bidding units on which they are eligible to bid.

24. Under the Milgrom-Wilson approach, the minimum activity level, measured as a fraction of the bidder's eligibility in the current round, will increase during the course of the auction. Absent waivers (discussed *infra*), a bidder's eligibility (in terms of bidding units) in the current round is determined by the bidder's activity level and eligibility in the previous round. In the first round, however, eligibility is determined by the bidder's upfront payment and is equal to the upfront payment divided by \$.02 per bidding unit.

⁴⁵ *Second Report and Order*, 9 FCC Rcd 2348 at ¶¶ 144-145.

⁴⁶ See discussion of upfront payments at ¶¶ 32-34, *infra*.

25. In each round of Stage I, a bidder who wishes to maintain its current eligibility must be active on licenses encompassing at least one-half of the bidding units for which it is eligible. Failure to maintain the requisite activity level will result in a reduction in the amount of bidding units upon which a bidder may be eligible to bid in the next round of bidding (unless an activity rule waiver is used). During Stage I, if bidding activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by two (2). Eligibility for each applicant in the first round of the auction is determined by the amount of the upfront payment received and the licenses identified in its auction application. In each round of Stage II, a bidder who wishes to maintain its current eligibility is required to be active on at least 75 percent of the bidding units for which it is eligible in the current round. During Stage II, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by four thirds (4/3). In each round of Stage III, a bidder who wishes to maintain its current eligibility must be active on licenses encompassing at least 95 percent of the bidding units for which it is eligible in the current round. In Stage III, if activity in the current round is below 95 percent of current eligibility, eligibility in the next round will be calculated by multiplying the current round activity by twenty nineteenth (20/19). We reserve the discretion to set and, by announcement before or during the auction, vary the requisite minimum activity levels (and associated eligibility calculations) for each auction stage. Retaining this flexibility will improve the Commission's ability to control the pace of the auction and help ensure that the auction is completed within a reasonable period of time.

26. In general, the auction will start in Stage I and move to Stage II if the auction activity level is below 10 percent for three consecutive rounds in Stage I, and move from Stage II to Stage III if the auction activity level is below five percent for three consecutive rounds in Stage II. In no case can the auction revert to an earlier stage. However, the Commission retains the discretion to announce during the course of an auction when, and if, the auction will move from one auction stage to the next. These determinations will be based on a variety of measures of bidder activity including, but not limited to, the auction activity level defined above, the percentage of licenses (measured in terms of bidding units) on which there are new bids, the number of new bids, and the percentage increase in revenue. The Commission delegates to the Bureau the authority to exercise such discretion.

27. Activity Waivers. To avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission on a particular day, we will provide bidders with five activity rule waivers that may be used in any round during the course of the auction. If a bidder's activity level is below the required activity level a waiver automatically will be applied. That is, if a bidder fails to submit a bid in a round, and its activity level from any standing high bids (high bids at the end of the bid withdrawal period in the previous round) falls below its required activity level, a waiver will be applied automatically. A waiver will preserve current eligibility in the next round, but cannot be used to correct an error in the amount bid. An activity rule waiver applies to an entire round of bidding and not to a particular MSA or RSA service area.

28. Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid, if they intentionally wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level.⁴⁷ If a bidder overrides the automatic waiver mechanism, its eligibility will be reduced permanently (according to the formulas specified above), and it will not be permitted to regain its bidding eligibility from a previous round. An automatic waiver invoked in a round in which there are no valid bids will not keep the auction open. Bidders will have the option to enter an activity rule waiver proactively during the bid submission period. Thus, a "proactive" waiver, as distinguished from an automatic waiver, is one requested by the bidder. If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.

29. If a simultaneous multiple round auction is employed, the Commission retains the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control and delegates to the Bureau the authority to exercise such discretion. The Bureau also retains the flexibility to adjust, by Public Notice prior to an auction, the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction.⁴⁸

30. A waiver may be submitted either in the round in which bidding falls below the minimum required level to maintain (for the next round) the same eligibility as in that round, or prior to submitting a bid in the next round. If an activity rule waiver is entered in a round in which no other bidding activity occurs, the auction will remain open.⁴⁹ However, an activity rule waiver entered after a round in which no other bidding activity occurs will not reopen the auction. In addition, to help ensure that the auctions are not closed prematurely, we will retain the discretion to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round. In such an instance, the Commission would, in effect, be submitting its own proactive waiver, thus keeping the auction open. At such time, the Commission could also advance to larger bid increments, speeding the pace of the auction.

31. Bid Withdrawal Provisions. If we choose to use a simultaneous multiple round auction methodology, we intend to apply bid withdrawal provisions. In the *Second Report and Order*, the Commission determined that bid withdrawal provisions were needed to

⁴⁷ See *Fourth Memorandum Opinion and Order*, 9 FCC Rcd 6858 at ¶ 15.

⁴⁸ See *Second Report and Order*, 9 FCC Rcd 2348 at ¶ 145.

⁴⁹ However, if we determine, based on evidence from experimental and actual auctions, that this is likely to excessively delay the close of an auction or result in other adverse strategic manipulation of an auction, the Bureau may announce by Public Notice prior to a specific auction that submission of a waiver will not keep an auction open under any circumstances.

discourage insincere bidding.⁵⁰ The Commission observed that insincere bidding, whether frivolous or strategic, distorts the price information generated by the auction process and reduces its efficiency.⁵¹ Accordingly, we adopt the bid withdrawal provisions established in the *Second Report and Order*.⁵² Pursuant to these rules, any bidder who withdraws a high bid during an auction will be required to reimburse the Commission the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid. No withdrawal payment will be assessed if the subsequent winning bid exceeds the withdrawn bid. If a license is reoffered by auction, the "winning bid" refers to the high bid in the auction in which the license is reoffered. If a license is reoffered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder will be required to pay an amount equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission. If a license which is the subject of withdrawal is not re-auctioned but is instead offered to the highest losing bidder(s) in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders would not be required to accept the offer, *i.e.*, they may decline without penalty. The payment amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.⁵³

4. Upfront and Down Payments

32. Background. In establishing its auction methodology for IVDS, the Commission set forth several provisions to ensure that winning bidders have the resources needed to obtain their licenses and construct their systems and to discourage insincere bidding. In the *Fourth Report and Order*, we required applicants to show a cashier's check in the amount of \$2,500 for each five licenses sought in order to obtain a bidding number and participate in the auction. Immediately following the auction, winning bidders were required to submit a

⁵⁰ See *Second Report and Order*, 9 FCC Rcd 2348 at ¶ 147.

⁵¹ *Id.*

⁵² See 47 C.F.R. § 1.2104(g)(1).

⁵³ But see *Atlanta Trunking Associates, Inc. v. MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions*, FCC 96-203, *Order*, (rel. May 3, 1996)(summarized in 61 Fed. Reg. 25,807 (May 23, 1996)), *recon. pending* ("*Atlanta Trunking*"). The *Atlanta Trunking* guidelines were formally incorporated into and adopted by a *Report and Order* which amended Section 24.704 of the Commission's rules to reflect the changes. See *Report and Order*, FCC 96-278 (rel. June 24, 1996).

\$2,500 upfront payment for every five licenses won.⁵⁴ We anticipated that this amount would ensure that only serious, qualified applicants would be eligible to bid at auction. In addition, we required winning bidders to make a substantial down payment within five business days after the close of bidding. Generally, we required that the down payment be sufficient to bring the winning bidder's total deposit with the Commission up to 20 percent of the amount bid.⁵⁵ Small business applicants were permitted to pay 10 percent at that time and the remaining 10 percent within five days of the grant of the license.

33. Petition. ITV requests that the Commission refund upfront payment amounts to the extent that they not only cover, but exceed, the required down payment. ITV maintains that this policy would ensure that winning bidders are not penalized by prevailing with a low bid. ITV alleges that this modification is especially important to applicants that qualify as a small business, who need to conserve their financial resources for other auctions, and when the Commission cannot pay interest on collected funds.⁵⁶

34. Decision. We grant ITV's petition on this issue. We agree with ITV that winning bidders should not be penalized because their winning bid was lower than the amount the upfront payment would suggest. The Commission will issue a refund to any qualified applicant after determining that no bid withdrawal or default payments are owed. Due to administrative constraints, however, we will not honor requests that any excess amount be retained and applied toward later payments or obligations. Additional instructions for obtaining a refund will be provided in a Bidder Information Package prior to auction.

5. Default Provisions

35. Background. In the *Fourth Report and Order*, we adopted default payments to discourage insincere bidding and to compensate the government for the cost of reauctioning a license. Specifically, we determined that the defaulting auction winner would be assessed an additional payment of three percent of the subsequent winning bid or three percent of its own bid, whichever is less.⁵⁷

36. Petition. ITV requests that, where the new bid on a license (upon reauction) exceeds the defaulting applicant's bid by 3 percent or more, no default payment be applied.⁵⁸ In the event that the subsequent bid exceeds the defaulting bid by less than 3 percent, ITV

⁵⁴ *Fourth Report and Order*, 9 FCC Rcd 2330 at ¶ 24. See also the detailed discussion *infra* in ¶¶ 76-77 on increasing the upfront payment amounts.

⁵⁵ *Id.*

⁵⁶ ITV Petition at 15-17.

⁵⁷ *Fourth Report and Order*, 9 FCC Rcd 2330 at ¶ 29.

⁵⁸ ITV Petition at 14.

requests that the defaulting applicant should only be responsible for payment of the difference between the subsequent winning bid and 103 percent of the defaulting applicant's bid.⁵⁹ ITV maintains that this proposal will prevent any windfall to the U.S. Treasury.⁶⁰

37. Decision. We believe that our existing default provisions serve an important purpose by helping to deter insincere or speculative bidding, and providing an incentive for bidders wishing to withdraw their bids to do so before bidding ceases. In the Second Report and Order, we observed that it is appropriate to create such an incentive because a withdrawal that occurs after an auction closes (default) is likely to be more harmful than one that occurs before closing.⁶¹ We noted, for example, that default reduces the likelihood that licenses will be assigned to those who value them the most and imposes additional costs on the government. Therefore, we determined that an additional 3 percent payment would discourage bidders from defaulting on licenses won at auction. We continue to believe that this amount is appropriate and will reasonably compensate the government for costs associated with reauctioning the license. Thus, we reject ITV's proposal.

B. Designated Entity Provisions

38. Background. In the *Fourth Report and Order*, we established several special provisions to ensure that designated entities, *i.e.*, small businesses, rural telephone companies, and businesses owned by members of minority groups and women, are given the opportunity to participate both in the competitive bidding process for, and in the provision of, IVDS.⁶² Our rules provide that on one of the two licenses in each market, a 25 percent bidding credit would be awarded to a winning bidder that is a business owned by women or minorities.⁶³ We declined to provide bidding credits to rural telephone companies, however, because we concluded that the relatively modest build-out costs for systems in this service would make such special provisions unnecessary to ensure that they had the opportunity to participate in the provision of IVDS offerings to rural areas.⁶⁴ We also made tax certificates available to initial investors in minority and women-owned businesses, and to licensees that transfer their authorizations to minority and women-owned enterprises.⁶⁵ Finally, because installment payments are an effective way to promote the participation of designated entities and to

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Second Report and Order*, 9 FCC Rcd 2348 at ¶ 154.

⁶² *Fourth Report and Order*, 9 FCC Rcd 2330 at ¶¶ 34-54.

⁶³ See 47 C.F.R. §§ 95.816(d)(1).

⁶⁴ *Fourth Report and Order*, 9 FCC Rcd 2330 at n.66.

⁶⁵ *Id.* at ¶¶ 48-52.

distribute licenses and services among geographic areas, and because use of IVDS spectrum is very likely to match the business objectives of *bona fide* small businesses, we allowed small businesses to pay for their licenses using installment payments.⁶⁶

39. Also, to ensure that our special provisions for designated entities would benefit only the parties to whom they were directed, we adopted "unjust enrichment" provisions designed to discourage trafficking in licenses obtained using these special provisions.⁶⁷ For example, the unjust enrichment provisions require reimbursement of the bidding credit plus interest when the licensee assigns or transfers the license to a business not owned by minorities and/or women.⁶⁸ In addition, we require small business licensees to pay back the full amount of the remaining principal balance upon transfer or assignment of a license to a non-qualifying entity.⁶⁹

1. Bidding Credits

40. Petition. ITV requests that a bidding credit be made available for both licenses in each IVDS service area. ITV asserts that we did not adequately explain why we restricted the use of bidding credits to one license per service area, and that any interest in "maximizing" auction revenue would be contrary to statutory authority.⁷⁰

41. Decision. We grant ITV's petition on this issue. In the *Fourth Report and Order*, we stated that providing bidding credits in the IVDS auctions was "necessary to provide [the pertinent] designated entities with a significant enough advantage to ensure their ability to compete successfully for some IVDS licenses."⁷¹ We note, however, that the Commission is not required to provide all potential special provisions to all designated entities in all auction contexts. We also note, contrary to ITV's assertions, that the Commission did not limit the application of bidding credits to only half of the available licenses solely to maximize auction revenues, but rather considered many other factors. We chose to make

⁶⁶ *Id.* at ¶¶ 53-54; *Second Report and Order*, 9 FCC Rcd at ¶¶ 231-240.

⁶⁷ See 47 C.F.R. §§ 1.2111, 95.816(e).

⁶⁸ See *Fourth Report and Order*, 9 FCC Rcd 2330 at ¶ 30. The payment equals the amount of the bidding credit plus interest at the rate imposed for installment financing at the time the license was awarded, and must be paid before the assignment or transfer will be permitted. The amount of the payment is reduced over time: a transfer or assignment in the first two years of the license term results in a forfeiture of 100 percent of the value of the bidding credit; during year three, of 75 percent of the bidding credit; in year four, of 50 percent; in year five, of 25 percent; and thereafter, no forfeiture is assessed.

⁶⁹ See *Fourth Report and Order*, 9 FCC Rcd 2330 at ¶ 36; 47 C.F.R. § 1.2110(c).

⁷⁰ ITV Petition at 11-13.

⁷¹ *Fourth Report and Order* at ¶ 39.

bidding credits available to only half of the available licenses, rather than all of them, because we believed that this substantial level of assistance, coupled with the special provision of tax certificates, fulfilled our statutory mandate to ensure that businesses owned by minorities and/or women would have a meaningful opportunity to participate in the competitive bidding process for, and in the provision of, IVDS offerings. We note that these provisions achieved a high degree of designated entity participation in the initial IVDS auction. Of the 594 licenses, 195 (32.8%) were won by bidders claiming minority-owned status, 282 (47.5%) by bidders claiming woman-owned status, and 557 (93.8%) by bidders claiming small business status. Since that time, however, the tax certificate program has been discontinued by Congress,⁷² and, as discussed *infra*, we are reconsidering the eligibility criteria for bidding credits in the IVDS context in light of the Supreme Court's recent decision in *Adarand*. Accordingly, to the extent we retain bidding credits for IVDS, we will provide bidding credits for both licenses in each service area. In view of the discontinuation of the tax certificate program, we believe that extending the bidding credit to both licenses is appropriate to increase the participation opportunities available for designated entities.⁷³

2. Tax Certificates

42. We eliminate the tax certificate program available to investors in women- and minority-owned firms. We adopted the tax certificate program in the *Fourth Report and Order* pursuant to authority granted in 26 U.S.C. § 1071.⁷⁴ Congress has since repealed Section 1071.⁷⁵ As a result, we are compelled to eliminate the tax certificate provision in our IVDS rules.

3. Unjust Enrichment Provisions

43. Petition. ITV asserts that the unjust enrichment provision for the transfer of a license obtained using bidding credits should not apply when the license is assigned or transferred at a loss. ITV also asserts that, when the license is profitably assigned or transferred, the forfeiture should be based on profits directly attributable to the license, rather than on the government's cost in providing the bidding credit.⁷⁶

⁷² H.R. 831, 104th Cong. 1st Sess. § 2. As a result of this action by Congress, we are compelled to eliminate the specific tax certificate provision in our IVDS rules. We have therefore eliminated former Section 95.816(d)(2) of the rules, 47 C.F.R. § 95.816(d)(2), and have redesignated the remainder of Section 95.816(d) as indicated in the Appendix, *infra*.

⁷³ See *Fourth Report and Order* at ¶ 34 (statutory goals described). These include promoting economic opportunity and competition, and disseminating licenses among a wide variety of applicants.

⁷⁴ *Fourth Report and Order* at ¶¶ 48-52.

⁷⁵ H.R. 831, 104th Cong. 1st Sess. § 2.

⁷⁶ ITV Petition at 17-19.

44. Decision. We deny ITV's petition on this issue. We do not believe that the unjust enrichment provisions should take into account the profits or losses of particular businesses. The recapture provisions are designed not only to repay the government for the cost of the benefit conferred, but also to ensure that the special provisions we adopted for designated entities benefit the parties to whom they were directed. Special treatment of designated entities is intended to further the statutory policy of ensuring that these entities have the opportunity to participate in spectrum-based services. The repayment provisions we adopted help to promote the long-term holding of licenses by those parties intended to be benefitted by the bidding credit and installment payment provisions.

4. Rural Telephone Companies

45. Petitions. Petitioners RCA and USIN request that rural telephone companies be provided all the special provisions extended to small businesses and businesses owned by women or minorities.⁷⁷ They assert that the Communications Act requires that special provisions be provided to rural telephone companies, and that, without bidding credits and other special provisions, it is unlikely that IVDS offerings will be available in rural areas.⁷⁸ They further assert that it will take more than build-out capability for rural telephone companies to provide IVDS offerings. They maintain that financial ability is required to obtain the license at auction in the first place.⁷⁹

46. Decision. We deny the petitions of RCA and USIN on this issue. As noted *supra*, the Commission has discretion to tailor the use of special provisions as necessary for each particular service.⁸⁰ For IVDS, we expect that the cost of winning licenses, and subsequently building-out systems, will be relatively modest compared to the costs associated with other services subject to auctions. USIN notes that the *Fourth Report and Order* lacks discussion of the expected actual build-out costs of IVDS systems and the economic characteristics of rural telephone companies.⁸¹ While we cannot yet determine with precision any average cost figures for building and operating an IVDS system, we are familiar with the technical and operational parameters of the service,⁸² and believe our assumption is reasonable that build-out costs will be modest relative to such costs for other auctionable services. In addition, we have previously assessed the economic characteristics of rural telephone

⁷⁷ RCA Petition for Reconsideration (filed June 13, 1994) (RCA Petition); U.S. Intelco Networks, Inc. Petition for Reconsideration (filed June 13, 1994) (USIN Petition).

⁷⁸ RCA Petition at 1-2; USIN Petition at 3-6.

⁷⁹ USIN Petition at 4-5; RCA Petition at 5-6.

⁸⁰ See ¶ 41, *supra*.

⁸¹ USIN Petition at 4 n. 4, 5.

⁸² See *Report and Order*, 7 FCC Rcd at 1633-41.

companies in this proceeding.⁸³ As a result, we expect that rural telephone companies, even without special provisions, will be able to compete effectively both during the auction and in providing service.

47. With respect to bidding credits, as discussed *infra*, we are proposing to eliminate bidding credits for minority and women-owned businesses and extend a 25 percent bidding credit to small businesses only.⁸⁴ A rural telephone company would be eligible for the bidding credit to the extent that it also qualifies as a small business. We also affirm our decision not to provide installment payments for those rural telephone companies that are not also small businesses. We continue to believe that qualification for installment payments should be limited to businesses that qualify as small.⁸⁵

48. Further, we anticipate that rural areas will be served despite the lack of special provisions for rural telephone companies, because other companies can also serve these areas at relatively low cost. While rural telephone companies possess infrastructure that might place them initially at an advantage over other applicants intending to serve rural areas, they do not, in the IVDS context, require an additional advantage in the form of a separate special provision before it is economically advantageous for them to serve rural customers. Whether or not we establish special provisions in this context is not why rural telephone companies will elect to provide or not provide service to these rural areas. Therefore, consistent with the *Fourth Report and Order*, we deny RCA's and USIN's request that we adopt special provisions specifically for rural telephone companies.

C. Miscellaneous

49. Audits. Since the initial IVDS auction, we have revised the short-form application to place applicants on notice of the Commission's authority to audit licensees and license applicants.⁸⁶ We believe the use of audits and other enforcement tools is necessary to maintain the integrity of the self-certification process we have used in our designated entity provisions. We have specified this authority in our revised IVDS rules.

50. Long-Form Application. While IVDS applicants have previously provided their financial information by filing Form 574 as their long-form application, we now require that

⁸³ See *Second Report and Order* at 2397; *Second Memorandum Opinion and Order* at 7256-58.

⁸⁴ See §§ 61-67 and 72-75, *infra*.

⁸⁵ *Fourth Report and Order*, 9 FCC Rcd at §§ 53-54.

⁸⁶ See Public Information Collection Requirement Submitted to Office of Management and Budget for Review, 59 Fed. Reg. 63803 (Dec. 9, 1994).

they use Form 600.⁸⁷ While Form 600 contains certain instructions that IVDS applicants would be instructed to ignore, it is a more complete form than the current Form 574.

51. Divestiture Provisions. In establishing rules for IVDS, we concluded that the best way to promote competition in the IVDS marketplace is to make at least two licenses available in each market.⁸⁸ Our rules therefore prohibit an IVDS licensee from acquiring an interest in another IVDS license in the same service area where it is licensed.⁸⁹ The Interactive Television Association (ITA) requests that the Commission initiate a rule making proceeding to eliminate this ownership restriction and permit one licensee to own both licenses in a market.⁹⁰ ITA maintains that, in view of several telephone and cable companies' interest in interactive television, these rules are no longer needed to promote competition.⁹¹ We decline to grant ITA's petition for rule making at this time. We observe that the interactive television marketplace is in a relatively early state of competition. Moreover, allowing a single entity to acquire both licenses in a service area would limit the opportunity for other potential competitors to emerge. Such a result is inconsistent with Congress' mandate to facilitate the dissemination of licenses among a wide variety of applicants.⁹²

52. On our own motion, we also clarify that, where unintended common attributable ownership interests exist between two license winners in an IVDS service area, an applicant will be permitted to divest itself of the prohibited common ownership within 90 days after license grant. Assuming that the applicant is otherwise qualified, the Commission will conditionally grant the license if the winning applicant has submitted a signed statement with its long-form application stating its intent to divest. The licensee must then certify its compliance when timely achieved. In addition, in the event that a licensee seeks to bid on another license in its market at a future auction, it may request a waiver of the common ownership prohibition to bid on the other license. If the licensee then wins the second license, the licensee must divest itself of its existing license within 90 days of the grant of the second and is responsible for all penalty or other amounts that result from these transactions. Any licensee desiring such a waiver should submit its statement and request as an attachment to its short-form application.

⁸⁷ See Notice of Public Information Collections Submitted to OMB for Review and Approval, 61 Fed. Reg. 3699 (Feb. 1, 1996).

⁸⁸ *Notice of Proposed Rule Making*, 6 FCC Rcd 1368, 1371 (1991).

⁸⁹ See 47 C.F.R. § 95.813(b)(2).

⁹⁰ ITA Petition for Rulemaking, RM 8551 (filed Oct. 21, 1994). Three letters were received, and they generally support ITA's request. Letter from John D. Elliott (Nov. 14, 1994); Letter from George C. Dick (Nov. 16, 1994); Letter from Cyrus K. Dam (Nov. 19, 1994).

⁹¹ *Id.* at 2-4.

⁹² 47 U.S.C. § 309(j)(3)(B).

V. FURTHER NOTICE OF PROPOSED RULE MAKING

A. Treatment of Designated Entities

1. Meeting the *Adarand* Standard

53. Background. In the *Fourth Report and Order*, we established several special provisions to ensure that designated entities, *i.e.*, small businesses, rural telephone companies, and businesses owned by members of minority groups and women, are given the opportunity to participate both in the competitive bidding process for, and in the provision of, IVDS service.⁹³ Among other provisions, our rules provided that on one of the two licenses in each market, a 25 percent bidding credit would be awarded to a winning bidder that is a business owned by women or minorities.⁹⁴

54. The standard of review applied to federal programs designed to enhance opportunities for racial minorities at the time our IVDS rules were adopted was an intermediate scrutiny standard. As the Supreme Court stated in *Metro Broadcasting, Inc. v. FCC*:

[B]enign race-conscious measures mandated by Congress -- even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination -- 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.⁹⁵

55. In *Adarand*, the Supreme Court invalidated the intermediate scrutiny standard for federal race-based programs. The Court held that all racial classifications, imposed by any federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored to further a compelling governmental interest.⁹⁶ Moreover, as the Court made clear in *Adarand*, a strict scrutiny standard of review will be applied even if the racial classifications are well motivated or "benign."⁹⁷

⁹³ *Fourth Report and Order*, 9 FCC Rcd 2330 at ¶¶ 34-54.

⁹⁴ See 47 C.F.R. §§ 95.816(d)(1).

⁹⁵ *Metro Broadcasting*, 497 U.S. at 564-65.

⁹⁶ *Adarand*, 115 S. Ct. at 2113.

⁹⁷ *Id.* at 2112.

56. Application of the two-prong strict scrutiny standard of review to provisions designed to encourage minority participation in IVDS requires the Commission to show: (1) a compelling governmental interest exists for taking race into account in licensing allocation decisions, and (2) the provisions in question are narrowly tailored to further the compelling governmental interest established by the record and findings.⁹⁸ *Adarand* offers little guidance regarding the specific requirements of this test. However, other cases, such as *Richmond v. J.A. Croson Co.*,⁹⁹ provide us with some indications of the type of record necessary to meet the strict scrutiny standard.

57. In *Croson*, the Supreme Court applied strict scrutiny to invalidate as unconstitutional a municipality's partial set-aside for minority-owned businesses. The Court held that remedying past discrimination constitutes a compelling interest, whether the discrimination was committed by the government or by private actors within its jurisdiction.¹⁰⁰ Other courts have also held remedial measures -- those intended to compensate for past discrimination -- to be compelling governmental interests.¹⁰¹ In *Croson*, however, the Court made clear that an interest in remedying general societal discrimination could not be considered compelling because a "generalized assertion" of past discrimination "has no logical stopping point" and would support unconstrained uses of racial classifications.¹⁰² Whether other objectives for race-based measures rise to the level of a compelling governmental interest is unclear. However, in a plurality opinion issued before *Adarand*, the Supreme Court indicated that non-remedial measures aimed at fostering ethnic diversity could satisfy the compelling interest requirement of strict scrutiny.¹⁰³

58. The Supreme Court in *Croson* noted the high standard of evidence required for the government to establish a compelling interest. It stated that the government must demonstrate a "strong basis in evidence for its conclusion that remedial action was necessary" and that such evidence should approach "a prima facie case of a constitutional or statutory violation of the rights of minorities."¹⁰⁴ Other courts, in cases decided after *Croson*, have held

⁹⁸ *Id.* at 2113.

⁹⁹ *Croson*, 488 U.S. 469 (1989).

¹⁰⁰ *Id.* at 491-93.

¹⁰¹ See, e.g., *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1413 (9th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992); *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 913 (11th Cir. 1990), *cert. denied*, 498 U.S. 983 (1990); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 421-22 (7th Cir. 1991), *cert. denied*, 111 S.Ct. 2261 (1991)

¹⁰² *Croson*, 488 U.S. at 498 (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275 (1986)).

¹⁰³ See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

¹⁰⁴ *Croson*, 488 U.S. at 500.