that statistical evidence can be probative of discrimination in the remedial setting, and that anecdotal evidence can buttress statistical evidence.[105]

59. As indicated above, once a compelling governmental interest is established, narrow tailoring, the second prong of the strict scrutiny test, must also be shown. This requirement is intended to ensure "that the means chosen 'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[106] The Court in *Croson* required that the government's remedial actions be narrowly tailored "to break down a pattern of deliberate exclusion" and stated that broader relief could be justified only on the basis of "evidence of a pattern of individual discriminatory acts . . . supported by appropriate statistical proof. . ."[107] Different factors have been used by courts to determine, under a strict scrutiny standard, whether a program is narrowly tailored. These include the following: (1) whether race-neutral measures were considered before adopting race-conscious measures;[108] (2) the scope of the program, and whether it contains a waiver mechanism that facilitates narrowing of that scope;[109] (3) the comparison of any numerical target to the number of qualified minorities in the relevant sector;[110] (4) the duration of the program, and whether it is subject to periodic review;[111] (5) the manner in which race is considered, whether as one factor among several or as determinative;[112] and (6) the degree and type of burden on non-minorities.[113]

60. An intermediate scrutiny standard of review currently applies to gender-based

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[105] *See, e.g., Peightal v. Metropolitan Dade County*, 26 F.3d 1548, 1556 (11th Cir. 1994) (statistical evidence constitutes requisite "strong basis in evidence"); *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991) *cert. denied*, 502 U.S. 1033 (1992) (convincing anecdotal and statistical evidence can be "potent").

[106] *Croson*, 488 U.S. at 493.

[107] *Id.* at 509.

[108] *See Adarand*, 115 S.Ct. at 2118; *Croson*, 488 U.S. at 507.

[109] *See Metro Broadcasting*, 497 U.S. at 622 (O'Connor, J., dissenting).

[110] *See Croson*, 488 U.S. at 501-02 (finding that the percentage figure used by the government to determine its minority subcontracting requirement, which was calculated in part based on the African-American population of Richmond, was improper because its usage relied on the assumption that minorities choose trades in direct proportion to their representation in the local population).

[111] *See Fullilove v. Klutznick*, 448 U.S. 448, 513 (Powell, J. concurring) (1980).

[112] *See Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir 1994), *cert. denied*, 115 S. Ct. 2001 (1995).

[113] *See Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987).

measures.[114] Under this standard, a gender-based provision is constitutional if it serves an important governmental objective and is substantially related to achievement of that objective. The Supreme Court has not addressed constitutional challenges to federal gender-based programs since *Adarand*. However, the Supreme Court recently upheld a constitutional challenge to a state gender-based program in *United States v. Commonwealth of Virginia* ("VMI")[115] and reaffirmed the application of an intermediate standard of review to gender-based measures. In *VMI*, the Court first indicated that parties defending their gender-based governmental action must demonstrate an "exceedingly persuasive justification" for their action, then stated that the parties must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.[116]

61. Discussion. The evidence supporting our gender- and race-based provisions cited in the *Fourth Report and Order* primarily shows: (1) broad discrimination against racial groups and women by lenders; and (2) underrepresentation of these groups as owners and employees in the communications industry.[117] At present, we believe that the record is insufficient to demonstrate a compelling interest under the strict scrutiny standard to support the race-based incentive programs of IVDS because it reflects primarily generalized assertions of discrimination. *Adarand* and *Croson* make clear that only a record of discrimination against a particular racial group would support remedial measures designed to help that group. Therefore, we believe that a record of discrimination against minorities in general is not sufficient. Specific evidence of discrimination against particular racial groups would be required to support a rule for any group. Our rules define minority group members to include Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.[118] Although we have general evidence of discrimination against certain racial groups, none of the evidence we have appears to satisfy the strict scrutiny standard.

62. Thus, we tentatively conclude that our present record in support of our race-based IVDS provisions is insufficient to satisfy strict scrutiny. We seek comment on our tentative conclusion. We also request comment on whether our IVDS provisions promote a compelling governmental interest and, more particularly, whether compensating for discrimination in

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[114] *See, e.g., Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1579-80 (11th Cir. 1994); *Contractors Association v. City of Philadelphia*, 6 F.3d 990, 1009-10 (3d Cir. 1993); *Lamprecht v. FCC*, 958 F.2d 382, 391 (D.C. Cir. 1992); *Coral Construction Co. v. King County*, 941 F.2d 910, 930-31 (9th Cir. 1991) *cert. denied*, 502 U.S. 1033 (1992).

[115] *United States v. Commonwealth of Virginia*, 1996 WL 345786 (United States Supreme Court, June 26, 1996).

[116] *VMI*, 1996 WL 345786 at 11 and 12.

[117] *Fourth Report and Order*, 9 FCC Rcd at 2337-39.

[118] 47 C.F.R. §24.720(i).

lending practices and in practices in the communications industry constitutes such an interest. We also ask interested parties to comment on nonremedial objectives that could be furthered by the minority-based provisions of our IVDS rules and whether they could be considered compelling governmental interests, such as increased diversity in ownership and employment in the communications industry or increased industry competition. In commenting, we ask parties to submit statistical data, personal accounts, studies, or any other data relevant to the entry of specific racial groups into the field of telecommunications. Examples of relevant evidence could include discrimination against minorities trying to obtain FCC licenses for auctioned or non-auctioned spectrum; discrimination against minorities seeking positions of ownership or employment in communications or related businesses; discrimination against minorities attempting to obtain capital to start up or expand a telecommunications enterprise, including terms and conditions; and discrimination against minorities operating telecommunications businesses, including treatment by vendors, FCC licensees, and suppliers.

63. We also ask those parties who conclude that our race-based provisions serve a compelling governmental interest to comment on whether the provisions are narrowly tailored to serve that interest. Are these provisions sufficiently narrow in scope? Do they unduly burden non-minorities?[119] Would race-neutral measures further the same interests and achieve the same objectives as race-conscious measures?[120]

64. In addition, we also tentatively conclude that the present record in support of our gender-based IVDS rules may be insufficient to satisfy intermediate scrutiny. We seek comment on our tentative conclusion. We also seek comment on whether there are remedial or nonremedial goals that would satisfy the "important governmental objective" requirement of the intermediate scrutiny standard such as, for example, increased participation of women in the FCC-licensing process for auctioned spectrum. Are our gender-based IVDS rules "substantially related" to the achievement of such objectives? Just as we requested above, in addressing evidence to support IVDS race-based provisions, we ask parties to submit statistical data, personal accounts, studies, or any other data relevant to the entry of women into the field of telecommunications.

65. We also are interested in supplementing the current record to support race- and gender-based provisions in our other rules. In this regard, the Commission initiated a comprehensive rule making proceeding to explore market barriers to women- and minority-owned businesses, as well as small businesses, pursuant to Section 257 of the Communications Act.[121] The record created in response to this Notice will also be

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[119] *See Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987).

[120] *See Adarand*, 115 S.Ct. at 2118; *Croson*, 488 U.S. at 507.

[121] *See* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, *Notice of Inquiry*, GN Docket No. 96-113, FCC 96-216 (rel. May 21, 1996), 11 FCC Rcd 6281, 61 Fed. Reg. 33066 (June 26, 1996) (*Market Entry Notice of Inquiry*).

incorporated into that Docket.

66. We undertake this effort to support our auction rules because we are committed to fulfilling the Congressional mandate to provide opportunities for women- and minority-owned businesses through the competitive bidding process. We believe, however, that marshalling sufficient evidence to satisfy the strict scrutiny standard of review now applicable to federal race-based programs may be a time-consuming process, and we are mindful that we may not fulfill our other obligations under Section 309(j) if we delay the award of IVDS licenses until that process is complete.

67. We note that the high number of defaulting bidders in the initial IVDS auction, combined with the delay in auctioning off the RSA licenses, has caused a significant delay in awarding IVDS licenses. This delay has hurt businesses that are interested in developing competitive IVDS. In addition, where one MSA bidder has defaulted, the second winning bidder has had a significant head start over the ultimate winner of the first license in providing service. Given that we authorized two licenses per service area in an attempt to have both licensees make service available in the near future, such an advantage was not contemplated when we established our rules authorizing reauctioning of licenses. We also believe that both Congress and consumers expect us to promote the rapid development of IVDS. Balancing our obligation to provide opportunities for women- and minority-owned businesses to participate in spectrum-based services against our statutory duties to facilitate the rapid delivery of new services to the American consumer and promote efficient use of the spectrum, we tentatively conclude that we should not contribute any further delays to the IVDS auction by postponing the auction to adduce sufficient evidence to support our race- and gender-based IVDS provisions. While we could proceed with the IVDS auction under the current rules, we tentatively conclude that this course of action would not serve the public interest because it may result in litigation that would delay the auction, the dissemination of additional IVDS licenses, and, ultimately, the introduction of competition.[122] As a result, we tentatively conclude that we will adopt race and gender neutral provisions, but continue to maintain the provisions for small businesses which we believe adequately benefit most of the businesses owned by minorities and/or women. We believe these proposed changes will enable us to meet our Congressional-mandate and proceed as expeditiously as possible to auction the remaining IVDS licenses. We seek comment on these tentative conclusions.

2. Special Provisions for Designated Entities

a. Small Business Definition

68. Background. In the *Second Report and Order*, we adopted the Small Business

[122] *Omnipoint*, slip op. at 17.

Administration's (SBA) definition of small business for our generic auction rules.[123] This definition requires the entity to demonstrate that, together with its affiliates, its net worth is no more than $6 million, and its annual profits are no more than $2 million for the previous two years.[124] In the *Fourth Report and Order*, we determined that these definitions should apply to applicants for IVDS auctions.[125] Since that time, however, we have defined small business for other services based on the gross revenues of the applicant and its affiliates for the preceding three years.[126]

69. Discussion. We propose to define small businesses based on gross revenues for the preceding three years. Specifically, we propose to define a small business as an entity whose average gross revenues for each of the preceding three (3) years do not exceed $15 million. Additionally, we propose to define a very small business (as discussed later in connection with the tiered bidding credits) as an entity with less than an average of $3 million in gross revenues in each of the last three (3) years. We believe that a company's gross revenues is a more accurate indicator of its size than is its net worth or annual profits.[127] A gross revenues test is a clear measure for determining the size of a business and is an established method of determining size eligibility for various types of federal programs that aid small businesses.[128] Moreover, we observe that this approach is consistent with our approach in 900 MHz SMR.[129] Commenters are invited to address whether the Commission should modify its small business definition and calculate small business eligibility based on gross revenues, rather than net worth and annual profits. Commenters should discuss what gross revenues threshold is appropriate for defining small business in the IVDS context.

70. We also propose a five percent attribution threshold for purposes of determining eligibility as a small business. Under such a standard, the gross revenues and affiliations of any investor in the applicant would not be considered so long as the investor holds less than a five percent interest in the applicant. Alternatively, we seek comment on whether we should

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[123] *Second Report and Order*, 9 FCC Rcd 2348 at ¶ 271.

[124] *Id.*

[125] *See* 47 C.F.R. § 95.816(d).

[126] *See* 47 C.F.R. § 24.720 (broadband PCS); 47 C.F.R. § 24.320 (narrowband PCS); 47 C.F.R. § 90.814(b)(1) (900 MHz SMR); 47 C.F.R. § 90.912(b) (800 MHz SMR).

[127] *See, e.g.*, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Order on Reconsideration and Seventh Report and Order*, PR Docket No. 89-553, PP Docket No. 93-253, GN Docket No. 93-252, FCC 95-395, 11 FCC Rcd 2639, 60 Fed. Reg. 48913 (Sep. 21, 1995) at ¶ 154, n.320 (*Second Order on Reconsideration and Seventh Report and Order*).

[128] *See, e.g.*, 13 C.F.R. § 121.902.

[129] *Second Order on Reconsideration and Seventh Report and Order,* FCC 95-395, 11 FCC Rcd 2639, 60 Fed. Reg. 48913 (Sept. 21, 1995).

count the gross revenues of controlling principals in the applicant and its affiliates for purposes of determining small business status. In determining attribution when IVDS licensees are held indirectly through intervening corporate entities, we propose to use the multiplier adopted in the *CMRS Third Report and Order* for the spectrum aggregation cap.[130] We seek comment on these tentative conclusions.

b. Bidding Credits

71. Background. A bidding credit acts as a discount on the winning bid amount that a bidder actually has to pay for the license. Our current IVDS rules provide for a bidding credit of 25 percent to businesses owned by members of minority groups or women.[131]

72. Discussion. We seek comment on whether we should extend a single bidding credit to all small businesses as we did for the C block PCS auction. If we choose to adopt a single small business bidding credit for IVDS, how big should the credit be? Should we retain the 25 percent bidding credits currently provided and make it available to all small businesses bidding in the IVDS auction? If we extend a bidding credit to small businesses, we expect that a significant number of women and minority-owned businesses will continue to qualify for bidding credits under our rules.[132] We believe that this may be the most effective way to amend our rules and proceed with the auction. We also believe that this proposal will meet the statutory objectives of promoting economic opportunity and competition, avoiding excessive concentration of licenses, and ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.[133] Moreover, as we observed in the *Fourth Report and Order*, we expect that the capital requirements for IVDS will be relatively low, particularly with respect to the smaller RSA licenses. We therefore anticipate that women- and minority-owned firms, as well as other potential bidders that might lack access to capital, will be able to compete effectively for IVDS licenses. We also point out that the overwhelming majority of IVDS applicants in the

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[130] *CMRS Third Report and Order*, 9 FCC Rcd 7988 at ¶ 277; *see also Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 at ¶ 71, n.169.

[131] 47 C.F.R. § 95.816(d)(1).

[132] *See, e.g., Second Report and Order and Second Further Notice of Proposed Rule Making*, PR Docket No. 89-553, 10 FCC Rcd 6884 (1995) ("*900 MHz SMR Second R&O/Second FNPRM*") (indicating that "U.S. Census Data shows that approximately 99% of all women-owned businesses and 99 percent of all minority-owned businesses generated net receipts of $1 million or less,") citing *Women-Owned Business*, WB87-1, 1987 Economic Census, p. 144, Table 8; *Survey of Minority-Owned Business Enterprises*, MB87-4, 1987 Economic Census, pp. 81-82, Table 8.

[133] *See, e.g., 900 MHz SMR Second R&O/Second FNPRM*, 10 FCC Rcd 6884 (1995).

past have been small businesses.[134]

73. In the alternative, should we offer tiered bidding credits, such as 15 percent for small businesses with aggregate gross revenues under $3 million and 10 percent for businesses with gross revenues between $3 million and $15 million? We tentatively conclude that, given the relatively low bids that IVDS licenses garnered in the July 1994 auction, IVDS may attract smaller businesses, thus justifying a tiered bidding credit. We seek comments on this tentative conclusion. Commenters are asked to address whether this approach would better reflect the difficulties that small businesses of varying size face in accessing capital. Commenters also should discuss what size definitions and bidding credit amounts are appropriate if the Commission adopts a tiered bidding credit scheme.

74. Commenters are also asked to address whether the Commission should completely eliminate the bidding credit. Commenters should address whether a bidding credit is needed to permit small businesses to compete effectively for IVDS spectrum. As noted above, IVDS, with its relatively low capital entry requirements, is well suited for small business investment and a bidding credit may not be needed to foster participation by these entities.[135] Given the success of small businesses in our MSA auction, commenters are invited to address whether we should revisit that conclusion.

75. While we reluctantly propose to eliminate our race- and gender-based preferences, we conclude that nothing in the *Adarand* decision calls our size-based provisions into question. We note that the Supreme Court held that a strict scrutiny standard of review applies to preferences based on race, not size.[136] Thus, attempts to ensure that small businesses have the opportunity to compete in the provision of IVDS are subject to a less rigorous legal review by the courts. Indeed, our small business installment payment provisions are bolstered by *Adarand* insofar as that decision requires the consideration of race-neutral measures to promote equal opportunity.[137]

B. Upfront Payments

76. Background. In the *Fourth Report and Order*, we determined that the appropriate upfront payment for IVDS auctions would be based on the maximum number of licenses a

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[134] We observe that in the IVDS auction for MSA licenses, 557 of 594 winning bidders (93.8 percent) claimed small business status.

[135] *Fourth Report and Order*, 9 FCC Rcd 2330 at ¶¶ 38, 53.

[136] *Adarand*, 115 S.Ct. at 2112-13.

[137] *See id.* at 2118, quoting *Croson*, 488 U.S. at 507 (under strict scrutiny, courts ask "whether there was 'any consideration of the use of race-neutral means to increase minority business participation.'")

bidder desired to win.[138] Bidders were required to present a cashier's check for $2,500 in order to bid on the IVDS licenses, and would be required to have $2,500 upfront money for every five licenses they won, effectively constituting an upfront payment of $500 per license won.[139] Following the initial IVDS auction, certain high bidders requested waivers to permit them to delay payment of their required down payments. Further, a substantial number of bidders defaulted on their winning bids, requiring us to reauction those licenses.

77. Discussion. We tentatively conclude that the upfront payment required under the *Fourth Report and Order* is inadequate. In several *ex parte* filings, parties indicated their support for increased upfront payment amounts.[140] The requests for waivers to delay making down payments, coupled with the significant number of defaulting winning bidders, lead us to believe that the initial upfront payment was too low to deter insincere, speculative bidding. We propose that more appropriate upfront payments would be $9,000 per MSA license and $2,500 per license for RSA markets, for the maximum number of licenses on which the applicant wishes to bid. We reach these proposed amounts by calculating values for each license of $.02 per MHz per pop, which is the standard methodology for determining upfront payment amounts.[141] This calculation yielded average upfront payments of approximately $9,011 per license for MSA markets (not counting the 9 markets previously awarded by lottery), and approximately $2,742 per license for RSA markets. Our proposed upfront payments round these figures. We believe that revised upfront payments in these amounts would attract as many qualified bidders as possible, while providing an adequate deterrent against frivolous bidding. We seek comment on our tentative conclusion and our proposal to increase the upfront payment amounts as described.

VI. PROCEDURAL MATTERS

78. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis for the *Sixth Memorandum Opinion and Order and Further*

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[138] 9 FCC Rcd 2330 at ¶ 24.

[139] *Id.*

[140] *See* Letter from Kingdon R. Hughes to Robert H. McNamara, Chief, Private Wireless Division (filed Jan. 25, 1995) at 8-9; Petition for Declaratory Ruling Regarding Bidding Credit and Informal Request for Adjustment in Price filed by Hardiner Kumra (filed Oct. 19, 1994) at 3-6; Informal Request for Adjustment of Auction Price filed by IGGW Interactive, Inc. (filed Oct. 19, 1995) at 3-6; and Petition for Special and Extraordinary Relief filed by MKS Interactive, Inc. (filed Nov. 1, 1994) at 5, 13.

[141] With the "MHz-pop" methodology, "pop" refers to each member of the population of the license service area, and "MHz" refers to the amount of spectrum, in megahertz, that the licensee is permitted to use. *See Second Report and Order* at 2378 ¶ 172, 2379 ¶ 180; *Notice of Proposed Rule Making* in PP Docket No. 93-253, 8 FCC Rcd 7635, 7652 n. 98 (1993). *See also Fourth Report and Order*, 9 FCC Rcd 2330, 2334 n.41.

Notice of Proposed Rule Making is as follows:

79. Need for and purpose of this action. As a result of new statutory authority, the Commission may utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis, *see generally* 5 U.S.C. § 603, within the *Notice of Proposed Rule Making* in this proceeding (at 8 FCC Rcd 7635, Appendix at 7666 (1993)), and published Final Regulatory Flexibility Analyses within the *Second Report and Order* (at 2400 ¶¶ 299-302) and the *Fourth Report and Order* (at 2340-41 ¶ 56). As noted in these previous final analyses, this proceeding will establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out statutory mandates that certain designated entities, including small entities, be afforded an opportunity to participate in the competitive bidding process and in the provision of spectrum-based services.

80. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis. As this is an Order on Reconsideration, there is no initial regulatory flexibility analysis to which petitioners are responding. There were no petitions which discussed the final regulatory flexibility analysis in the underlying order.

81. Significant alternatives considered. Although no comments were received pertaining to the IVDS, the *Second Report and Order* and *Fourth Report and Order* addressed at length the general policy considerations raised as a result of the Commission's new auction authority.

82. With respect to the *Memorandum Opinion and Order* reconsidering our rules, a Final Regulatory Flexibility Analysis (FRFA), in compliance with 5 U.S.C. Section 801, is contained in Appendix B. Also, with respect to the *Further Notice of Proposed Rule Making*, an Initial Regulatory Flexibility Analysis is contained in Appendix B. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Further Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

83. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

84. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before October 3, 1996 and reply comments on or before October 10, 1996. To file formally in this proceeding you must file an original and four copies of all comments and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send your comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments will be available for public inspection during regular business hours in the Reference Center of the Federal Communications Commission, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

85. Authority for issuance of this *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making* is contained in 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).

86. Accordingly, IT IS ORDERED that, pursuant to the authority of 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), this *Sixth Memorandum Opinion and Order* is adopted, and Parts 1 and 95 of the Commission's Rules ARE AMENDED as set forth in Appendix A.

87. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 60 days after their publication in the Federal Register. IT IS FURTHER ORDERED that, as described above, the petition for reconsideration filed by ITV IS GRANTED in part to the extent described above and IS DENIED in all other respects, the petitions for reconsideration filed by Phase One, RCA, and USIN ARE DENIED, and the petition for rule making filed by ITA IS DENIED.

88. For further information concerning this proceeding, contact Christina Eads Clearwater at (202) 418-0660 (Auctions Division, Wireless Telecommunications Bureau).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A

FINAL RULES

Parts 1 and 95 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

Part 1 - Practice and Procedure

1. Section 1.2107 is amended by revising paragraph (c) to read as follows:

§ 1.2107 Submission of down payment and filing of long-form applications.

* * * * *

(c) A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder (unless it has already submitted such an application, as contemplated by Sec. 1.2105(a)(1)(b). For example, if the applicant is high bidder for a license in the Interactive Video Data Service (see 47 C.F.R. Part 95, Subpart F), the long form application will be submitted on FCC Form 600 in accordance with Sec. 95.815 of this chapter. Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications. Notwithstanding any other provision in Title 47 of the Code of Federal Regulations to the contrary, the high bidder's long-form application must be mailed or otherwise delivered to: Office of the Secretary, Federal Communications Commission, Attention: Auction Application Processing Section, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. An applicant that fails to submit the required long-form application as required under this subsection, and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the penalties set forth in Sec. 1.2104.

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Part 95 - Personal Radio Services

2. Section 95.815 is amended by revising paragraphs (b), (d)(2), and (f)(3] to read as follows:

§ 95.815 License Application.

* * * * *

(b) Each application for an IVDS system license must be made on a separate FCC Form 600, and must be submitted to the Federal Communications Commission, Interactive Video and

Data Service, P.O. Box 358365, Pittsburgh, PA 15251-5365. Each application for a CTS license where the CTS antenna exceeds 6.1m (20 feet) (see § 95.811(b)) must be made on a separate FCC Form 574, and must be submitted to the address set forth in § 1.1102 of the Commission's Rules.

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(d) * * *

(2) A completed application (FCC Form 600).

* * * * *

(f) * * *

(3) A separate application (FCC Form 600) for each CTS that is being added or modified.

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3. Section 95.816 is amended by revising paragraphs (c)(1), (c)(2), (c)(4), (c)(6), and (d)(1); deleting paragraph (d)(2); and revising paragraph (d)(3) and redesignating it as (d)(2); and adding a new paragraph (d)(3). The amended Section 95.816 reads as follows:

§ 95.816 Competitive bidding proceedings.

* * * * *

(c) * * *

(1) Competitive bidding design options and mechanisms. The Wireless Telecommunications Bureau will select competitive bidding design(s) and mechanisms in accordance with Sections 1.2103 and 1.2104 of this Chapter. If simultaneous multiple round bidding is used, the Wireless Telecommunications Bureau has the discretion to vary the duration of the bidding rounds or the interval at which bids are accepted at any time before or during the course of the auction.

(2) Forms.

(i) Applicants must submit short-form applications (FCC Form 175) as specified in Commission Public Notices. Minor deficiencies may be corrected prior to the auction. Major modifications such as changes in ownership, failure to sign an application or failure to submit required certifications will result in the dismissal of the application. *See* §§ 1.2105(a) and (b) of this Chapter.

(ii) Applicants must submit a long-form application (FCC Form 600) within ten (10) business days after being notified that it is the winning bidder for a license. *See* §§ 1.2107(c) and (d) of this Chapter.

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(4) Down payments. *See* § 1.2107(b) of this Chapter.

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(6) Withdrawal, default or disqualification. *See* §§ 1.2104(g) and 1.2109 of this Chapter.

* * * * *

(d) * * *

(1) Bidding credits. A winning bidder that qualifies as a business owned by women and/or minorities may use a bidding credit of twenty five (25) percent to lower the cost of its winning bid.

(2) Installment payments. Each licensee that qualifies as a small business may pay the remaining 80 percent of the net auction price in quarterly installment payments pursuant to § 1.2110(e) of this Chapter. Licensees who qualify for installment payments are entitled to pay their winning bid amount in installments over the term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for five-year U.S. Treasury obligations. Payments shall include interest only for the first two years and payments of interest and principal amortized over the remaining three years of the license term. A license issued to an eligible small business that elects installment payments shall be conditioned on the full and timely performance of the license holder's quarterly payments.

(3) Audits.

(i) Applicants and licensees claiming eligibility under this section shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(ii) Consent to such audits is part of the certification included in the short-form application (Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents, and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed IVDS and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

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APPENDIX B

I. Final Regulatory Flexibility Analysis

Sixth Memorandum Opinion and Order

This action reconsiders rules previously adopted by the Commission and is authorized under Section 405 of the Communications Act, 47 U.S.C. § 405. Because the action is not generated by a Notice of Proposed Rule Making, there is no applicable Initial Regulatory Flexibility Act analysis to which it responds. However, the Commission's Final Regulatory Flexibility Analysis (FRFA) in this Order conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-131, 110 Stat. 847 (1996).[142]

A. Need for and Objective of the Rules

This Order adopts rule changes regarding the Commission's auction of Interactive Video and Data Service (IVDS) licenses. The rule changes are appropriate because: (1) laws have changed since the rules were originally adopted; namely, the tax certificate program which encouraged investment in minority- and women-owned IVDS bidders, was eliminated; (2) the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), raised the level of legal scrutiny that must be met by some of the designated entity programs which take race into account; and (3) petitions for reconsideration of our earlier orders have caused us to review the rules in a new light. The objective of the Order is to bring the benefit of our experience from the first IVDS auction to subsequent IVDS auctions, and to make opportunities available to small businesses to operate in the service. The most significant changes being made are: to allow IVDS licenses to be auctioned using a simultaneous multiple round auction methodology; to eliminate the tax certificate program for licensees; and to extend bidding credits to both licenses in each IVDS market.

B. Summary of Issues Raised by Public Comment on the Initial Regulatory Flexibility Analysis

As this is an Order on Reconsideration, there is no initial regulatory flexibility analysis to which petitioners are responding. There were no petitions which discussed the final regulatory flexibility analysis in the underlying order.

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[142] Subtitle II of the CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), codified at 5 U.S.C. § 601, *et. seq.*

C. Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rules

Authorizing use of simultaneous multiple round auctions

The Commission, on its own motion, is adopting a rule which will permit IVDS licenses to be auctioned using a simultaneous multiple round auction in addition to oral outcry auctions. The Commission is recommending the use of an oral outcry auction for the RSA and re-auctioned licenses, but it is trying to add flexibility in the event that a simultaneous multiple round auction would be more appropriate at some later point. A simultaneous multiple round auction will allow remote access to bidding software, auction information, bid submission and results. This will make it easier for small business operators to participate in an auction without leaving their places of business. Also, it will make information concerning the status of the auction easier to access, which will reduce the administrative burden on participants in the auction. There are no other reporting, recordkeeping or compliance changes which would result from this rule change.

Elimination of the Tax Certificate Program

The Commission had authority under Title 26 of the United States Code, 26 U.S.C. § 1071, to issue tax certificates to benefit women and/or minority owned businesses. In 1995, Congress repealed Section 1071. This rule is being eliminated to comply with the tax code.

Bidding Credits Extended to Both Licenses in Each MSA

The Commission originally wrote its rules to permit a bidding credit to be awarded to only one auction winner in each MSA. Originally, a minority- or woman-owned business designated entity auction winner who did not receive a bidding credit was free to transfer its license and gain the benefits of a tax certificate. The auction winner who received a bidding credit was subject to unjust enrichment penalties if it transferred the license. The tax certificate acted as the equivalent of a bidding credit, helping an auction winner attract capital. If the auction winner's license was transferred to a designated entity, or the winner is a designated entity, the tax certificate would provide a financial incentive for transacting business with the designated entity. In the absence of a tax certificate program, small businesses with gross revenues under the requisite levels will be eligible for a bidding credit on both licenses in the MSA. The companies eligible for these bidding credits will have to provide information to the Commission which establishes that they meet the qualifications to receive the bidding credit. This reporting requirement is necessary to avoid fraud on the public.

Long Form Application Changed to Form 600

Applicants were required to submit financial information regarding their qualification to hold a license on an FCC Form 574. The Commission has secured approval by the Office of Management and Budget for the use of the FCC Form 600.[143] This form collects more accurate and complete financial information regarding applicants than the form used in the first IVDS auction. As a result, it helps the Commission ensure that the applicants for licenses are fully qualified to hold licenses, reducing the amount of time that radio spectrum would sit unused, if it were subject to legal dispute.

Winning Bidders May Receive Upfront Payment Refund

One petitioner, ITV, Inc., requested that, when upfront money on deposit exceeded the amount necessary for a winning bidder to make its down payment, the excess funds be refunded to the bidder. *See supra* ¶¶ 32-34. We granted the request to change our rules to alleviate one source of financial constraint on small businesses. This will not result in any changed reporting or recordkeeping. It could reduce the need to secure additional interim financing.

All of these changes were made to encourage the participation of designated entities in the auctions of IVDS licenses, as section 309(j) of the Communications Act requires.

D. Description and Estimate of Small Entities Subject to the Rules

The proposed changes in the regulations would affect a number of entities both large and small. The Commission was directed by the Communications Act, 47 U.S.C. § 309(j) to make provisions to ensure that smaller businesses, and other designated entities, have an opportunity to participate in the auction process. To fulfill this statutory mandate, these proposed rules are designed to attract participation by small entities. The small businesses who will be subject to the rules would be those which choose to operate interactive video and data services, a class of wireless communications services with a wide variety of uses. The services will generally be offered to consumers who wish to subscribe to those services.

IVDS is a communications-based service subject to regulation as a wireless provider of pay television services under Standard Industrial Classification 4841 (SIC 4841), which covers subscription television services.[144] The Small Business Administration (SBA) defines small businesses in SIC 4841 as businesses with annual gross revenues of $11 million or less. 13

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

[144] Generally, IVDS services will be subscriber-based services providing video communications which could be described as a form of subscription television service.

C.F.R. § 121.201. In this *Further Notice*, we propose to extend special provisions to small businesses with annual gross revenues of $15 million or less and additional benefits to very small businesses with annual gross revenues of $3 million or less. We observe that this proposal is consistent with our approach in other wireless services, *see e.g.*, the 900 MHz specialized mobile radio service, and is narrowly tailored to address the capital requirements for IVDS. The Commission is soliciting SBA approval for the small business definitions for this and other auctionable services.

The Commission's estimate of the number of small business entities subject to the rules begins with the Bureau of Census report on businesses listed under SIC 4841, subscription television services. The total number of entities under this category is 1,788.[145] There are 1,463 companies in the 1992 Census Bureau report which are categorized as small businesses providing cable and pay TV services.[146] We know that many of these businesses are cable and television service businesses, rather than IVDS licensees. Therefore, the number of small entities currently in this business which will be subject to the rules will be less than 1,463.

The first IVDS auction resulted in 170 entities winning licenses for 594 MSA licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, we defined a small business as an entity, together with its affiliates, that has no more than a $6 million net worth and, after Federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[147] In the upcoming IVDS re-auction of approximately 100 licenses in metropolitan service area (MSA) markets and auction of 856 licenses in rural service area (RSA) markets (two licenses per market), we have proposed bidding credits and installment payments to encourage participation by small and very small businesses. We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our proposed rules. Given the success of small businesses in past IVDS auctions, and that small businesses make up over 80 percent of firms in the subscription television services industry, we assume for purposes of this IRFA that all of the licenses may be awarded to small

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[145] U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 2D, SIC Code 4841 (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration).

[146] The Census table divides those companies by the amount of annual receipts. There is a dividing point at companies with annual receipts of $10 million. The next increment is annual receipts of $17 million, a category that greatly exceeds the SBA definition of small businesses that provide subscription television services. However, there are 17 firms in this category, with revenues between $10-$17 million. Approximately 1,480 SIC 4841 category firms have annual gross receipts of $15 million or less. Only a small fraction of those 1,480 firms provide interactive video and data services.

[147] *Fourth Report and Order*, 9 FCC Rcd 2330 at ¶ 36.

businesses, which would be affected by the rules we propose. We estimate that some companies will win more than one license, as happened in the earlier IVDS auction.

Applicants seeking to participate in the auction also will be subject to these proposed rules. It is impossible to accurately predict how many small businesses will apply to participate in the auction. In the last IVDS auction, there were 289 qualified applicants. We do not anticipate that there will be significantly more participants in the subsequent IVDS auction.

E. Steps Taken to Minimize the Burdens on Small Entities

The changes made in the *Sixth Memorandum Opinion and Order* are designed to minimize burdens on small businesses. The extension of an additional bidding credit to the second license in each market will assist businesses owned by women and minorities. Most of the businesses owned by women and minorities which have participated in the FCC's auctions are small businesses which will benefit from this rule. This rule change will benefit small businesses owned by women and minorities by doubling the number of bidding credits available to them.

Refunds of excess upfront payments on deposit will benefit small businesses. Smaller businesses often have more difficulty raising capital. The rules permitted the retention of any excess upfront payments on deposit with the FCC to apply to down payments or to bid withdrawal payments. 47 C.F.R. §1.2106. While an upfront payment is an important part of ensuring that only serious bidders participate in the Commission's auction process, it is also important that small businesses have an opportunity to put their more limited funds to the best possible use. By assuring the return of excess funds after the first down payment and any withdrawal penalties are paid, small businesses will have those funds to use as they wish.

By adding an auction methodology, the Commission adds flexibility to its auction process. One advantage of simultaneous multiple round auctions is that they can make it possible for bidders to participate from their own places of business. That is an advantage under some auction circumstances. The Commission has chosen to use an oral outcry auction for the RSA license auction, and for the first MSA licenses which will be re-auctioned, because an oral outcry auction will be most efficient. *See supra* Paragraphs 15-16.

F. Significant Alternatives Considered and Rejected

Authorizing use of simultaneous multiple round auctions

We do not currently have plans to use a simultaneous multiple round auction for this

service. The rule is being added should it become necessary at a later time to re-auction licenses which have developed a higher degree of interdependence. Because this rule adds administrative expediency, which will speed the issuance of licenses, we have chosen to add the option of an additional auction methodology for this service. The Commission is acting to minimize delays in the close of an auction by adding flexibility to its stopping and activity rules. We determined that the alternative of leaving the rules unchanged could delay the auction process at some time in the future.

Elimination of the Tax Certificate Program

All small businesses owned by members of minority groups or women who choose to participate in the auction for IVDS licenses will be subject to this rule change. Due to the repeal of the tax code provision, the Commission has no choice but to eliminate this provision which benefitted these small businesses.

Bidding Credits Extended on Both Licenses in Each MSA

This rule will apply to any small businesses owned by women or minorities that are eligible for bidding credits which participate in the re-auction of MSA licenses.[148] We considered leaving the rules unchanged, but, in the absence of the tax certificate program, the rules may have unfairly disadvantaged some minority or women owned small businesses while offering greater advantages to some of their competitors. Therefore, in eliminating the tax certificate program, we felt it was necessary to extend the bidding credit to both licenses in each market. The Commission considered the extension of bidding credits to rural telephone companies.[149] The Commission offers bidding credits to businesses owned by women or minorities to provide an incentive for those businesses to enter the communications industry. Rural telephone companies are already participants in this industry. The Commission was not required to make all benefits available to all designated entities. Consequently, in weighing the competing public policy concerns with respect to bidding credits, the Commission chose not to extend bidding credits to rural telephone companies.

Long Form Application Changed to Form 600

This rule will enable the Commission to more effectively evaluate applications filed for IVDS licenses. The Commission did not consider alternatives because, in adapting its processes to auctions, the Commission has concentrated on reducing the number of different forms and steps that auction participants will have to master to participate in the process. Because all other auctionable services have shifted to the Form 600, IVDS auction participants will be able to use

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[148] This rule is proposed to be changed in the accompanying *Further Notice of Proposed Rule Making.*

[149] *See e.g.*, Petition for Reconsideration of Rural Cellular Association (filed June 13, 1994).

information they may have filed for other auctionable services in any future IVDS auctions as well.

Winning Bidders May Receive Upfront Payment Refund

The rules previously did not make clear that an auction winner could receive a refund of any excess monies on deposit with the FCC, after payment of the first down payment and any penalties due. This rule change was made to ensure that businesses which win IVDS licenses have as much capital available to build systems and serve the public as possible. Because the rule change results in returning money to businesses, the Commission did not consider alternatives in making this change.

G. Commission's Outreach Efforts to Learn of and Respond to the Views of Small Entities Pursuant to 5 U.S.C. § 609

The Commission did not seek specific comments regarding small entities' views of the rules being changed because the petitions and comments were filed in this proceeding prior to the enactment of the 1996 Regulatory Flexibility Act Amendments. However, the Commission, in making changes to the rules, has sought to alleviate burdens on small businesses. When Congress authorized the FCC to use auctions, it instructed the FCC to make provisions for designated entities, including small businesses, when it designed competitive bidding mechanisms.

H. Report to Congress

The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this *Memorandum Opinion and Order*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 4 U.S.C. § 801(a)(1)(A). A copy of this Final Regulatory Flexibility Analysis will also be published in the Federal Register.

II. Initial Regulatory Flexibility Analysis

Further Notice of Proposed Rulemaking

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in this *Further Notice of Proposed Rule Making* regarding the interactive video and data service (IVDS). Written public comments are requested

on the IRFA. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the comment deadlines provided above.

A. Reason for Action:

The further notice in this rule making proceeding was initiated to secure comment on proposals to eliminate all race- and gender-based provisions in our competitive bidding rules for the IVDS auction only. The proposals advanced in the *Further Notice of Proposed Rule Making* also are designed to implement Congress's goal of giving small businesses, rural telephone companies, and businesses owned by members of minority groups and women the opportunity to participate in the provision of spectrum-based services in accordance with 47 U.S.C. § 309(j)(4)(D). The Commission also seeks to modify its rule concerning the amount it requires for upfront payments from applicants to participate in the auction in accordance with 47 U.S.C. § 309(j)(3).

B. Objectives:

The Commission proposes changes to its rules for IVDS to address legal uncertainties raised by the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995). Specifically, the Commission seeks to ensure competition and ownership diversity by avoiding a lengthy delay in conducting the auction caused by possible legal challenges to our rules, which provided bidding credits and other provisions to minority- and women-owned businesses. The Commission proposes to base the provision of bidding credits on the size of the business, rather than on the race or gender affiliation of the owner(s). The Commission also proposes to increase the upfront payment amounts for IVDS licenses because: it believes the current upfront payment amount was insufficient to ensure against a significant number of defaulting winning bidders; and to ensure payment of applicable penalties arising from defaults.

C. Legal Basis:

The proposed action is authorized under Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934. 47 U.S.C. §§ 154(i), 303(r) and 309(j), as amended.

D. Description and Estimate of Small Entities Subject to the Rules:

The proposed changes in the regulations would affect a number of entities both large and small. The Commission was directed by the Communications Act, 47 U.S.C. § 309(j) to make provisions to ensure that small businesses, and other designated entities, have an opportunity to participate in the provision of spectrum based services. To fulfill this statutory mandate, these proposed rules are designed to attract participation by the small entities. The small businesses who will be subject to the rules would be those which choose to operate interactive video and data services, a class of wireless communications services with a wide variety of uses. The

services will generally be offered to consumers who wish to subscribe to those services.

IVDS is a communications-based service subject to regulation as a wireless provider of pay television services under Standard Industrial Classification 4841 (SIC 4841), which covers subscription television services.[150] The Small Business Administration (SBA) defines small businesses in SIC 4841 as businesses with annual gross revenues of $11 million or less. 13 C.F.R. § 121.201. In this *Further Notice*, we propose to extend special provisions to small businesses with average gross revenues for each of the preceding three (3) years that do not exceed $15 million, and additional benefits to very small businesses who have less than an average of $3 million in gross revenues in each of the last three years. *See supra* ¶ 69. We observe that this proposal is consistent with our approach in other wireless services, *see e.g.*, the 900 MHz specialized mobile radio service, and is narrowly tailored to address the capital requirements for IVDS. The Commission is soliciting SBA approval for the small business definitions for this and other auctionable services.

The Commission estimate of the number of small business entities subject to the rules begins with the Bureau of Census report on businesses listed under SIC 4841, subscription television services. The total number of entities under this category is 1,788.[151] There are 1,463 companies in the 1992 Census Bureau report which are categorized as small businesses providing cable and pay TV services.[152] We know that many of these businesses are cable and television service businesses, rather than IVDS licensees. Therefore, the number of small entities currently in this business which will be subject to the rules will be less than 1,463.

The first IVDS auction resulted in 170 entities winning licenses for 594 MSA licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, we defined a small business as an entity with a net worth not in excess of $6 million and average net income after Federal income taxes for the two preceding years not in excess of $2 million.[153] In the upcoming IVDS re-auction of approximately 100 licenses in metropolitan service area

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[150] Generally, IVDS services will be subscriber-based services providing video communications which could be described as a form of subscription television service.

[151] U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 2D, SIC Code 4841 (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration).

[152] The Census table divides those companies by the amount of annual receipts. There is a dividing point at companies with annual receipts of $10 million. The next increment is annual receipts of $17 million, a category that greatly exceeds the SBA definition of small businesses that provide subscription television services. However, there are 17 firms in this category, with revenues between $10-$17 million. Approximately 1,480 SIC 4841 category firms have annual gross receipts of $15 million or less. Only a small fraction of those 1,480 firms provide interactive video and data services.

[153] *Fourth Report and Order*, 9 FCC Rcd 2330 at ¶ 36.

(MSA) markets and auction of 856 licenses in rural service area (RSA) markets (two licenses per market), we have proposed bidding credits and installment payments to encourage participation by small and very small businesses. We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our proposed rules. Given the success of small businesses in past IVDS auctions, and that small businesses make up over 80 percent of firms in the subscription television services industry, we assume for purposes of this IRFA that all of the licenses may be awarded to small businesses, which would be affected by the rules we propose. We estimate that some companies will win more than one license, as happened in the earlier IVDS auction.

Applicants seeking to participate in the auction also will be subject to these proposed rules. It is impossible to accurately predict how many small businesses will apply to participate in the auction. In the last IVDS auction, there were 289 qualified applicants. We do not anticipate that there will be significantly more participants in the subsequent IVDS auction.

E. Reporting, Recordkeeping and Other Compliance Requirements:

All small businesses which choose to participate in these services will be required to demonstrate that they meet the criteria set forth to qualify as small businesses, as was required under part 1, subpart Q of the FCC's Rules, 47 C.F.R. part 1, subpart Q. Any small business applicant wishing to avail itself of those provisions will need to make the general financial disclosures necessary to establish that the small business is in fact small. The proposed rule changes will eliminate the requirements that small businesses owned by minorities and/or women demonstrate that their owners are minorities and/or women. There are no additional reporting or recordkeeping requirements proposed by these rules.

Each small business applicant will be required to submit an FCC Form 175, OMB Clearance Number 3060-0600. The estimated time for filling out an FCC Form 175 is 45 minutes. In addition to filing an FCC Form 175, each applicant must submit information regarding the ownership of the applicant, any joint venture arrangements or bidding consortia that the applicant has entered into, and financial information which demonstrates that a small business wishing to qualify for installment payments and bidding credits is a small business. Applicants which do not have audited financial statements available will be permitted to certify to the validity of their financial showings. While many small businesses have chosen to employ attorneys prior to filing an application to participate in an auction, the rules are proposed so that a small business working with the information in a bidder information package can file an application on its own. When an applicant wins a license, it will be required to submit an FCC Form 600, *see supra* ¶ 50, which will require technical information regarding the applicant's proposals for providing service. This application will require information provided by an engineer who will have knowledge of the system's design.

F. Federal Rules Which May Overlap, Duplicate or Conflict With These Rules:

None.

G. Significant Alternative Minimizing the Impact on Small Entities Consistent with the Stated Objectives:

In the *Further Notice of Proposed Rule Making*, the Commission tentatively concludes that the possibility of legal challenges to the rules could cause lengthy delays in issuing licenses in this service. Since the first IVDS auction, the Supreme Court in *Adarand v. Peña*, 115 S. Ct. 2097 (1995) raised the legal standard for assessing the constitutionality of federal programs which take race into account. Such programs are now subject to a strict scrutiny standard of review. Although programs which take gender into account are reviewed under an intermediate scrutiny standard of review, *United States v. Commonwealth of Virginia*, 1996 WL 345786 (United States Supreme Court, June 26, 1996) (*VMI*), we believe there is a significant risk, under either standard, that the auction would be subject to delay through litigation over the constitutionality of the program. The Commission is currently gathering evidence, through a Notice of Inquiry proceeding pursuant to Section 257 of the Telecommunications Act of 1996, on barriers to market entry for small businesses, including those owned by women and minorities.[154] We realize that this change may impose a burden on small businesses owned by women or minorities.[155] We seek comment on whether there are alternatives which will enable us to avoid litigation delays, which adversely affect all small businesses, and still make provision for these designated entities.

The *Further Notice of Proposed Rule Making* solicits comment on a variety of alternatives set forth herein. Any significant alternatives presented in the comments will be considered. The *Further Notice of Proposed Rule Making* proposes setting new standards for the measurement of small businesses. The earlier standard defined a small business as an entity, together with its affiliates, that has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years. 47 C.F.R. § 1.2110. We are proposing to define a small business as a business with average gross revenues for each of the preceding three (3) years that do not exceed $15 million, and define a very small business as one which has less than an average of $3 million in gross revenues in each of the last three years. *See supra* ¶ 69. We seek comment on the classes of

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[154] In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Notice of Inquiry, GN Dkt. No. 96-113, FCC 96-216 (adopted May 10, 1996, released May 21, 1996), 11 FCC Rcd 6281 (1996).

[155] Of the 594 IVDS licenses auctioned initially, 140 were won by bidders claiming minority-owned status, 227 were won by bidders claiming woman-owned status, and 55 were won by bidders claiming minority and woman-owned status. FCC's 1994 Visitor's Auction Guide, released December 5, 1994.

small entities and how many total entities, existing and potential, would be affected by the proposed rules in the *Further Notice of Proposed Rule Making*. These changes would be consistent with the definitions used in other auctionable mobile radio services such as 900 MHz specialized mobile radio services.[156] We request each commenter to identify whether it is a "small business" under this definition.

The *Further Notice of Proposed Rule Making* proposes providing a bidding credit to small businesses. The Commission seeks comment on whether a 25 percent bidding credit is appropriate for all small businesses or whether a tiered bidding credit, 10 percent for small businesses and 15 percent for very small businesses, is appropriate. We seek comment on the impact of the creation of a larger pool of small businesses eligible for bidding credits. We propose businesses with average gross revenues of $15 million or less in each of the last three (3) years be eligible for bidding credits, as opposed to the previous standard of an entity, together with its affiliates, that has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years. We request comment on how this larger pool of small businesses will affect the smaller businesses which choose to participate in the auction. Additionally, we are particularly interested in learning whether tiered bidding credits will offset any potential competitive disadvantage to those smaller businesses.

The Commission proposes to raise the upfront payment to $9,000 per MSA and $2,500 per RSA for businesses participating in IVDS auctions. This rule change is designed minimize the adverse impact on the IVDS service of participation in the auction by speculators and other frivolous bidders. The Commission realizes that a higher upfront payment may pose a greater obstacle to participation by smaller businesses. We seek comment on our tentative conclusion that the previous upfront payment was too low. We also request commenters to address the question of whether there are other means to deter speculative or frivolous bidders who do not meet the commitments they make in bidding in IVDS auctions.

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[156] *See supra*, Paragraph 69. *See also Second Order on Reconsideration and Seventh Report and Order*, FCC 95-395, 60 Fed. Reg. 48913 (Sept 21, 1995).