

Table 1.—General Superfund Section

State	Site name	City/county	Notes

WA	Lakewood	Lakewood/ Pierce	P

P=Sites with partial deletion(s).			

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 95

[PP Docket No. 93-253; FCC 96-447]

Interactive Video and Data Service

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This *Tenth Report and Order* modifies the competitive bidding rules for the upcoming auction of Interactive Video and Data Service (IVDS) licenses as proposed by the *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making*. In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding. Specifically, the rule amendments include eliminating the bidding credits available to women- and minority-owned IVDS applicants and extending bidding credits to small businesses based upon a revised two-tiered small business definition, i.e., providing varying bidding credit amounts to small businesses of different sizes. The *Tenth Report and Order* also clarifies the attribution rules for affiliates of IVDS applicants, and amends the competitive bidding rules to increase the amount of the upfront payments required to participate in the IVDS auction. The intended effect of this action is to establish the competitive bidding rules for the upcoming auction of IVDS licenses.

EFFECTIVE DATE: December 27, 1996.

FOR FURTHER INFORMATION CONTACT: Howard Griboff or Christina Eads Clearwater, Wireless Telecommunications Bureau, (202) 418-0660.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Tenth Report and Order* in PP Docket No. 93-253; FCC 96-447, adopted November 15, 1996 and released November 21, 1996. The complete text of the *Tenth Report and Order* 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

Tenth Report and Order

I. Introduction and Executive Summary

1. In this *Tenth Report and Order*, the Commission modifies its competitive bidding rules for the upcoming auction of Interactive Video and Data Service (IVDS) licenses.¹ Specifically, the Commission amends certain provisions concerning the treatment of small businesses, businesses owned by members of minority groups and women, and rural telephone companies (collectively, "designated entities"), in order to address the legal requirements of the Supreme Court's decisions in *Adarand Constructors, Inc. v. Peña* (*Adarand*)² and *United States v. Virginia (VMI)*.³ The Commission also increases the upfront payment amounts for bidding on IVDS licenses in order to encourage sincere bidding. By implementing these modifications, the Commission reiterates that it is committed to fulfilling its statutory obligation to ensure that designated entities are afforded opportunities to participate in the provision of spectrum-based services.⁴

2. As it explained in the *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making* (FNPRM),⁵ the Commission was prompted to reexamine its race- and gender-based IVDS auction rules by the

¹ IVDS is a point-to-multipoint, multipoint-to-point, short distance communications service. IVDS licensees may provide information, products, or services to individual subscribers located within a service area and subscribers may provide responses. 47 CFR Section 95.803(a).

² _____ U.S. _____, 115 S. Ct. 2097, 132 L.Ed.2d 158 (1995).

³ _____ U.S. _____, 116 S. Ct. 2264, 135 L.Ed.2d 735 (1996).

⁴ 47 U.S.C. Section 309(j)(4)(D).

⁵ Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, PP Docket No. 93-253, FCC 96-330, 61 FR 49103 (September 18, 1996). In response to the FNPRM, comments were filed by (1) ITV, Inc. and IVDS Affiliates, LLC (ITV/IAC); (2) Interactive America Corporation, Inc. (IAC); (3) Loli, Inc., Trans Pacific Interactive, Wireless Interactive Return Path, L.L.C., and IVDS On-Line Partnership (collectively, "IVDS Licensees"); and (4) Progressive Communications, Inc. (Progressive). Reply comments were filed by IAC.

Supreme Court's decisions in *Adarand* and *VMI*. The Commission initially adopted these race- and gender-based rules in the *Fourth Report and Order* in this docket in order to fulfill its mandate under Section 309(j) of the Communications Act of 1934, as amended ("Communications Act"), to provide opportunities for businesses owned by members of minority groups and women to participate in the provision of spectrum-based services.⁶ After the Commission adopted these rules, however, the Supreme Court held in *Adarand* that any federal program that makes distinctions on the basis of race must satisfy the strict scrutiny standard of judicial review.⁷ More recently, the Supreme Court held in *VMI* that a state program that makes distinctions on the basis of gender must be supported by an "exceedingly persuasive justification" in order to withstand constitutional scrutiny.⁸ Based on the analysis of *VMI* in conjunction with *Adarand*, the Commission concludes that any gender-based preference maintained in the IVDS auction rules must meet the VMI intermediate scrutiny standard of judicial review.

3. Based upon review of the comments submitted in response to the FNPRM, the Commission also concludes that the present record is insufficient to support either the race-based IVDS auction rules under the strict scrutiny standard or the gender-based rules under the "exceedingly persuasive justification" standard of intermediate scrutiny. The Commission has considered the need to award the remaining IVDS licenses expeditiously and to promote the rapid deployment of new services to the public without judicial delays,⁹ as well as the statutory objective of disseminating licenses among a wide variety of applicants, including designated entities.¹⁰ Bearing these factors in mind, the Commission concluded that in order to avoid uncertainty and delay that would likely result from legal challenges to the special provisions for minority- and women-owned businesses in its current

⁶ Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Fourth Report and Order*, PP Docket No. 93-253, 59 FR 24947 (May 13, 1994), 9 FCC Rcd 2330, 2336-40 (1994) (*Fourth Report and Order*).

⁷ *Adarand*, 115 S. Ct. at 2113. *Adarand* explicitly overruled the intermediate scrutiny standard for racial classifications set by the Supreme Court in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990), which was the standard of review at the time the IVDS rules were adopted. See *Fourth Report and Order*, 9 FCC Rcd at 2338 n.73.

⁸ *VMI*, 116 S. Ct. at 2274-76.

⁹ 47 U.S.C. Section 309(j)(3)(A).

¹⁰ *Id.* Section 309(j)(3)(B).

IVDS rules, it is appropriate to make the IVDS rules race- and gender-neutral.¹¹ The Commission believes that its action here is consistent with its obligations under Section 309(j)(3).¹²

4. As explained in the *FNPRM*, the Commission's experience in conducting the initial IVDS auction also led it to examine other aspects of its rules, and the Commission has determined that it should take certain steps to minimize the possibility of insincere bidding and bidder default. To achieve these goals, the Commission amends its rules to raise the initial upfront payment for participation in the IVDS auction to \$9,000 per Metropolitan Statistical Area (MSA) license and \$2,500 per license for Rural Service Area (RSA) markets, for the maximum number of licenses on which the applicant wishes to bid.

5. Finally, a number of the comments addressed other issues which are not within the scope of this proceeding. The Commission defers decisions on those matters until they can be addressed in the appropriate context.

II. Rules Affecting Designated Entities

A. Meeting the Constitutional Standards

6. *Background.* In the *FNPRM*, the Commission explained the history of its race- and gender-based IVDS rules, the statutory objectives they were designed to promote, and the impact of the Supreme Court's decisions in *Adarand* and *VMI*. As discussed, an intermediate scrutiny standard of review was applied to federal race- and gender-based programs at the time the IVDS rules were adopted.

7. In *Adarand*, the Supreme Court held that all racial classifications, whether imposed at the federal, state or local government level, must be analyzed by a reviewing court under a strict scrutiny standard of review. This standard requires such classifications to be narrowly tailored to further a compelling governmental interest.¹³ In *VMI*, the Supreme Court reviewed a state program containing gender classification and held it was

unconstitutional under an intermediate scrutiny standard of review. This standard requires that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."¹⁴ Under this test, the government 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.'"¹⁵ While the Supreme Court has not directly addressed constitutional challenges to federal gender-based programs since *Adarand* and *VMI*,¹⁶ a review of the relevant broad language in *VMI* indicates that the Court does not differentiate between federal and state official actions in its equal protection analysis.¹⁷ Similarly, the *Adarand* decision definitively eliminated any distinction between federal and state race-based programs in setting its strict scrutiny standard of judicial review.¹⁸ Therefore, the Commission concludes that any gender-based preference maintained in the IVDS auction rules would need to meet the *VMI* intermediate scrutiny standard of review.

8. In the *FNPRM*, the Commission noted that judicial precedent indicates that only a record of discrimination against a particular racial group would support remedial measures designed to benefit that group and that generalized

assertions of discriminations are inadequate.¹⁹ The Commission tentatively concluded that, although it has some general evidence of discrimination against certain racial groups, the evidence in the record to date does not appear adequate to satisfy the strict scrutiny standard of review. The Commission requested comment on this tentative conclusion. The Commission also requested comment on a number of questions related to this analysis, including whether compensating for discrimination in lending practices in the communications industry constitutes a compelling government interest. The Commission also asked interested parties to comment on other objectives that could be furthered by the minority-based provisions 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. The Commission asked commenters to submit statistical data, personal accounts, studies, or any other data relevant to the entry of specific racial groups into the field of telecommunications, and whether its race-based provisions are narrowly tailored to serve the interests that commenters assert to be compelling governmental interests. In the *FNPRM*, the Commission also tentatively concluded that the present record in support of its gender-based IVDS rules may be insufficient to satisfy the intermediate scrutiny standard and asked commenters to submit evidence relating to the entry of women into the field of telecommunications. The Commission asked interested parties to comment on whether there are any other goals that would satisfy the "important government objective" requirement of the intermediate scrutiny standard, such as increased participation of women in the FCC-licensing process for auction spectrum, and whether its gender-based IVDS rules are "substantially related" to the achievement of such objectives.

9. In the *FNPRM*, the Commission also tentatively concluded that it should not delay the IVDS auction for the amount of time it would take to adduce sufficient evidence to support the race- and gender-based IVDS provisions. The Commission also concluded that proceeding with the IVDS auction with these rules intact would not serve the public interest because it might result in litigation that ultimately would further

¹⁴ *VMI*, 116 S. Ct. at 2274 (citing *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 136-37 & n.6 (1994) and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

¹⁵ *Id.* at 2275 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724 (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980))).

¹⁶ *But see Lamprecht v. FCC*, 958 F.2d 382, 391, 393 n.3 (D.C. Cir. 1992), a pre-*Adarand/VMI* decision in which Justice Thomas (a member of the D.C. Circuit panel to which the case was presented) invokes the "exceedingly persuasive justification" standard in striking down a federal gender-preference policy. As the dissent in *Lamprecht* confirmed, Justice Thomas applied "the more exacting scrutiny of Justice O'Connor's dissent [in *Metro*, 497 U.S. at 602-31]." *Id.* at 404 (Mikva, C.J., dissenting), which formed the core of Justice O'Connor's majority opinion in *Adarand*.

¹⁷ "Since [*Reed v. Reed*, 404 U.S. 71 (1971)], the Court has repeatedly recognized that *neither federal nor state government* acts compatibly with the equal protection principle when a law or official policy denies * * * equal opportunity * * *." *VMI*, 116 S. Ct. at 2275 (emphasis added); "To summarize the Court's current directions for cases of official classification based on gender: * * * the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.'" *Id.* (emphasis added). See also *Heckler v. Mathews*, 465 U.S. 728, 744-45 (1984) (reviewing a federal statute containing gender classification under the same standard the Court used to review the state statute in *Mississippi Univ. for Women*); *Califano v. Westcott*, 443 U.S. 76, 85 (1979) (same).

¹⁸ *Adarand*, 115 S. Ct. at 2113.

¹¹ See Amendment of Parts 20 and 24 of the Commission's Rules, *Report and Order*, WT Docket No. 96-59, 61 FR 51233 (October 1, 1996), 11 FCC Rcd 7824 (1996) (*DEF Report and Order*), which modified the designated entity provisions of the broadband Personal Communications Services (PCS) F block rules to make them race- and gender-neutral; Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Sixth Report and Order*, PP Docket No. 93-253, 60 FR 37786 (July 21, 1995), 11 FCC Rcd 136 (1995), *aff'd sub nom. Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996), which modified the designated entity provisions of the broadband PCS C block rules to make them race- and gender-neutral.

¹² 47 U.S.C. Section 309(j)(3).

¹³ *Adarand*, 115 S. Ct. at 2113.

¹⁹ *FNPRM* (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986))).

delay the award of the IVDS licenses and postpone the introduction of new competition to the marketplace.²⁰ The Commission tentatively concluded that in order to meet its Congressional mandate and expeditiously proceed to auction the remaining IVDS licenses, it should adopt race- and gender-neutral IVDS auction 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.

10. *Discussion.* Upon review of the record before it, the Commission revises the IVDS rules to make them race- and gender-neutral, particularly since most of the commenters support this action.²¹ The other commenters failed to provide any specific anecdotal or statistical evidence to supplement the record supporting race-based or gender-based IVDS auction rules. IAC takes the position that, because there is a lack of available equipment for constructing IVDS systems, the Commission is moving too quickly in eliminating minority- and gender-based preferences.²² IAC proposes that the Commission allow parties additional time to establish a full record upon which to decide whether the race- and gender-based preferences should be eliminated.²³ However, IAC does not present any support for the proposition that a record could be developed in this proceeding if more time was available, nor do any of the other commenters. Accordingly, the Commission concludes that making the IVDS auction rules race- and gender-neutral will serve the public interest by enabling it to expeditiously auction the remaining IVDS licenses. Other commenters also requested that the Commission delay the IVDS auction, but not for the purpose of establishing a record to support race- and gender-based rules.²⁴ The Commission denies

these requests to delay the auction, and notes that applicants should factor the obligations and uncertainties attendant to the auction process into their decision to participate and the amount to bid.²⁵

11. While the Commission eliminates the race- and gender-based provisions of the IVDS auction rules, it will retain provisions for small businesses, as agreed to by all commenters.²⁶ The Commission concludes that nothing in the *Adarand* or *VMI* decisions calls its small business provisions into question. Moreover, by retaining small business preferences, the Commission believes it will continue to fulfill the mandate under Section 309(j) to provide increased opportunities for minority- and women-owned businesses,²⁷ because many minority- and women-owned entities are small businesses who therefore will qualify for the same special provisions that would have applied to them under the previous rules.²⁸

12. The Commission also has initiated a comprehensive rule making proceeding to gather evidence regarding market barriers to entry faced by minority- and women-owned firms as well as small businesses.²⁹ If a sufficient record is adduced that will support race- and gender-based provisions that will satisfy judicial scrutiny, it will consider race- and gender-based provisions for future auctions. Toward this end, the Commission will continue to request bidder information on the

IVDS short-form filings as to minority and/or women-owned status. In analyzing the applicant pool and the auction results, the Commission will monitor whether it has accomplished substantial participation by minorities and women through the broad provisions available to small businesses. This will also assist the Commission in preparing its report to Congress on the success of designated entities in auctions.³⁰

B. Special Provisions for Designated Entities

1. Small Business Definition

13. *Background.* In the current IVDS rules, the Commission adopted a definition of "small business," that requires an entity to demonstrate that, together with its affiliates, its net worth is not more than \$6 million, and its annual profits are not more than \$2 million for the previous two years. In the *FNPRM*, the Commission stated its belief that the gross revenues of the applicant and its affiliates is a more accurate indicator of its size than is its net worth or annual profits, and the Commission proposed to revise the IVDS definition of small business to match the three-year gross revenues test that it has used to define "small business" for other auctions.³¹ The Commission further stated that, because it expects that the capital requirements for IVDS will be relatively low (as compared to, for example, broadband PCS), IVDS may attract greater participation by smaller businesses who lack access to capital. The potential in IVDS for greater participation by smaller businesses also justifies special provisions based on the size of the bidding entity, such as a tiered bidding credits. Therefore, the Commission proposed to redefine a "small business" as an entity with average gross revenues not to exceed \$15 million for each of the preceding three years. The Commission also proposed to add a second tier of small businesses, referred to as "very small businesses," and defined as entities with average gross revenues of not more than \$3 million for each of the preceding three years. The Commission requested comment on these revised definitions. It also requested comment on whether to implement a five percent

²⁰ Id. The Commission observes that the D.C. Circuit Court of Appeals stayed the C block auction under an intermediate scrutiny standard on the basis of race- and gender-based provisions similar to those adopted in the IVDS rules. *Telephone Electronics Corp. v. FCC*, No. 95-1015 (D.C. Cir. Mar. 15, 1995) (order granting stay).

²¹ See, e.g., Progressive Comments at 1; ITV/IALC Comments at 4.

²² IAC Comments at 5-7.

²³ Id.; IAC Reply Comments at 1-2.

²⁴ IVDS Licensees request that the Commission delay the auction until certain technical, regulatory, and administrative issues are resolved. IVDS Licensees Comments at 4-6. ITV/IALC request that the auction not be held until resolution of all auction default issues and action has been taken on the petitions for reconsideration of the Commission's decision in Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Service to Subscribers, *Report and Order*, WT Docket No. 95-47, 61 FR 32710-01 (June 25, 1996), 11 FCC Rcd 6610 (1996). ITV/IALC Comments at 7-

9. See also IAC Reply Comments at 4-5 (agreeing with IVDS Licensees and ITV/IALC on these points).

²⁵ See Requests for Waivers in the First Auction of Interactive Video and Data Service (IVDS) Licenses, *Memorandum Opinion and Order*, 11 FCC Rcd 8211, 8213 (1996).

²⁶ IVDS Licensees Comments at 2 (in light of the elimination of race- and gender-based provisions, the small business preferences provide "one of the few avenues remaining for minority- and women-owned businesses to enter the communications industry"); IAC Comments at 8 (preferences for small businesses should be retained to fulfill the Commission's statutory obligations under Section 309(j)); ITV/IALC Comments at 4 (preferences should be based on a party's lack of economic strength); Progressive Comments at 1 (small business provisions will give "equal status to all small business enterprises").

²⁷ 47 U.S.C. Section 309(j)(3).

²⁸ See generally 1992 Survey of Minority-Owned Business Enterprises, Agriculture and Financial Statistics Division, Bureau of the Census, U.S. Department of Commerce (December 11, 1995); 1992 Survey of Women-Owned Businesses, Agriculture and Financial Statistics Division, Bureau of the Census, U.S. Department of Commerce (January 29, 1996).

²⁹ 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), 11 FCC Rcd 6280 (1996) (Section 257 Notice of Inquiry). See also 47 U.S.C. Section 257.

³⁰ See 47 U.S.C. Section 309(j)(12)(D).

³¹ *FNPRM* (citing 47 CFR Sections 24.320, 24.720, 90.912(b), 90.814(b)(1)). See also 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, 60 FR 48913 (September 21, 1996), 11 FCC Rcd 2639, 2700-01 & n.320 (1995) (900 SMR Auction Report and Order).

attribution threshold for purposes of determining an entity's eligibility as a small business. Alternatively, the Commission sought comment on whether it should only count the gross revenues of the controlling principals in the applicant and its affiliates for purposes of determining small business status. Finally, the Commission sought comment on its tentative conclusion to use a multiplier similar to the one adopted in the *CMRS Third Report and Order* for the spectrum aggregation cap to determine attribution when IVDS licensees are held indirectly through intervening corporate entities.³²

14. *Discussion.* Based upon its experience with spectrum auctions, the Commission believes that gross revenues-based definitions are a more accurate indicator of an entity's size than the net worth/annual profit definition which was previously used. Therefore, the Commission will redefine a "small business" as an entity with average gross revenues not exceeding \$15 million for each of the preceding three years, and a "very small business" as an entity with average gross revenues not exceeding \$3 million for each of the preceding three years. IVDS Licensees and ITV/IALC support small business definitions based upon gross revenues,³³ and only Progressive takes the position that the Commission should retain the previous small business definition.³⁴ The Commission further notes that the creation of a subcategory of very small businesses enables it to tailor benefits to better meet the needs of the smaller business entities likely to participate in the IVDS auction. As discussed below, the Commission finds that its goals can best be served by offering varying bidding credits tailored to the applicant's size. The Commission also believes that the \$15 million/\$3 million gross revenue financial thresholds are appropriate and are consistent with the carefully-analyzed approach it took in the auction of 900 MHz Specialized Mobile Radio (SMR) licenses.³⁵ Indeed, in this auction, the Commission expects participation by a comparable group of smaller businesses that participated in the 900 MHz SMR auction. Because the

Commission believes these are appropriate thresholds, it declines to adopt the higher thresholds proposed by ITV/IALC.³⁶

15. In determining whether an entity qualifies as a small business at either threshold, the Commission will consider the gross revenues of the small business applicant, its affiliates, and certain investors in the applicant. Specifically, the Commission will attribute the gross revenues of all controlling principals in the small business applicant as well as the gross revenues of affiliates of the applicant.³⁷ At ITV/IALC's request,³⁸ the Commission clarifies that personal net worth is not included in the determination of eligibility for bidding as a small business.³⁹ In addition, the Commission will use the multiplier adopted in the *CMRS Third Report and Order* for the spectrum aggregation cap to determine when IVDS licensees are indirectly held through intervening corporate entities.⁴⁰ The Commission thus chooses not to impose specific equity requirements on the controlling principals that meet the small business definition.⁴¹ However, the Commission will still require that, in order for an applicant to qualify as a small business, qualifying small business principals must maintain "control" of the applicant. The term "control" would include both *de jure* and *de facto* control of the applicant.⁴² While the

³⁶ ITV/IALC Comments at 4-5 (proposing small business average gross revenues eligibility threshold of \$18 million and very small business average gross revenues eligibility threshold of \$5 million because IVDS licensees will more likely be financing their systems from equity sources rather than debt).

³⁷ Both commenters addressing this issue supported the use of gross revenues of controlling principals as the determinant of small business status. See IVDS Licensees Comments at 2; ITV/IALC Comments at 5 n.5.

³⁸ ITV/IALC Comments at 5 n.5.

³⁹ See, e.g., Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Fifth Memorandum Opinion and Order*, PP Docket No. 93-253, 59 FR 63210 (December 7, 1994), 10 FCC Rcd 403, 421 (1994) (*Competitive Bidding Fifth Memorandum Opinion and Order*).

⁴⁰ *CMRS Third Report and Order*, 9 FCC Rcd 7988, 8114-15. IVDS Licensees supports this proposal. IVDS Licensees Comments at 2.

⁴¹ IVDS Licensees alternatively proposes a twenty-five percent equity exception similar to that adopted in the Commission's broadband PCS rules. 47 CFR Section 24.709(b)(3). IVDS Licensees Comments at 2.

⁴² Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock. *De facto* control is determined on a case-by-case basis. An entity must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) the entity constitutes or appoints more than 50 percent of the board of directors or partnership management committee; (2) the entity has authority to appoint, promote, demote and fire senior executives that

Commission is not imposing specific equity requirements on the small business principals, the absence of significant equity could raise questions about whether the applicant qualifies as a *bona fide* small business.

16. On a related matter, ITV/IALC seeks clarification in its comments that once an entity qualifies as a small business, it would not lose its status through financial growth in subsequent years,⁴³ and thereby lose its ability to make installment payments as a small business under 47 CFR Section 95.816(d)(2). The Commission addressed this concern in its broadband PCS rules. There it emphasized its strong interest in seeing small businesses grow and succeed in the wireless marketplace and stated that growth of the licensee's gross revenues and assets, or growth as a result of a licensee acquiring additional licenses, generally would not jeopardize continued eligibility for designated entity preferences.⁴⁴ The Commission believes this policy equally should apply to IVDS licensees and, therefore, incorporates this concept into its IVDS rules.⁴⁵

2. Bidding Credits

17. *Background.* Under the current IVDS rules, businesses owned by members of minority groups or women are granted a 25 percent bidding credit. In the *FNPRM*, the Commission proposed to eliminate race-and gender-based bidding credits in its IVDS rules and sought comment on whether it should extend a single bidding credit to all small businesses and, if so, the magnitude of that credit. The Commission asked whether it should offer tiered bidding credits for small businesses of different sizes, e.g., a 15 percent bidding credit for very small businesses and a 10 percent bidding credit for small businesses. The Commission tentatively concluded that given the relatively low bids that IVDS garnered in the July 1994 auction, IVDS may attract smaller businesses, thus justifying tiered bidding credits.

control the day-to-day activities of the licensees; and (3) the entity plays an integral role in all major management decisions. See *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 447.

⁴³ ITV/IALC Comments at 5 n.4.

⁴⁴ *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 420. See also 47 CFR Section 24.711(c)(2) ("A licensee (or other attributable entity's) increased gross revenues or increased total assets due to nonattributable equity investments * * *, debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for installment payments.").

⁴⁵ 47 CFR Section 95.816(e)(2) (as revised).

³² *Id.* (citing Implementation of Sections 3(n) and 332 of the Communications Act—Regulatory Treatment of Mobile Services, *Third Report and Order*, GN Docket No. 93-252, PR Docket No. 93-144, PR Docket No. 89-553, 59 FR 59945 (November 21, 1996), 9 FCC Rcd 7988, 8114-15 (1994) (*CMRS Third Report and Order*)).

³³ See, e.g., IVDS Licensees Comments at 1-2; ITV/IALC Comments at 4-5.

³⁴ Progressive Comments at 1 (contending that differing categories of small businesses will create problems for the Commission in the future).

³⁵ *900 SMR Auction Report and Order*, 11 FCC Rcd at 2700.

18. *Discussion.* The Commission will maintain bidding credits for small businesses and will adopt a tiered bidding credit approach, as supported by several commenters.⁴⁶ The Commission agrees with IVDS Licensees that preservation of the bidding credit is consistent with its obligations under Section 309(j) to "promote economic opportunity for a wide variety of applicants, including small businesses and businesses owned by minorities and women."⁴⁷ Furthermore, the Commission believes that a tiered approach, which enhances the discounting effect of bidding credits because not all entities receive the same benefit, will encourage smaller businesses to participate in the provision of IVDS services.⁴⁸ The Commission also believes that the 15 percent bidding credit for very small businesses and a 10 percent bidding credit for small businesses are appropriate and consistent with the thresholds used in the 900 MHz SMR auctions.⁴⁹ As noted above, the Commission expects auction participation by a group of smaller businesses comparable to those that participated in the 900 MHz SMR auction. Moreover, the Commission does not believe a greater bidding credit is justified here as it was for certain highly capital intensive services, like broadband PCS. Therefore, the Commission declines to adopt the higher bidding credits proposed by IVDS Licensees and ITV/IALC.⁵⁰ The two tiered approach and the magnitude of the bidding credits the Commission adopts here are reasonable and equitable and meet the concerns of the commenters. These credits are narrowly tailored to the varying abilities of businesses to access capital and also take into account that different small businesses will pursue different strategies.

III. Upfront Payments

19. *Background.* The Commission recognized in the *FNPRM* that in order to deter insincere, speculative bidding and guard against the substantial number of defaults that occurred after the July 1994 auction, it needs to obtain a higher upfront payment from IVDS

bidders than the upfront payment currently required by the rules (*i.e.*, \$2,500 for every five licenses a bidder desires to win). In response to several *ex parte* filings from IVDS bidders supporting increased upfront payments, the Commission proposed to increase the initial upfront payment to \$9,000 per MSA license and \$2,500 per RSA license, for the maximum number of licenses on which the applicant wishes to bid.

20. *Discussion.* Based upon the record regarding IVDS upfront payment amounts,⁵¹ the Commission adopts the proposed upfront payment amounts and will amend Section 95.816(c)(3) of the Commission's Rules. Specifically, the Commission raises the initial upfront payments for participation in the IVDS auction to \$9,000 per MSA license and \$2,500 per RSA license, for the maximum number of licenses on which an entity wishes to bid. The Commission believes that this action is consistent with the underlying purpose for upfront payments—to deter insincere and speculative bidding and to ensure that bidders have the financial capability to build out their systems.⁵² The Commission also believes that the revised upfront payments will continue to attract as many qualified bidders, while providing an adequate deterrent against frivolous bidding. Thus, the Commission declines to adjust the upfront payment amounts as proposed by ITV/IALC.⁵³

IV. Other Issues

21. Several commenters raise issues beyond the scope of the *FNPRM*. For example, Progressive and IAC request that the Commission revise the length of the IVDS license terms from 5 to 10 years.⁵⁴ This proposal requires formal rule making procedures and is beyond the scope of this proceeding. Similarly, ITV/IALC seeks an exception to the cross-ownership rule.⁵⁵ Again, this type of relief falls outside the scope of this proceeding. Finally, a number of policy questions were raised in the comments

regarding default issues.⁵⁶ The Commission notes that it will be addressing default issues in a future proceeding regarding the general competitive bidding rules.

V. Procedural Matters and Ordering Clauses

22. As required by the Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. Section 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *FNPRM*. The Commission sought written public comments on the expected impact of the rule changes proposed in the *FNPRM* on small entities, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this *Tenth Report and Order* conforms to the RFA, 5 U.S.C. Section 604, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Public Law No. 104-121, 110 Stat. 847 (1996).⁵⁷

A. Need for and Objective of the Rules

23. This *Tenth Report and Order* adopts rule changes regarding the Commission's auction of IVDS licenses. The rule changes are appropriate because laws have changed since the rules were originally adopted. The Supreme Court's decisions in *Adarand*⁵⁸ and *VMI*⁵⁹ raised questions about the level of legal scrutiny that must be met by some of the designated entity provisions in the Commission's rules which take race and gender into account. The objective of the rule changes in the *Tenth Report and Order* primarily is to ensure that the competitive bidding rules comply with the appropriate legal standards by making the rules race- and gender-neutral, while at the same time instituting further rule changes that continue to promote participation of small businesses in auctions for licenses to provide spectrum services. Further, a secondary objective of some of the rule changes, such as the small business definition, availability of bidding credits, and increased upfront payments, is to apply the benefit of the

⁴⁶ See IVDS Licensees Comments at 2-3; ITV/IALC Comments at 6.

⁴⁷ See IVDS Licensees Comments at 3 (quoting 47 U.S.C. Section 309(j)(4)(C)(ii)).

⁴⁸ See *id.* (quoting *DEF Report and Order*, 11 FCC Rcd at 7849).

⁴⁹ 900 SMR Auction Report and Order, 11 FCC Rcd at 2700.

⁵⁰ IVDS Licensees Comments at 3; ITV/IALC Comments at 6 (suggesting a 25 percent bidding credit for very small businesses and a 15 percent credit for small businesses).

⁵¹ IVDS Licensees Comments at 3; IAC Comments at 9; ITV/IALC Comments at 6-7; *FNPRM* at n.140 (list of *ex parte* filings supporting increased upfront payments).

⁵² See, e.g., *DEF Report and Order*, 11 FCC Rcd at 7860.

⁵³ ITV/IALC Comments at 6-7 (proposing that the MSA payment be an even multiple of the RSA payment, e.g., per-market payments of \$7,500.00 for MSA's and \$2,500.00 for RSA's, to reduce computational complexity in figuring bidding eligibility as the auction proceeds and to avoid "stranding" MSA upfront payments with no ability to apply the entire amount to an RSA license).

⁵⁴ Progressive Comments at 1; IAC Reply Comments at 4.

⁵⁵ ITV/IALC Comments at 3-5.

⁵⁶ IAC Comments at 7-8 (request not to reactivate defaulted licenses before the defaulting party's administrative and judicial remedies are exhausted); *id.* at 9 (request the Commission clarify how it evaluates requests for waiver of payment deadlines and other IVDS auction-related rules); ITV/IALC Comments at 2 (request that defaulting parties should not be eligible for future IVDS auctions); IAC Reply Comments at 2-4 (opposition to ITV/IALC's request).

⁵⁷ Subtitle II of the CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), codified at 5 U.S.C. Section 601, *et seq.*

⁵⁸ 115 S. Ct. 2097.

⁵⁹ 116 S. Ct. 2264.

Commission's experience from the first IVDS auction to subsequent IVDS auctions, and to increase the flexibility and opportunities available to small businesses to participate in the provision of the services.

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

24. There were no petitions or comments which solely discussed or addressed the IRFA. However, a number of commenters raised and discussed issues effecting small businesses in their comments on the *Tenth Report and Order*. Those comments are addressed and discussed, where applicable, in the detailed sections below.

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

25. The 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 (or very small businesses), just as was required by the prior rules. The changed rules will include more businesses in the category of small businesses, which will be eligible for designated entity preferences such as bidding credits and installment payment plans. Any small business applicant wishing to avail itself of those provisions will need to make the general financial disclosures, as well as applicant and affiliate disclosures, necessary to establish that the small business is in fact small (or very small). The changed rules have eliminated the requirements that small businesses owned by women or minorities demonstrate that their owners are women or minorities. However, the Commission requests voluntary reporting of minority and women ownership to comply with its mandate to report its efforts to Congress. Accordingly, there are no additional reporting or recordkeeping requirements being imposed by these rules.

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

26. The Commission is directed by the Communications Act of 1934, 47 U.S.C. section 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 and comply with the current legal standards, these rule changes are designed to ensure compliance with the new legal standards while promoting participation by small entities, including minorities, women, and rural

telephone companies. The small businesses who will be subject to the rules would be those which choose to operate IVDS, 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 wireless provider of pay television services under Standard Industrial Classification 4841 (SIC 4841), which covers subscription television services.⁶⁰ The U.S. Small Business Administration (SBA) defines small businesses in SIC 4841 as businesses with annual gross revenues of \$11 million or less. 13 CFR section 121.201. In this *Tenth Report and Order*, the Commission extends 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. The Commission observes that this rule change is consistent with its approach in other wireless services, e.g., the 900 MHz specialized mobile radio service, and is narrowly tailored to address the lower capital requirements for IVDS. SBA approval for the small business definitions is pending for this and other auctionable services.

28. 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 1,788.⁶¹ There are 1,463 companies in the 1992 Census Bureau report which are categorized as small businesses providing cable and pay TV services.⁶² 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, 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.⁶³ In the upcoming IVDS re-auction of approximately 100 licenses in MSA markets and auction of 856 licenses in RSA markets (two licenses in each of 428 markets), while the Commission makes the rules race and gender-neutral, it also modifies its definition of small business to include a second tier of very small businesses, adopts tiered bidding credits, and continues to include provisions for installment payments in its rules 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 rules. Given the success of small businesses in past IVDS auctions, and that small businesses comprise over 80 percent of firms in the subscription television services industry, the Commission assumes for purposes of this FRFA that all of the licenses may be awarded to small businesses, which would be affected by the rule changes it has made. Some companies may win more than one license, as was the situation in the earlier IVDS auction.

30. Applicants seeking to participate in the auction also will be subject to these rule changes. 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. However, because of the lower capital requirements for IVDS in general, there may be a greater number of very small businesses participating.

E. Steps Taken to Minimize the Burdens on Small Entities

31. The changes made in the *Tenth Report and Order* are designed to ensure compliance with the current legal standards applicable to federal programs implemented to benefit minority and women-owned businesses, while minimizing burdens on small

⁶⁰ Generally, IVDS services will be subscriber-based services providing video communications which could be described as a form of subscription television service.

⁶¹ 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).

⁶² 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.

⁶³ *Fourth Report and Order*, 9 FCC Rcd at 2336.

businesses and promoting participation of small businesses in spectrum auctions. The extension of a two-tiered definition for small businesses, as well as the provision for tiered bidding credits will assist businesses owned by women and minorities. Based upon experience to date, most of the businesses owned by women and minorities which have participated in the Commission's auctions are small businesses or very small businesses which, in the end, will benefit from these rule changes. As discussed below, the Commission considered and rejected alternatives, such as providing parties additional time to supplement the record or to afford the industry more time to develop technology and equipment, because there is no evidence that, given additional time, the record will be sufficiently supplemented or the industry will develop the technology any faster. While some may argue that the increase in upfront payments may raise some entry barriers, such concerns are outweighed by the need to maintain the integrity of the auction process to ensure sincere bidders and, thus, create increased opportunities for sincere small business bidders. Furthermore, the rule change increasing the upfront payment amounts will ultimately benefit the entities participating in the IVDS auctions, by ensuring that the participants have the financial ability to pay for the licenses for which they bid.

F. Significant Alternatives Considered and Rejected

Eliminating the Race and Gender-Based Provisions

32. In the *Tenth Report and Order*, the Commission concludes that the possibility of legal challenges to the rules due to the race and gender-based provisions could cause lengthy delays in issuing licenses in this service and, therefore, revises those provisions in its competitive bidding rules to make them race and gender-neutral. The Commission has not been able to consider other alternatives to the rule changes given that no alternatives were proposed by any of the commenters, and the record was not supplemented during this proceeding with any additional evidence of market entry barriers, anecdotal or statistical evidence or any other factors which directly adversely effect small businesses owned by minorities and/or women. Although one commenter requested that the Commission provide parties with additional time to supplement the record, and another requested that the Commission delay any rule making determinations to afford the industry

additional time to develop equipment and technology for implementing IVDS, the Commission rejected these requests, because there is no evidence the record will be sufficiently supplemented or the industry will develop the technology any faster. The Commission notes that it is currently gathering evidence, through a *Notice of Inquiry* proceeding pursuant to the Telecommunications Act of 1996, on barriers to market entry for small businesses, including those owned by women and minorities.⁶⁴ The Commission believes that the rule changes discussed below (for example, offering bidding credits based upon an entity's size) will more than adequately benefit small businesses that are owned by minorities or women.

Adoption of Two-Tiered Definition for Small Businesses

33. The *Tenth Report and Order* adopts a two-tiered definition to define small businesses: (1) a small business is a business with average gross revenues for each of the preceding three years that do not exceed \$15 million, and (2) a very small business is one which has less than an average of \$3 million in gross revenues in each of the last three years. The Commission adopts this two-tiered definition because its ongoing experience with spectrum auctions has affirmed its belief that gross revenues-based definitions are a more accurate indicator of size than a net worth/annual profit definition. Also, this definition is consistent with the carefully-analyzed approach used in other auctionable mobile radio services such as 900 MHz SMR services.⁶⁵ Although one commenter suggested altering the financial thresholds for determining whether an entity is a "small business" or "very small business" under the proposed definition, the Commission believes that the adopted two-tiered definition is appropriate given the likely participants in this auction and the Commission's desire to maintain consistency between auctions. In determining whether an entity qualifies as a small business under either tier, the Commission will attribute the gross revenues of all controlling principals, as well as the gross revenues of affiliates of the applicant. Also, the Commission will use the multiplier adopted in the *CMRS Third Report and Order* for the spectrum aggregation cap to determine when IVDS licensees are indirectly held through corporate entities. While the Commission chose not to impose specific equity requirements on the

controlling principals of qualifying small businesses, it will still require that qualifying small businesses are actually "controlled" by their principals.

Adoption of Tiered Bidding Credits

34. The Commission adopted tiered small business bidding credits for the upcoming IVDS auction as follows: (1) 10 percent bidding credits for small businesses and (2) 15 percent for very small businesses. Although a few commenters proposed higher percentages for each tier of bidding credits offered (for example, 15 percent for small businesses and 25 percent for very small businesses), the Commission declines to adopt their proposals because it does not believe a greater bidding credit is justified here as it was for certain highly capital intensive services, like broadband PCS. The Commission believes the extent, magnitude and range of the bidding credits adopted meet the varying needs of small and very small businesses who will participate in the IVDS auctions.

Increase in Upfront Payment Amounts

35. The *Tenth Report and Order* adopts increased upfront payment amounts of \$9,000 per MSA license and \$2,500 per RSA license for businesses participating in IVDS auctions. These increased amounts are designed to maintain the integrity of the auction by minimizing the adverse impact of participation by speculators and other frivolous bidders in the IVDS auction. Commenters agree that the previous upfront payment was too low, and no other alternatives were suggested to deter speculative or frivolous bidders who do not meet the commitments they make in bidding in IVDS auctions. Based upon the record regarding IVDS upfront payment values, the Commission believes that the revised upfront payment values are set at appropriate levels and provide an adequate deterrent against frivolous bidding, and therefore, the Commission declined to adopt the approach of one commenter who suggested it modify the multiplier for the MSA payment to an even multiplier of the RSA payment. Moreover, the impact that increased upfront payments may have on designated entities will be offset by the fact that eligible entities may elect to make payments for their licenses via installment payments, which eligibility shall not be jeopardized due to normal projected growth of gross revenues and assets.

⁶⁴ Section 257 Notice of Inquiry.

⁶⁵ 900 SMR Auction Report and Order.

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

36. The Commission sought specific comments regarding the views of small entities with respect to the changes being made through solicitation of comments and reply comments to its *FNPRM*, and the *IRFA* that was contained therein. Although there were no comments on the *IRFA*, there were a number of comments received in connection with the *FNPRM* as noted herein. Further, the Commission's Office of Communications and Business Opportunities has undertaken additional outreach efforts through newsletters and other mailings to learn of the views of, and respond to, small entities.

H. Report to Congress

37. The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this *Tenth Report and Order*, in a report to Congress pursuant to the SBREFA, 5 U.S.C. Section 801(a)(1)(A). A copy of this Final Regulatory Flexibility Analysis will also be published in the Federal Register.

38. Authority for issuance of this *Tenth Report and Order* is contained in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(r) and 309(j).

39. 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. Sections 154(i), 303(r), and 309(j), this *Tenth Report and Order* is adopted, and Part 95 of the Commission's Rules IS AMENDED as set forth below.

40. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE December 27, 1996.

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

List of Subjects in 47 CFR Part 95

Communications equipment, Radio.
Federal Communications Commission
William F. Caton,
Acting Secretary.

Rule Changes

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

PART 95—PERSONAL RADIO SERVICES

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

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

2. Section 95.816 is amended by revising paragraphs (c)(3) and (d)(1), adding new paragraph (d)(4), redesignating paragraph (e) as paragraph (e)(1) and revising it, and adding new paragraph (e)(2) to read as follows:

§ 95.816 Competitive bidding proceedings.

* * * * *

(c) * * *

(3) *Upfront payments.* Each eligible bidder in the IVDS auction will be required to submit an upfront payment of \$9,000 per MSA license and \$2,500 per RSA license for the maximum number of licenses on which it intends to bid pursuant to section 1.2106 of this chapter and procedures specified by Public Notice.

* * * * *

(d) * * *

(1) *Bidding credits.*

(i) A winning bidder that qualifies as a small business (as defined in 95.816(d)(4)(i) of this section) may use a bidding credit of 10 percent to lower the cost of its winning bid.

(ii) A winning bidder that qualifies as a very small business (as defined in 95.816(d)(4)(ii) of this section) may use a bidding credit of 15 percent to lower the cost of its winning bid.

* * * * *

(4) Definitions.

(i) *Small business.* A small business is an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average annual gross revenues that are not more than \$15 million for the preceding three years.

(ii) *Very small business.* A very small business is an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average annual gross revenues that are not more than \$3 million for the preceding three years.

(iii) *Gross revenues.* Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years, or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form application

(Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.

(iv) *Controlling interest shall be attributable.* Controlling interest means majority voting equity ownership, any general partnership interest, or any means of actual working control (including negative control) over the operation of the licensee, in whatever manner exercised.

(v) *Multiplier.* Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(e) *Unjust enrichment.*

(1) Any business owned by minorities and/or women that has obtained a IVDS license in the IVDS auction held in July 1994 through the benefit of tax certificates shall not assign or transfer control of its license within one year of its license grant date. If the assignee or transferee is a business owned by minorities and/or women, this paragraph shall not apply; provided, however, that the assignee or transferee shall not assign or transfer control of the license within one year of the grant date of the assignment or transfer.

(2) A licensee's (or other attributable entity's) increased gross revenues due to nonattributable equity investments (i.e., from sources whose gross revenues are not considered under 95.816(d)(4)(iv) of this section), debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for preferences as a small business or very small business under this section.

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