prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the action proposed today does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

Authority: 42 U.S.C. 7401–7671q.

Dated: September 9, 1996.

Chuck Clarke,

Regional Administrator.

[FR Doc. 96–23785 Filed 9–17–96; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 95

[PP Docket No. 93–253; FCC 96–330]

Interactive Video and Data Service

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The *Further Notice of Proposed Rule Making* (FNPRM) tentatively concludes that the 25 percent bidding credit available to women- and minority-owned applicants in IVDS is not supported by the record, and seeks additional evidence to support the provision of the bidding credit to women- and minority-owned applicants in light of the Supreme Court's decision in *Adarand*. The FNPRM also seeks comment on whether and how the Commission should extend bidding credits to small businesses. The FNPRM also requests comment on whether the Commission should implement a tiered bidding credit scheme to provide varying bidding credit amounts to small businesses of different sizes and modify its small business definition. The FNPRM also tentatively concludes that the Commission should increase the upfront payments from $2,500 for every five licenses won to $9,000 per Metropolitan Statistical Area license won, and $2,500 per Rural Statistical Area license won.

DATES: Comments must be submitted on or before October 3, 1996; reply comments must be submitted on or before October 10, 1996.

ADDRESSES: Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Eric Malinen, Wireless Telecommunications Bureau, (202) 418–0680 or Christina Eads Clearwater, Wireless Telecommunications Bureau, (202) 418–0660.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Further Notice of Proposed Rule Making* in PP Docket No. 93–253; FCC 96–330, adopted August 6, 1996 and released September 10, 1996. The complete text of the *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making* is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. and also may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

Title: In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding

I. Further Notice of Proposed Rule Making

A. Treatment of Designated Entities

1. In the *Fourth Report and Order,* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93–253, 59 FR 24947 (May 13, 1994), 9 FCC Rcd 2330 (*Fourth Report and Order*), the Commission 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. Among other provisions, the 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 was a business owned by women or minorities. *See* 47 CFR § 95.816(d)(1). The standard of review applied to federal programs designed to enhance opportunities for racial minorities at the time the IVDS rules were adopted was an intermediate scrutiny standard. In *Adarand Constructors, Inc. v. Peña,* ____ U.S. ____, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (*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. 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. *Adarand* offers little guidance regarding the specific requirements of this test. However, other cases, such as *Richmond* v. *J.A. Croson Co.,* 488 U.S. 469 (1989) (*Croson*) provide some indications of the type of record necessary to meet the strict scrutiny standard.

2. 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. Other courts have also held remedial measures—those intended to compensate for past discrimination—to be compelling governmental interests. 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.

3. 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.'' Other courts, in cases decided after *Croson,* have held that

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

4. 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.'' 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 * * *''. 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; (2) the scope of the program, and whether it contains a waiver mechanism that facilitates narrowing of that scope; (3) the comparison of any numerical target to the number of qualified minorities in the relevant sector; (4) the duration of the program, and whether it is subject to periodic review; (5) the manner in which race is considered, whether as one factor among several or as determinative; and (6) the degree and type of burden on non-minorities.

5. An intermediate scrutiny standard of review currently applies to gender-based measures. 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,* 1996 WL 345786 (1996) and reaffirmed the application of an intermediate standard of review to gender-based measures. In that case, 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.

6. The evidence supporting the 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. At present, the Commission believes 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, the Commission believes 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. Although the Commission has general evidence of discrimination against certain racial groups, none of the evidence appears to satisfy the strict scrutiny standard.

7. Thus, the Commission tentatively concludes that the present record in support of its race-based IVDS provisions is insufficient to satisfy strict scrutiny. The Commission seeks comment on this tentative conclusion. The Commission also requests comment on whether the IVDS provisions promote a compelling governmental interest and, more particularly, whether compensating for discrimination in lending practices and in practices in the communications industry constitutes such an interest. The Commission also asks interested parties to comment on nonremedial objectives that could be furthered by the minority-based provisions of the 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, the Commission asks 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.

8. The Commission also asks those parties who conclude that the 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? Would race-neutral measures further the same interests and achieve the same objectives as race-conscious measures?

9. In addition, the Commission also tentatively concludes that the present record in support of the gender-based IVDS rules may be insufficient to satisfy intermediate scrutiny. The Commission seeks comment on its tentative conclusion. The Commission also seeks 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 the gender-based IVDS rules ''substantially related'' to the achievement of such objectives? Just as the Commission requested above, in addressing evidence to support IVDS race-based provisions, it asks parties to submit statistical data, personal accounts, studies, or any other data relevant to the entry of women into the field of telecommunications.

10. The Commission also is interested in supplementing the current record to support race- and gender-based provisions in its 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. *See* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, *Notice of Inquiry,* GN Docket No. 96–113, 61 FR 33066 (June 26, 1996), FCC 96–216 (released May 21, 1996). The record created in response to this FNPRM will also be incorporated into that Docket.

11. The Commission undertakes this effort to support its auction rules because the Commission is committed to fulfilling the Congressional mandate to provide opportunities for women- and minority-owned businesses through the competitive bidding process. The

Commission believes, however, that marshaling sufficient evidence to satisfy the strict scrutiny standard of review now applicable to federal race-based programs may be a time-consuming process, and the Commission is mindful that it may not fulfill its other obligations under Section 309(j) if the Commission delays the award of IVDS licenses until that process is complete.

12. The Commission notes 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, the Commission 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 the Commission established the rules authorizing reauctioning of licenses. The Commission also believes that both Congress and consumers expect us to promote the rapid development of IVDS. Balancing its obligation to provide opportunities for women- and minority-owned businesses to participate in spectrum-based services against its statutory duties to facilitate the rapid delivery of new services to the American consumer and promote efficient use of the spectrum, the Commission tentatively concludes that it should not contribute any further delays to the IVDS auction by postponing the auction to adduce sufficient evidence to support the race- and gender-based IVDS provisions. While the Commission could proceed with the IVDS auction under the current rules, the Commission tentatively concludes 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. As a result, the Commission tentatively concludes that it will adopt race and gender neutral provisions, but continue to maintain the provisions for small businesses which it believes adequately benefit most of the businesses owned by minorities and/or women. The Commission believes these proposed changes will enable it to meet its Congressional-mandate and proceed as expeditiously as possible to auction the remaining IVDS licenses. The Commission seeks comment on these tentative conclusions.

13. In the *Second Report and Order,* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93–253, 59 FR 22980 (May 4, 1994), 9 FCC Rcd 2348 (1994) (*Second Report and Order*), the Commission adopted a definition of small business for the generic auction rules. 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. In the *Fourth Report and Order,* the Commission determined that these definitions should apply to applicants for IVDS auctions. *See* 47 CFR § 95.816(d). Since that time, however, the Commission has defined small business for other services based on the gross revenues on the applicant and its affiliates for the preceding three years. *See* 47 CFR § 24.720 (broadband PCS); 47 CFR § 24.320 (narrowband PCS); 47 CFR § 90.814(b)(1) (900 MHz SMR); 47 CFR § 90.912(b) (800 MHz SMR).

14. The Commission proposes to define small businesses based on gross revenues for the preceding three years. Specifically, it proposes 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, the Commission proposes 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. The Commission believes that a company's gross revenues is a more accurate indicator of its size than is its net worth or annual profits. 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. *See, e.g.,* 13 CFR § 121.902. Moreover, the Commission observes that this approach is consistent with its approach in 900 MHz SMR. *See* 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, 60 FR 48913 (September 21, 1995) (*Second Order on Reconsideration and Seventh Report and Order*). 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.

15. The Commission also proposes 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, the Commission seeks comment on whether it should 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, the Commission proposes to use the multiplier adopted in the *CMRS Third Report and Order* for the spectrum aggregation cap. *See CMRS Third Report and Order,* GN Docket No. 93–252, 59 FR 9945 (November 12, 1994), 9 FCC Rcd 7988 (1994). The Commission seeks comment on these tentative conclusions.

16. A bidding credit acts as a discount on the winning bid amount that a bidder actually has to pay for the license. The current IVDS rules provide for a bidding credit of 25 percent to businesses owned by members of minority groups or women. 47 CFR Section 95.816(d)(1).

17. The Commission seeks comment on whether it should extend a single bidding credit to all small businesses as it did for the C block PCS auction. If the Commission chooses to adopt a single small business bidding credit for IVDS, how big should the credit be? Should the Commission retain the 25 percent bidding credits currently provided and make it available to all small businesses bidding in the IVDS auction? If it extends a bidding credit to small businesses, the Commission expects that a significant number of women and minority-owned businesses will continue to qualify for bidding credits under the rules. *See, e.g., Second Report and Order and Second Further Notice of Proposed Rule Making,* PR Docket No. 89–553, 60 FR 50583 (September 29, 1995), 10 FCC Rcd 6884 (1995). The Commission believes that this may be the most effective way to amend the rules and proceed with the auction. The Commission also believes 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. Moreover, as the Commission observed in the *Fourth Report and Order*, the Commission expects that the capital requirements for IVDS will be relatively low, particularly with respect to the smaller RSA licenses. The Commission therefore anticipates 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. The Commission also points out that the overwhelming majority of IVDS applicants in the past have been small businesses.

18. In the alternative, should the Commission 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? The Commission tentatively concludes 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. The Commission seeks 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.

19. 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. *See Fourth Report and Order*. Given the success of small businesses in the MSA auction, commenters are invited to address whether the Commission should revisit that conclusion.

B. Upfront Payments

20. In the *Fourth Report and Order*, the Commission determined that the appropriate upfront payment for IVDS auctions would be based on the maximum number of licenses a bidder desired to win. 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. 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.

21. The Commission tentatively concludes 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. The requests for waiver to delay making down payments, coupled with the significant number of defaulting winning bidders, lead the Commission to believe that the initial upfront payment was too low to deter insincere, speculative bidding. The Commission proposes 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. The Commission reaches 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. *See Second Report and Order*; *see also Fourth Report and Order*. 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. The Commission's proposed upfront payments round these figures. The Commission believes that revised upfront payments in these amounts would attract as many qualified bidders as possible, while providing an adequate deterrent against frivolous bidding. The Commission seeks comment on this tentative conclusion and the proposal to increase the upfront payment amounts, as described.

II. Procedural Matters

Initial Regulatory Flexibility Analysis

22. 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 FNPRM 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:

23. The further notice in this rule making proceeding was initiated to secure comment on proposals to eliminate all race- and gender-based provisions in the 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

24. 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 the conduct of the auction caused by probable legal challenges to the rules. 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

25. 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

26. 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 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.

27. IVDS is a communications based service subject to regulation as a wirelsss provider of pay television services under Standard Industrial Classification 4841 (SIC 4841), which covers subscription television services. The Small Business Administration (SBA) defines small businesses in SIC 4841 as businesses with annual gross revenues of $11 million or less. 13 CFR § 121.201. In this *Further Notice of Proposed Rule Making,* the Commission proposes to extend special provisions to small businesses with annual gross revenues for each of the preceding years three 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. The Commission observes that this proposal is consistent with its 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.

28. 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. There are 1,463 companies in the 1992 Census Bureau report which are categorized as small businesses providing cable and pay TV services. The Commission knows 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.

29. 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, the Commission 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. In the upcoming IVDS reauction 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), the Commission has proposed bidding credits and installment payments to encourage participation by small and very small businesses. The Commission cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under the 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, the Commission assumes for purposes of this IRFA that all of the licenses may be awarded to small businesses, which would be affected by the proposed rules. The Commission estimates that some companies will win more than one license, as happened in the earlier IVDS auction.

30. 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. The Commission does not anticipate that there will be significantly more participants in the subsequent IVDS auction.

E. Reporting, Recordkeeping and Other Compliance Requirements

31. 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 CFR 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.

32. 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, 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

33. None.

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

34. 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 intermediate scrutiny, *United States* v. *Commonwealth of Virginia,* 1996 WL 345786 (United States Supreme Court, June 26, 1996), the Commission believes 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. The Commission realizes that this change may impose a burden on small businesses owned by women or minorities. It seeks comment on whether there are alternatives which will enable it to avoid the delays of litigation, which adversely affect all small businesses and still make provision for these designated entities.

35. 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 in IVDS as a business, 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 CFR § 1.2110. The Commission is 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. The Commission seeks comment on the classes of 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. The Commission requests each commenter to identify whether it is a ''small business'' under this definition.

36. *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. The Commission seeks comment on the impact of the creation of a larger pool of small businesses—defining as small all businesses with gross revenues of $15 million or less. The Commission proposes 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. It requests comment on how this larger pool of small businesses will affect the smaller businesses which choose to participate in the auction. Additionally, the Commission is particularly interested in learning whether tiered bidding credits will offset any potential competitive disadvantage to those smaller businesses.

37. The Commission proposes to raise the upfront payment to $9000 per MSA and $2500 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. It seeks comment on its tentative conclusion that the previous upfront payment was too low. The Commission also requests 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.

List of Subjects

47 CFR Part 1

Administrative practice and procedure, Reporting and recordkeeping requirements, Telecommunications.

47 CFR Part 95

Communications equipment, Radio.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 96–23940 Filed 9–17–96; 8:45 am]

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