FCC Fourth Report and Order

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FCC 94-99

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

FOURTH REPORT AND ORDER

Adopted: April 20, 1994 **Released:** May 10, 1994

By the Commission:

TABLE OF CONTENTS

I. INTRODUCTION

1. On March 8, 1994, the Commission adopted a Second Report and Order in this proceeding (Second Report and Order)[1] establishing general rules and procedures governing competitive bidding for radio spectrum (auctions). The Second Report and Order identified the types of services and licenses that may be subject to auctions, described a menu of competitive bidding methods, and adopted generic auction procedures. The Commission stated that specific competitive bidding rules for licensing individual services would be addressed in subsequent Reports and Orders. This Fourth Report and Order establishes rules and procedures for auctioning licenses in the Interactive Video and Data Service (IVDS).[2]

2. In this Fourth Report and Order, we find that the value of IVDS licenses is not expected to be sufficiently high to justify the use of simultaneous multiple round bidding. We therefore conclude that the auction methods most appropriate to the IVDS are oral bidding (open outcry) and single round sealed bidding. We also establish rules and procedures to deter possible abuses of the bidding and licensing procedures. Last, we establish preferences for small businesses and businesses owned by minorities or women to enhance their participation in the competitive bidding process and in the provision of IVDS system offerings.

II. BACKGROUND AND AUCTION ELIGIBILITY

3. The IVDS is a point-to-multipoint, multipoint-to-point, short distance communications service in which licensees may provide information, products, or services to individual subscribers located at fixed locations in the service area, and subscribers may provide responses.[3] The rules governing IVDS were adopted in 1992 in Gen. Docket No. 91-2.[4] In that proceeding, the Commission decided to define

---

[1] Second Report and Order in PP Docket No. 93-253, FCC 94-61, released April 20, 1994 (Second Report and Order). On February 3, 1994, we adopted the First Report and Order in this proceeding, which, pursuant to 47 U.S.C. § 309(i)(4)(C), prescribed transfer disclosure requirements with respect to licenses or permits awarded by random selection. First Report and Order in PP Docket No. 93-253, FCC 94-32 (released February 4, 1994), petitions for reconsideration pending.

[2] Concurrent with this Fourth Report and Order, we are adopting a Third Report and Order, FCC 94-98, in this docket addressing the specific competitive bidding rules and procedures for "narrowband" Personal Communications Services (PCS).

[3] Service offerings might include subscriber opportunities to provide real-time responses to educational and pay-per-view programming, commercial data applications such as home banking, and the downloading of data. See Report and Order in Gen. Docket No. 91-2, 7 FCC Rcd 1630, 1630 ¶ 2, 1637 ¶ 54 (1992).

[4] Report and Order, supra note 3; see 47 C.F.R. Part 95, Subpart F.

specific service areas and license IVDS channels in these areas on an exclusive basis. As so defined, the IVDS has 734 service areas, with two licenses of 500 kilohertz each (218.0-218.5 and 218.5-219.0 MHz) available in each area.[5] In the event of mutually exclusive applications[6] for license, the Commission decided in that earlier proceeding to use the lottery processes specified in our rules.[7]

4. The Omnibus Budget Reconciliation Act of 1993 (Budget Act)[8] added a new Section 309(j) to the Communications Act of 1934, as amended (Communications Act),[9] to permit the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive accepted applications for initial license. In the Notice of Proposed Rule Making in this proceeding, we stated that "the principal use of IVDS-allocated spectrum is reasonably likely to involve the licensee receiving compensation from subscribers for communications services," and therefore proposed to subject IVDS to competitive bidding.[10] Following our subsequent review of comments and reply comments, we concluded that IVDS should be subject to auctions.[11] In this Fourth Report and Order we have attempted to design IVDS auction rules and procedures that meet Congressional objectives.[12] We believe that these objectives are embodied in two basic Commission policy goals: promoting economic growth, and enhancing access to

---

[5] See 47 C.F.R. §§ 95.803, 95.853. IVDS service or market areas are defined in terms of the 734 cellular system service areas. See Public Notice, Report No. 92-40, released January 24, 1992; 47 C.F.R. § 22.903 (cellular). Many of these service areas cover rural or remote, sparsely populated areas.

[6] The Commission, in general, "considers two or more applications to be 'mutually exclusive' if their conflicts are such that the grant of one application would effectively preclude, by reason of harmful electrical interference, the grant of one or more of the other applications." Second Report and Order at ¶ 12 n. 5.

[7] See 47 C.F.R. § 1.972 (1992). On September 15, 1993, a lottery for nine IVDS markets was conducted. This lottery was permitted under the Budget Act described below, the pertinent applications having been accepted for filing by the Commission prior to July 26, 1993. See Budget Act, infra note 8, § 6002(e).

[8] Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993)(Budget Act); see H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 480-89 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News 1169-78.

[9] 47 U.S.C. §§ 151-713.

[10] 8 FCC Rcd 7635, 7659 ¶ 143 (1993); see generally 47 U.S.C. § 309(j)(2).

[11] Second Report and Order at ¶¶ 49-53.

[12] 47 U.S.C. § 309(j)(3).

telecommunications service offerings for consumers, producers, and new entrants.[13]

III. COMPETITIVE BIDDING DESIGN

5. As noted, we have determined that mutually exclusive IVDS applications are subject to auctions. We must, therefore, identify the methodology and procedure we will use to auction the licenses. We do so in the paragraphs below, pursuant to Section 309(j)(3) of the Communications Act and based on the record in this proceeding.[14] As described below, some further details about specific competitive bidding procedures will be provided later by Public Notice(s).[15]

A. General Competitive Bidding Designs

6. The Second Report and Order established the criteria to be used in selecting the auction design method for each auctionable service. Generally, we concluded that awarding licenses to those parties that value them most highly will foster Congress' policy objectives. In this regard, we noted that because a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of the license to that bidder, an auction design that awards licenses to those bidders who are willing to pay the highest bid tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum.

7. We concluded that where the licenses to be auctioned are interdependent (that is, either substitutes for, or complements to, each other) and their value is expected to be high, "simultaneous multiple round" auctions would best achieve the Commission's goals for competitive bidding.[16] We also noted that simultaneous multiple round

---

[13] Second Report and Order at ¶¶ 3-7.

[14] We received comments or reply comments on auctioning licenses in the IVDS from the following: American Group (American); Quentin L. Breen (Breen); Chase McNulty Group, Inc. (Chase); EON Corporation (EON)(ex parte filings); Independent Cellular Consultants (ICC); Andrea L. Johnson (Johnson); Kingswood Associates (Kingswood); NYNEX Corporation (NYNEX); Radio Telecom and Technology, Inc. (RTT); Harry Stevens, Jr. (Stevens); and Richard L. Vega Group (RLV). Of these, five -- American (reply comment at 23-25), Kingswood (reply comment at 23-25), NYNEX (comment at 11), Stevens (reply comment at 1), and RLV (comment at 11-14) -- commented in this context only on whether IVDS should be subject to auctions, an issue we addressed in the Second Report and Order. See ¶ 3, supra.

[15] The Public Notice(s) will be issued by either the Commission or the Private Radio Bureau.

[16] See Second Report and Order at ¶¶ 106-111. With this method, all licenses or classes of licenses are auctioned at once, using multiple rounds, and the bidding continues until bidding activity subsides. Thus, bidders may repeatedly "top" the previously high

bidding is more complex for bidders and may be administratively more expensive than other auction methods we may select, and indicated that we would use this design only in instances where the expected value of the licenses to be auctioned is high relative to the costs of conducting a simultaneous multiple round auction.[17]

8. In the Second Report and Order we stated our intention to tailor the auction design to fit the characteristics of the licenses to be awarded. We noted that simultaneous multiple round auctions may not be appropriate for all licenses.[18] The less the interdependence among licenses, the less the benefit to auctioning them simultaneously. To the extent that simultaneous auctions are more costly and complex to run, we indicated that we may choose a sequential auction design, including sequential oral auctions, when there is little interdependence among individual licenses.

9. We further explained that when the values of particular licenses to be auctioned are low relative to the costs of conducting a simultaneous multiple round auction, we may consider auction designs that are relatively simple, with low administrative costs and minimal costs to the auction participants. We noted that as the value of licenses decreases, and thus the benefits of simultaneous multiple round bidding diminish relative to the cost and complexity of such auctions, a less complex auction method may be more suitable. For example, with large numbers of low value licenses we noted that we may decide that it is preferable to implement a low cost auction method such as single round sealed bidding to minimize cost and expedite the licensing process.

10. Last, in the Second Report and Order we noted that Congress directed us to "design and test multiple alternative methodologies under appropriate circumstances."[19] Thus, where appropriate, we intend to choose bidding methods other than simultaneous multiple round auctions and periodically reevaluate the effectiveness of all methods utilized.

B. IVDS Competitive Bidding Design

11. We find that the generally preferred method of simultaneous multiple round auctions is not the most appropriate for IVDS, and that IVDS also presents a good opportunity to test less complex alternative procedures. As discussed below, of the auction methods described in the Second Report and Order, oral bidding (open outcry) and single round sealed bidding appear best suited to the IVDS. Both are relatively inexpensive fc the Commission to administer, and the costs

---

bids. <u>See id.</u> at ¶¶ 82, 86.

[17] <u>Id.</u> at ¶ 111.

[18] <u>Id.</u> at ¶ 112.

[19] <u>Id.</u> at ¶ 115, <u>quoting</u> 47 U.S.C. § 309(j)(3); <u>see also</u> ICC comment at 9 (supporting IVDS as a candidate for testing alternative methodologies).

of participation by bidders are fairly low. Moreover, both have the advantage of being relatively simple for bidders to understand and also generally can be completed quickly. Thus, these methods are likely to promote the statutory goal of rapid implementation of service to the public.[20] We therefore adopt these two methods to auction IVDS licenses.[21]

12. The IVDS offers two 500 kilohertz channels (frequency segments A and B) in each of 734 service areas, and the aggregation of both channels in a market is not permitted. While there may be some degree of interdependency among the IVDS licenses for geographically contiguous areas,[22] we do not believe that it is great enough to justify the greater costs and administrative complexities associated with holding a simultaneous multiple round auction.[23] Last, with large numbers of IVDS licenses covering only rural areas,[24] we anticipate that the demand for, and value of, most markets will not be great enough to justify the use of more complex methods such as simultaneous multiple round auctions.[25]

13. For IVDS open outcry auctions, each service area (with two licenses each) will be auctioned individually, and the two highest bidders in each service area will be awarded a license. The highest bidder will get first choice of frequency segment A or segment B at the highest bid price. The second highest bidder will be awarded the remaining segment at the amount it bid.

14. With single round sealed bidding, we will auction the two frequency segments separately. Licenses for frequency segment B will be auctioned first. As soon as practicable thereafter, we will announce the high bidders for licenses on frequency segment B and

---

[20] See 47 U.S.C. § 309(j)(3)(A).

[21] If, as we gain experience, we find that another auction design for the IVDS would better achieve the goals of the Budget Act, we may revisit this issue.

[22] Two commenters, EON and ICC, very briefly address the issue of potential interdependence among IVDS licenses. EON argues that the sequence of IVDS auctions should track "ADIs," a proposal we discuss and adopt infra. EON does not state, however, that bidders might perceive the aggregation of licenses to result in additional efficiencies of IVDS operation. EON ex parte filing of Jan. 26, 1994, at 4. ICC states that auction procedures favoring license aggregation run counter to policies favoring licensee diversity. ICC Comment at 7.

[23] The interdependencies for IVDS are likely to be less than for services where roaming is important. See generally Second Report and Order at ¶ 91. The IVDS rules do not permit "roaming" across service areas.

[24] See note 5, supra.

[25] See Second Report and Order at ¶¶ 112-113.

announce a deadline date for short-form applications for segment A licenses. In the event of a tie in single round sealed bidding, we will hold one additional round between the parties that tied.

15. Having both oral and sealed bidding methods available permits us the flexibility to fit the right auction method to the particular IVDS licenses being auctioned. Further, it is consistent with Congress' directive that we design and test multiple alternative methodologies under different circumstances. ICC comments that, of the two methods, sealed (or electronic) bidding is preferable to oral bidding because some potential bidders perhaps cannot afford to attend an auction in person.[26] As noted in the Second Report and Order, however, such sealed bidding generates no information about license values until after the auction closes, tending to decrease bid levels and reduce the efficiency of the license assignment.[27] We therefore believe that oral bidding should be used in the potentially higher valued markets, where having license value information during the auction is especially important, and that sealed bidding should be used for the remaining markets.[28]

16. We believe that, in general, the greater the population in the service area, the greater will be the perceived value of, and demand for, the license. The 734 service areas for the IVDS are identical to those of cellular radio service areas: 306 "Metropolitan Statistical Areas" (MSAs) and 428 "Rural Service Areas" (RSAs).[29] We have concluded that we should conduct oral auctions for the IVDS service areas corresponding to MSAs, and sealed bid auctions for the remaining service areas, or RSAs. We reserve the discretion to reconsider this bidding design if, in light of experience gained with auctions, a change appears warranted.[30]

C. **Bidding Procedures**

17. Sequencing. We must choose the sequence in which IVDS licenses will be auctioned. We believe that, in general, the higher valued IVDS licenses should be auctioned first: the cost to the

---

[26] ICC comment at 6-7, reply comment at 7-8. Chase would prefer that we randomly alternate between oral and sealed methodologies. Chase comment at 1-2.

[27] Second Report and Order at ¶ 89 n. 81.

[28] For example, when choosing between the two methods, we do not want to hold the more expensive oral bidding auction in instances where we believe that the operational costs of holding the auction might outweigh the benefits (efficient allocation and revenues generated).

[29] See note 5, supra.

[30] For instance, sealed bidding might be appropriate if we re-auction a small number of MSAs, or postpone initially the auctioning of MSAs located near international borders while agreements are negotiated.

public from delaying licensing increases with the value of the license, and, to the limited extent that aggregation of licenses is important, auctioning the higher valued licenses first facilitates it.[31] In determining the sequence for auctioning IVDS licenses we are persuaded by EON's argument that the IVDS is a television-driven service and that the licenses should therefore be auctioned in a manner consistent with the geographic areas defined by "Areas of Dominant Influence" (ADIs),[32] rather than by numerical order of service area. EON and ICC also commented generally that licenses for the more densely populated IVDS service areas should be auctioned prior to the other areas.[33] Therefore, we will auction licenses in ADI order, starting with the lowest numbered ADI (having the highest population) and proceeding in numerical order.[34] Prior to starting the auction process, we will issue a Public Notice listing the pertinent ADIs, and the order in which licenses for the corresponding service areas will be auctioned (by open outcry) in each ADI. We anticipate that we will hold sealed bid auctions for licenses in rural areas as soon as practicable after auctioning the more populated areas. For the rural areas, licenses on frequency segment B will be auctioned first, and then a separate sealed bid auction will be held for licenses on frequency segment A.

18. Bid Increments. In a multiple round auction, a bid increment is the amount or percentage by which a bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current round of bidding. For IVDS auctions, the Commission, including the auctioneer, retains the discretion to impose bid increments before or during the auction.[35]

---

[31] Second Report and Order at ¶¶ 117-120. We have noted, "Knowing who has won [the] large markets is likely to be more important for bidding decisions about small markets than the converse." Id. at ¶ 119.

[32] This standard market definition, developed by Arbitron Ratings Company, places each county in the continental U.S. within one of 210 ADIs.

[33] EON ex parte filing of Jan. 26, 1994, at 2, 4; ICC comment at 7.

[34] The majority of ADIs comprise a number of MSAs. See generally note 5, supra. We will auction the lowest numbered service area in the ADI first, then go in numerical order until all MSAs in that ADI are auctioned. We will also auction the remaining service areas (MSAs) that make up the ADIs for the 9 markets that were lotteried. See id.

[35] See generally id. at ¶ 126.

IV. PROCEDURAL, PAYMENT AND PENALTY ISSUES

A. Pre-Auction Application Procedures

19. The Second Report and Order established general rules and procedures for participating in auctions. Again, however, we noted that these might be modified on a service-specific basis. As described below, we have determined that we will follow the procedural, payment, and penalty rules established in the Second Report and Order, with certain minor modifications to fit the IVDS. Certain procedural details will be supplied later by Public Notice(s). Our objective has been to design rules and procedures that will reduce administrative burdens and costs on bidders and the Commission, ensure that bidders and licensees are qualified and able to construct their systems, and minimize the potential for delay of service to the public.

20. We will require applicants to follow the application filing and processing rules outlined in the Second Report and Order.[36] Before each scheduled IVDS auction the Commission, or, pursuant to delegated authority, the Private Radio Bureau, will release Public Notices concerning the auction. The Public Notices will specify the license(s) to be auctioned and the time, place, and method of competitive bidding to be used, as well as applicable bid submission and payment procedures. A Public Notice will also specify the filing deadline date for short-form applications.

21. Bidders will be required to submit short-form applications on FCC form 175 by the date specified in the Public Notice.[37] If the Commission receives only one application that is acceptable for filing for a particular frequency segment, and there is thus no mutual exclusivity,[38] the Commission will by Public Notice cancel the auction for this license and establish a date for the filing of a long-form

---

[36] Second Report and Order at ¶ 160-188. In its comments, RTT sets forth a waiver request and asks that we rule on it in advance of the IVDS auctions. RTT comment at 1-5. Specifically, RTT requests that the Commission, by declaratory ruling, rule that any IVDS licensee using "T-NET" technology, with a power level greater than that permitted in our rules, will be granted a rule waiver to permit the power level. We will not make the requested ruling at this time. All requests for waiver must be evaluated in the context of a specific system design for avoidance of interference to television reception. This information can be provided when the applicant files a long-form application for license in a particular market. _See generally_ Second Memorandum Opinion and Order in Gen. Docket No. 91-2, 8 FCC Rcd 2787, 2788 ¶ 8 (1993).

[37] Applicants should note whether they intend to bid for one or both frequency segments. Applicants need not submit microfiche originals or copies.

[38] As noted previously, absent mutually exclusive applications, the Commission is prohibited from auctioning the license. 47 U.S.C. § 309(j)(1).

application (FCC Form 574). In order to encourage maximum bidder participation, we will provide applicants whose short-form applications are substantially complete, but which contain minor errors or defects, with an opportunity to correct their applications prior to the auction. However, applicants will not be permitted to make any major modifications to their applications, including ownership changes or changes in the identification of parties to bidding consortia.[39] In addition, applications that are not signed or that fail to make the required certifications will be dismissed and may not be resubmitted.

22. The Commission will issue a subsequent Public Notice listing all applications containing minor defects, and applicants will be given an opportunity to cure and resubmit defective applications. After reviewing the corrected applications, the Commission will release another Public Notice announcing the names of all applicants whose applications have been accepted for filing.

B. Upfront Payment

23. In the Second Report and Order, we described three types of payments: upfront payments, down payments, and final payments. Chase favors upfront payments, while ICC believes that such a requirement would constitute a hardship on small entrepreneurs.[40] We believe an upfront payment is needed for oral outcry IVDS auctions. Requiring this payment provides some degree of assurance that only serious, qualified bidders will participate and serves as a deterrent to the filing of speculative applications which tend to slow down the provision of service to the public. It also provides the Commission with a source of funds to satisfy any penalties assessed. Therefore, we will require the upfront payment and retain the flexibility to determine the payment amount on an auction-by-auction basis. We will not, however, require an upfront payment for applicants in sealed bid IVDS auctions.

24. A bidder may file applications for every IVDS license being auctioned, but, for open outcry auctions, its upfront payment should reflect the maximum number of licenses it desires to win. Once a bidder is a "winning" bidder for the maximum number of licenses reflected by its upfront payment, it will be precluded from bidding further. We will use the following procedure for collecting this payment for oral bidding IVDS auctions. The applicant or its representative will be required to show the Commission, immediately prior to the auction, a cashier's check for at least $2,500[41] in order

---

[39] See Second Report and Order at ¶ 167.

[40] Chase comment at 2; ICC comment at 8, reply comment at 7.

[41] In establishing procedures for auctioning IVDS licenses, we have tried to reduce the complexities of the auction process for both the Commission and potential applicants. To this end, we have established a standard, reasonable upfront payment amount in lieu of an amount based on a formula (e.g., $0.02/pop/MHz). Such a formula,

to get a bidding number and enter the designated area in the room where the bidding will take place. Bidders will be required to have $2,500 upfront money for every five licenses they win.[42] The $2,500 upfront payment will be collected immediately after the first license is won by an applicant.[43] The highest bidder will be asked to sign a bid confirmation form. The upfront money will later be counted toward the down payment. We believe these procedures will keep the auction process simple, keep costs down for small businesses who wish to bid on only a few licenses, and eliminate Commission expenses due to issuing refunds.

C. Payment for Licenses Awarded by Competitive Bidding

25. To provide further assurance that winning bidders will be able to pay the full amount of their bids, we decided generally in the Second Report and Order that each winning bidder must tender a down payment sufficient to bring the total deposit up to 20 percent of the winning bid. We believe a down payment is appropriate for IVDS. Therefore, winning bidders will be required to supplement their upfront payments to bring their total deposit with the Commission up to at least 20 percent[44] of the final payment due for the license(s) won in that particular auction.[45] The down payment will be due within

---

when used in the context of more populated areas, can result in a very substantial upfront payment. In the context of IVDS, we believe $2,500 strikes a good balance between ensuring that only serious, qualified bidders participate and not placing an unreasonable financial burden on small businesses. This amount was established in the Second Report and Order, _see_ _id._ at ¶ 180, as the general minimum upfront payment, consistent with comments submitted.

[42] For example, if a bidder brings only one check for $2,500 and wins five licenses, he or she will not be allowed to bid on another license. If a bidder brings two $2,500 checks, he or she may bid until 10 licenses are won. Therefore, if a bidder anticipates winning 16 licenses, he or she must bring four $2,500 cashier's checks.

[43] The upfront money will be collected immediately after the first license is won in each group of five licenses (1, 6, 11, etc.). Bidders should bring a $2,500 cashier's check for each five licenses they desire to purchase. The Commission will not refund money to those bringing a single check to cover the total upfront payment required, rather than multiple $2,500 checks, if the single check is for an amount ultimately greater than the upfront payment required. On request we will, however, apply such balance to any further monies owed in the context of IVDS auctions.

[44] Small businesses using the preference of installment payments, _see_ Section VI below, need only bring their deposits up to 10 percent within 5 business days, with the remaining 10 percent due within five days of the license grant. _See_ Second Report and Order at ¶¶ 192 n. 145, 238.

[45] If the upfront payment already tendered amounts to 20 percent or more of the winning bid, no additional deposit will be required.

five business days after the close of bidding.[46] The down payment will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable penalties. During the period that deposits are held pending ultimate award of the license, the interest that accrues, if any, will be retained by the Government.

26. Long-form applications (FCC Form 574) will be due from successful bidders within 10 business days after they have been notified of their winning bidder status.[47] Once we have reviewed the application and made a determination that the applicant is qualified, we will grant the license, conditioned on the timely payment of all monies due. In the Second Report and Order, we decided to require auction winners to make full payment of the balance of their winning bids within 5 business days of the grant of their license, except for small businesses using the preference of installment payments.[48] This time frame appears to be appropriate for IVDS, and we will therefore use it.

D. Default and Disqualification

27. In the Second Report and Order, we concluded that strong incentives are needed to ensure that potential bidders are financially and otherwise qualified to participate in auction proceedings, so as to avoid delays in the deployment of new services to the public.[49] We stated that, for open outcry auctions, we will assess a default penalty if a bidder fails to make the down payment on a license, fails to pay for a license, or is disqualified after the close of an auction. In the case of single round bidding, we stated that we will impose a penalty in instances where the default occurs after the high bidder has been notified by the Commission that it has submitted the high bid.[50]

28. In an oral auction, a winning bidder that withdraws its bid after signing a bid confirmation form or fails to remit the required down payment or balance of its winning bid in the time frame

---

[46] Second Report and Order at ¶ 192. For single round sealed bidding, we will notify the high bidders soon after the auction. The down payment will then be due within five business days.

[47] If a filing fee is required, the general rules governing the submission of fees will apply. See 47 C.F.R. § 1.1101 et seq. These rules provide for dismissal of an application if the application fee is not paid, is insufficient, is in improper form, is returned for insufficient funds, or is otherwise not in compliance with our fee rules. See also Second Report and Order at ¶ 167 n. 127.

[48] Id. at ¶ 194.

[49] Id. at ¶¶ 195-197.

[50] Id. at ¶¶ 156-157.

specified, will be deemed to have defaulted. In a sealed bid auction, a winning bidder is deemed to have defaulted if it withdraws its bid after publication of the initial public notice notifying auction winners or fails to remit the required down payment or balance of its winning bid in the time frame specified. In such instances, we may re-auction the license or offer it to the next highest bidder(s). In cases where disqualification or default occurs after the full down payment has been made, we will hold a new auction for the license. Further, "if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission also may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it may deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant."[51] Entities who obtain their licenses through the auction process are put on notice that if their licenses are revoked or canceled they will forfeit all monies paid to the Commission regarding those licenses.[52]

29. We believe it is important to adopt default penalties for IVDS auctions. If a bidder in an oral auction defaults or is disqualified, a default penalty will be imposed equal to the difference between the bidder's high "winning" bid and the amount of the winning bid the next time the license is offered by the Commission, if this latter amount is lower. In addition, with open outcry auctions, the defaulting auction winner will be assessed a penalty of three (3) percent of the subsequent winning bid or three percent of its own (the defaulting bidder's) bid, whichever is less.[53] The additional three percent penalty is designed to discourage insincere bidding and to compensate the government for the cost of reauctioning a license. In single round sealed bid auctions, if a high bidder defaults prior to making the required down payment, we will impose a default penalty equal to the difference between the high bid and the next highest bid. If a high bidder defaults after having made the down payment, the additional three percent penalty will be applied.[54]

V. REGULATORY SAFEGUARDS

A. Unjust Enrichment Provisions

30. Congress directed that we take steps to prevent unjust enrichment due to trafficking in licenses that were obtained through competitive bidding. 47 U.S.C. § 309(j)(4)(E). In Section VI, below, we adopt specific rules governing unjust enrichment by designated

---

[51] Id. at ¶ 198.

[52] This includes licensees who fail to meet the construction benchmarks contained in 47 C.F.R. § 95.833.

[53] Id. at ¶¶ 154-157.

[54] See id. at ¶ 157.

entities.[55] The IVDS rules already contain provisions to reduce trafficking,[56] and ICC argues that these rules are sufficient.[57] Consistent with the Second Report and Order, however, the IVDS-specific anti-trafficking provisions will not apply to licenses obtained through competitive bidding, although we will enforce the new transfer disclosure requirements contained in Section 1.2111 of our rules.[58] Generally, applicants seeking to transfer their licenses within five years of the initial license grant will be required to file, together with their transfer application, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of the license. We will give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for an assignment or transfer of control of their licenses, in order to determine whether any unforeseen problems relating to unjust enrichment have arisen outside of the designated entity context.

B. Performance Requirements

31. Congress has directed that the Commission, in implementing auction procedures, "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."[59] In the Second Report and Order, we decided that it was unnecessary and undesirable to impose additional performance requirements for auctionable services beyond those already provided in service rules.[60] The IVDS rules already contain specific performance requirements, such as the requirement to build-out the system within a specified period of time. See, e.g., 47 C.F.R. § 95.833. Entities that obtain, by transfer or assignment, an IVDS license that was awarded by competitive bidding, take such license subject to the existing performance requirements.

---

[55] See ¶¶ 47, 52, 54 & n. 90, infra. We have amended 47 C.F.R. § 95.819 to clarify the procedures for the transfer or assignment of IVDS licenses.

[56] For example, current IVDS licenses must meet the five-year construction benchmark before they may transfer, sell, assign, or give an IVDS license to another entity. See 47 C.F.R. § 95.819.

[57] ICC comment at 7.

[58] See 47 C.F.R. § 1.2111; Second Report and Order at ¶¶ 263-265.

[59] 47 U.S.C. § 309(j)(4)(B).

[60] Second Report and Order at ¶ 219.

C. Rules Prohibiting Collusion

32. In the Second Report and Order we adopted special rules prohibiting collusive conduct in the context of competitive bidding. See 47 C.F.R. § 1.2105(c). We indicated that such rules would serve the objectives of the Budget Act by preventing parties, especially larger firms, from agreeing in advance to bidding strategies that might divide the market according to their strategic interests and to the disadvantage of other bidders. These rules apply to all auctionable services, including the IVDS. Bidders are required to identify on their FCC Form 175 applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. Bidders are also required to certify that they have not entered into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. After the short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.

33. Concerning bidding consortia, joint venture, partnership or other such agreements or arrangements, all such arrangements must have been entered into prior to the filing of short-form applications. Where specific instances of collusion in the competitive bidding process are alleged, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to forfeiture of their down payment or their full bid amount, revocation of their license(s), and may be prohibited from participating in future auctions.

VI. TREATMENT OF DESIGNATED ENTITIES

A. Introduction

34. As discussed in the Second Report and Order, Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). The statute requires the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" in order to achieve this congressional goal. In addition, Section 309(j)(3)(B) provides that in establishing eligibility criteria and bidding methodologies the Commission shall promote "economic opportunity and competition ... by avoiding excessive concentration of licenses and 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." 47 U.S.C. § 309(j)(3)(B).

Finally, Section 309(j)(4)(A) provides that to promote these objectives, the Commission shall consider alternative payment schedules, including lump sums or guaranteed installment payments.

35. In the Second Report and Order we established the eligibility criteria and general rules that would govern the award of preferences for designated entities. We also established a menu of preferences, including installment payments and bidding preferences, that we could choose from in selecting the preferences that will be applicable to a particular service, and specified the circumstances under which a tax certificate program would be established. In addition, we set forth rules to prevent unjust enrichment by designated entities seeking to transfer licenses obtained through use of one of the preferences.

36. In this Fourth Report and Order we adopt specific preferences for the IVDS designed to ensure that designated entities are given the opportunity to participate both in the competitive bidding process and in the provision of the service. In particular, we adopt the following preferences:

(1) A 25 percent bidding credit will be available for one license in each service area (for either frequency segment A or B), for businesses owned by minorities and/or women;

(2) Tax certificates will be available to initial investors in minority and women-owned enterprises upon divestiture of their non-controlling interests, and to licensees who transfer their authorizations to minority or women-owned businesses; and

(3) Installment payments will be made available to small businesses.

We also incorporate and adopt the unjust enrichment provisions adopted in the Second Report and Order applicable to each of the preferences we adopt here, and adopt the designated entities eligibility requirements of the Second Report and Order.[61]

37. We received IVDS-specific comments favoring the preferences of spectrum set-asides[62] and royalty payments.[63] As we noted in the Second Report and Order, however, the appropriateness of preferences is best determined in light of the characteristics of the particular service and the nature of its expected pool of bidders, and we find

---

[61] See 47 C.F.R. § 1.2111; Second Report and Order at ¶¶ 267-278.

[62] Breen and ICC favor set-asides as a means to encourage applications from small businesses. Comments of Breen 9; ICC at 4-6. ICC also argues that, without set-asides, large telecommunications providers might attempt to stifle IVDS technology or permit it only as an adjunct to existing offerings. ICC comments at 5-6.

[63] Breen and ICC state that this option will encourage participation by designated entities. Breen at 7; ICC comment at 7, reply comment at 8.

that these preferences are not appropriate for the IVDS. Concerning set-asides, we note that the total spectrum available in the service is small: two 500 kilohertz channels available in each service area. Thus for the IVDS, with its licensing scheme of two licenses per market, the use of set-asides would result in one of every two licenses being reserved for designated entities. We decline to reserve so great a proportion of the service's spectrum. Furthermore, in the Second Report and Order we decided, for all services, not to use the preference of royalty payments.[64] While we will continue to assess the feasibility of these preferences as we gain experience with auctions in the context of this and other services, we are not persuaded to change our decision for the IVDS.

38. We note that the IVDS, with its expected relatively low capital entry requirements, is well suited for ownership by designated entities and other potential bidders that might otherwise lack the financial resources to compete by auction for a license. This, combined with the variety of uses possible with the service, makes it likely that the IVDS will promote economic growth and enhance the access of consumers to new and innovative service offerings. As we gain experience with IVDS auctions, we intend continually to assess the effectiveness of our measures, and will apply any knowledge gained to subsequent auctions for other services.

B. Bidding Credits

39. In the Second Report and Order we stated that we would consider using bidding credits to encourage participation by designated entities in auctions. Upon consideration and review of the record on this subject, we believe that affording businesses owned by minorities and women a substantial bidding credit for certain specified IVDS licenses is the most cost-effective and efficient means of achieving Congress' objective of "ensuring" the opportunity of these designated entities to participate in the provision of IVDS offerings. Bidding credits will provide minority and women-owned firms with a significant advantage, which we believe is necessary to achieve this congressional goal, while preserving the advantages of open bidding competition. In effect, the bidding credit will function as a discount on the bid price a minority or women-owned firm will actually have to pay to obtain a license and, thus, will address directly the financing obstacles encountered by these entities. We believe that a bidding credit in the amount of twenty-five (25) percent is necessary to provide these designated entities with a significant enough advantage to ensure their ability to compete successfully for some IVDS licenses. Thus, in each market, a single 25 percent bidding credit will be awarded to a business owned by minorities and/or women if it is a winning bidder.[65]

---

[64] Id. at ¶¶ 252-253.

[65] Only one bidding credit is available in each market. If it happens that the two highest bidders are both designated entities eligible for a bidding credit, the second highest bidder will be given the option of accepting the remaining license without the credit, or declining the remaining license.

40. As discussed in the Second Report and Order, Congress mandated that the Commission "ensure" the opportunity for participation in spectrum-based services by each category of designated entity, including businesses owned by minorities and women. This plain language leads us to conclude that adequate measures must be taken to assure that minority and women-owned businesses have the ability to participate in the provision of services subject to competitive bidding. Moreover, in enacting this legislation, it is clear that Congress was concerned about disseminating licenses to a wide variety of applicants and wanted the Commission to take meaningful steps to accomplish this goal.[66] Indeed, Congress included a requirement in the statute that the Commission report to it in 1997 about, among other things, whether competitive bidding facilitated the introduction of new companies into the telecommunications market and whether designated entities "were able to participate successfully in the competitive bidding process." 47 U.S.C. § 309(j)(12)(iv).

41. Apart from Congress' directive, we think that ensuring opportunities for women and minorities to participate in the IVDS is important for the telecommunications industry. These companies can play a vital role in serving inner city areas and other niche markets that may be overlooked by other companies, thus promoting our goal of universal access to telecommunications services. Not only will the industry become more diverse through the adoption of meaningful preferences, but we believe that a much wider customer base will obtain access to innovative technologies. Moreover, studies show that even when minority-owned firms do not locate within urban minority communities, they employ more minorities relative to other companies, thereby promoting our goals of equal employment opportunity and economic growth.[67]

---

[66] We have decided not to provide bidding credits (or other separate preferences) to rural telephone companies bidding on IVDS spectrum because we conclude that, given the relatively modest build-out costs for systems in this service, such preferences are unnecessary to ensure the participation of rural telephone companies in the provision of IVDS offerings to rural areas. The preferences are also, therefore, unnecessary in this context to meet Congress' intent to ensure that rural consumers receive the benefit of new technologies such as IVDS. Rural telephone companies will, however, be eligible for bidding credits if they are owned by minorities or women. They may also qualify for installment payments if they satisfy the eligibility criteria for small businesses.

[67] See, e.g., 47 C.F.R. § 21.307, 22.307 (equal employment opportunity rules for common carriers); Implementation of the Commission's Equal Employment Opportunity Rules (Notice of Inquiry), FCC 94-103 (released April 21, 1994)("[O]ur EEO rules enhance access by minorities and women to increased employment opportunities which are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership. Thus the rules ... promote the further development of the broader communications infrastructure.") See also Banking on Black Enterprise at 3.

42. The general record in this proceeding[68] reflects a severe underrepresentation of minorities and women in telecommunications. Indeed, the Commission's Small Business Advisory Committee (SBAC) found only 11 minority firms engaged in the delivery of cellular, specialized mobile radio, radio paging, or messaging services.[69] Likewise, American Women in Radio and Television (AWRT) found that only 24 percent of small communications businesses are owned by women (when companies without paid employees are excluded, women own less than 15 percent of small communications firms).[70] Many commenters observe that the factors that preclude minorities and women from effective participation concern access to financing. With regard to women, they note that no existing FCC policy provides an incentive for women to enter the communications business, and that access to capital remains the biggest obstacle women business owners must face. Similarly, the SBAC states that minorities frequently do not or cannot use traditional sources of financing. Citing the U.S. Senate amicus brief in Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990), the SBAC asserts that "spectrum for radio facilities was first allocated at a time when undisguised discrimination in education, employment opportunities, and access to capital excluded minorities from all but token participation." The SBAC concludes that minorities were impeded from successfully competing for licenses when they were first awarded and, due to systematic barriers to technical training and employment opportunities, this situation has continued over time.

43. Given this history of underrepresentation of minorities and women in telecommunications and the inability of these groups to access financing, we find that the best way we can accomplish these statutory mandates is to provide bidding credits exclusively to minority and women-owned businesses. The record demonstrates that women and minorities face barriers to entry not encountered by other firms, including other designated entities, and it is, therefore, appropriate and necessary that we provide them with a substantial bidding advantage.[71] In other contexts, Congress has recognized that the use of preferences in the licensing process can be necessary to remedy underrepresentation by minorities. For example, in 1982, Congress mandated the grant of a "significant preference" to minority applicants participating in lotteries for spectrum-based services. 47 U.S.C. § 309(i)(3)(A). And, in 1988, Congress attached a provision to the FCC appropriations legislation that precluded the Commission from spending any appropriated funds to examine or change its minority

---

[68] For a list of all commenters in this proceeding, see Appendix A, Second Report and Order. Footnote 14, supra, lists those commenters that made IVDS-specific comments.

[69] Report of the FCC Small Business Advisory Committee to the FCC Regarding Gen. Docket No. 90-314 (Sept. 15, 1993), reprinted at 8 FCC Rcd 7820, 7827 (1993).

[70] See Comments of AWRT at 5.

[71] See, e.g., Comments of AWRT at 4-7; Call-Her at 5; Cook Inlet at 38-39.

broadcast preference policies.[72] Absent such measures targeted specifically to women and minorities, it would be virtually impossible to assure that these groups achieve any meaningful measure of opportunity for actual participation in the provision of the services in question.[73]

44. We also agree with Call-Her that even comparatively large businesses owned by women and minorities face discriminatory lending practices and other discriminatory barriers to entry and, therefore, eligibility for bidding credits should not be limited to small firms. The IVDS auctions present a unique licensing opportunity for these historically disadvantaged groups to gain a foot-hold in the communications industry.[74] Our goal is to encourage businesses owned by minorities and women to provide viable, sustained competition to larger businesses. Therefore, we have accorded preferences to minority and women-owned firms regardless of their size. This

---

[72] Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-102, 101 Stat. 1329-31.

[73] In the Second Report and Order, we addressed the constitutionality of race and gender-based preferences and concluded that the proper standard of scrutiny to be employed in this context is the "intermediate scrutiny" standard used in the Metro case. Second Report and Order at ¶¶ 289-297; see 110 S.Ct at 2997. We further concluded that under such a standard, preferences for minority and women-owned businesses are constitutionally permissible. We recognize that Metro's standard of review applies to measures approved by Congress. 110 S. Ct. at 3008-09. As noted above, the bidding credits in question here were expressly approved and, indeed, are required to achieve the statutory goals. See 47 U.S.C. § 309(j)(4)(D) (The Commission must "consider the use of tax certificates, bidding preferences, and other procedures" to ensure the participation of "small businesses, rural telephone companies, and businesses owned by members of minority groups and women."). Moreover, an argument might be made that IVDS licensees will be able to control the content of the transmissions carried on their facilities and that the service can therefore be analogized (at least) to mass communications media. See, e.g., Johnson comment at 1-4, 8 (like other emerging subscription-based services, IVDS will, in practice, increasingly converge with broadcast and cable services). To the extent that this control exists or is later developed with regard to the IVDS, the preferences we adopt for minorities and women would be consistent with the important governmental interest identified in Metro: increasing minority ownership to encourage diversity in the provision of content.

[74] Because of the discrimination suffered by minorities and women as contractors and subcontractors in the telecommunications industry, see MBELDEF Study, this unique chance to enter the field as primary telecommunications providers, competing with, rather than dependent upon, other providers, is especially important.

approach is consistent with our auction rules and will further the statutory mandate to ensure participation by designated entities.[75]

45. Further, Congress clearly intended that businesses owned by minorities and women must be given the opportunity to participate in the provision of spectrum-based services independent of their status as small businesses. The plain language of Section 309(j)(4)(D) states that the Commission "shall ... ensure" the opportunity for participation by "small businesses ... and businesses owned by members of minority groups and women ...." (emphasis added). If Congress had intended to limit the directive of Section 309(j)(4)(D) only to small businesses, no need would have existed to mention separately minorities and women. Moreover, Section 309(j)(4)(D) was added at Conference, and the Conference Report does not offer any suggestion that, to come within the section's purview, businesses owned by minorities or women must be small businesses. In contrast, and as we discussed more fully in the Second Report and Order, the legislative history of Section 309(j)(4)(A), relating to installment payments, expressly indicates that the provision was intended only to promote financial assistance for small businesses.[76] Accordingly, we shall interpret Section 309(j)(4)(D) in accordance with its plain language and will not limit its application to small businesses.[77]

46. In determining the appropriate amount of the bidding credit we considered several factors. First, we agree with those commenters that support a bidding credit of 25 percent or more[78] because we think that a substantial credit is necessary to ensure meaningful participation by minority and women-owned businesses. In the broadcast context, we have noted that licensees can transfer their stations to minorities in distress sales provided that the price is no more than 75 percent of market value.[79] This policy is based upon our

---

[75] See Banking on Black Enterprise at 13 (government assistance should accrue to more capable black entrepreneurs, who are most likely to contribute to the goal of economic development).

[76] See Second Report and Order at ¶¶ 234-236.

[77] Even though small businesses are also mentioned in Section 309(j)(4)(D), we do not believe bidding preferences for small businesses are appropriate for IVDS auctions. We believe the installment payments preference, as outlined below, will be sufficient to ensure their participation.

[78] See comments of AIDE at 7, Devsha at 5, NABOB at 10-11, and ex parte filing of Personal Communications Network Services of New York at 2-3, each suggesting a bidding credit of 25 percent. Rocky Mountain Telephone proposes a 50 percent bidding credit. Comments of Rocky Mountain Telephone at 16. And Richard Vega proposes a 100 percent bidding credit for certain designated entities. Comments of Richard Vega at 7.

[79] See Lee Broadcasting Corp., 76 FCC 2d 462 (1980).

finding that 25 percent is an appropriate discount to eliminate financial entry barriers for minority-owned companies seeking to become broadcast licensees. Likewise, we believe that a bidding credit of 25 percent will adequately ensure participation by a wide variety of minority and women-owned firms in IVDS auctions and service provision. The amount is not so substantial, however, as to foster participation by firms that are not otherwise financially capable of building-out an IVDS system. We will monitor carefully the effectiveness of the 25 percent bidding credit in the IVDS context and continually assess whether it is achieving the goal of ensuring that minority and women-owned firms participate successfully in auctions for this service.

47. To prevent any unjust enrichment by minorities or women trafficking in licenses acquired through the use of bidding credits, we will impose a forfeiture requirement on transfers or assignments of such licenses to entities that are not owned by minorities or women.[80] Minority and women-owned businesses seeking to transfer or assign a license to an entity that is not owned by minorities or women will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer or assignment will be permitted. The amount of the penalty will be reduced over time: a transfer or assignment in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit; during year three, of 75 percent of the bidding credit; in year four, of 50 percent; in year five, of 25 percent; and thereafter, no penalty.[81] Furthermore, as noted earlier, we will use the eligibility criteria from the Second Report and Order to ensure that only legitimate minority and women-owned firms are able to take advantage of bidding credits. In addition, to further ensure that our rules are as narrowly tailored as possible, while still fulfilling the statutory goal, we are prohibiting publicly-traded companies from taking advantage of the bidding credits and we are providing bidding credits for only one license in each market for businesses owned by minorities or women.

C. Tax Certificates

48. Congress instructed the Commission to consider the use of tax certificates to ensure designated entity participation in spectrum-based services. See 47 U.S.C. § 309(j)(4)(D). In the Second Report and Order we observed that tax certificates could be useful as a means of attracting investors to designated entity enterprises and to encourage licensees to assign or transfer control of licenses to designated entities in post-auction transactions. We stated further that we would examine the feasibility of using this measure in subsequent service-specific auction rules.[82] After further

---

80 See Second Report and Order at ¶ 264.

81 Interest will also be charged according to the total number of years the license was held.

82 Second Report and Order at ¶ 251.

consideration of this matter, we believe that tax certificates would be an appropriate tool to assist minority and women-owned businesses to attract start-up capital from non-controlling investors. In addition, we believe that tax certificates will give licensees the incentive to assign or transfer their authorizations to such entities in post-auction sales, thereby providing added assurance that minority and women-owned entities will have the opportunity to participate in the provision of IVDS offerings. Accordingly, we will issue tax certificates to initial investors in minority and women-owned IVDS applicants upon the sale of their non-controlling interests. We will also issue tax certificates to IVDS licensees who assign or transfer control of their licenses to minority and/or women-owned entities.

49. As stated previously, the record reveals that women and minorities face barriers to entry not encountered by other designated entities.[83] In particular, they have an especially difficult time accessing capital and, as a result, are severely under-represented in the telecommunications industry. Together with the other preferences we adopt today, tax certificates should help to ensure the participation of minority and women-owned businesses in this service. This measure will make it easier for these designated entities to attract start-up capital because investors will know that they can defer taxes on any gains made when their interests are sold. In addition, tax certificates will provide incentives to licensees to seek out minority and female buyers in after-market sales because the licensees will be able to defer taxes on profits made in the sale.

50. We have used tax certificates over the years to encourage broadcast licensees and cable television operators to transfer their stations and systems to minority buyers.[84] We also have granted tax certificates to shareholders in minority-controlled broadcast or cable entities who sell their shares, when such interests were acquired to assist in the financing of the acquisition of the facility.[85] These broadcast and cable tax certificates are issued pursuant to the Internal Revenue Code, 26 U.S.C. § 1071. While Congress' goal in authorizing tax certificates under Section 309(j)(4)(D) of the Act is somewhat different, and focuses on ensuring the opportunity for designated entities to participate in auctions and spectrum-based services, we think that it will be an equally valuable program. Issuance of tax certificates to investors and licensees that sell to minorities and women will augment the bidding credits preference, and together the measures should increase the ability of these entities to access financing, thus ensuring their opportunity to participate in IVDS auctions and services.

---

[83] See ¶¶ 42-44, supra.

[84] See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982)("1982 Policy Statement"); see also Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978).

[85] 1982 Policy Statement, 92 FCC 2d at 855-58.

51. In implementing this program, we will borrow from our existing tax certificate program and grant tax certificates, upon request, that will enable the licensees and investors meeting the criteria outlined here to defer the gain realized upon a sale either by: (1) treating it as an involuntary conversion under 26 U.S.C. § 1033, with the recognition of gain avoided by the acquisition of qualified replacement property; or (2) electing to reduce the basis of certain depreciable property; or both. Tax certificates will be available to initial investors in minority and women-owned businesses who provide "start-up" financing, which allows these businesses to acquire licenses at auction or in the aftermarket, and those investors who purchase interests within the first year after license issuance, which allows for the stabilization of the designated entities' capital base. Also, in accordance with our existing policy, to be eligible for a tax certificate, such investor transactions must not reduce minority or female ownership or control in the entity below 50.1 percent. The definition of a minority or female-owned entity is set forth in the Second Report and Order and, with regard to our investor tax certificate policy, the entity in which the investment is made must satisfy that definition at the time of the original investment as well as after the investor's shares are sold. For after-market sales, tax certificates will only be issued to licensees who sell to entities that meet that definition. Tax certificates will be granted only upon completion of the sale, although parties can request a declaratory ruling from the Commission regarding the tax consequences of prospective transactions.

52. As with our other tax certificate policies, we wish to deter "sham" arrangements to obtain tax certificates and, pursuant to Section 309(j)(4)(E), therefore adopt measures to prevent unjust enrichment. First, we intend to enforce strictly the definitions adopted in the Second Report and Order and will carefully review investment and purchase arrangements to ensure that 50.1 percent control and equity by minorities and women was, and will be, maintained. Second, like our existing tax certificate program,[46] we will impose a one-year holding requirement on the transfer or assignment of IVDS licenses obtained through the benefit of tax certificates. We believe that the rapid resale of such licenses to non-minorities or women at a profit would subvert our goal of ensuring the opportunity to participate by minority and women-owned businesses. The well-established one-year holding period would prevent this type of unjust enrichment. While this restriction will not be applied to assignments or transfers to qualified minority and female-owned businesses, assignees and transferees obtaining licenses pursuant to this exception will be subject to the one-year holding requirement.

D. Installment Payments

53. In this Fourth Report and Order, we adopt the preference of installment payments and limit its use to small businesses. Permitting a winning bidder to pay by installment payments is the

---

[46] See Amendment of Section 73.3597 of the Commission's Rules, Memorandum Opinion and Order, 99 FCC 2d 971, 974 (1985).

equivalent of having the government extend credit to the bidder. Using this option, a prospective licensee may not need to rely as heavily on private financing either before or after an auction. As a result, this method is an effective way to promote the participation of designated entities in the provision of spectrum-based services, and is an effective means to distribute licenses and services among geographic areas.[87] In the Second Report and Order, we decided that the option of installment payments should be extended only to small businesses (including those held by minorities and women), and then only in instances where smaller spectrum blocks are being auctioned and the use of the blocks is very likely to match the business objectives of bona fide small businesses.[88] With the IVDS, the spectrum blocks are relatively small and the potential difficulties associated with permitting this option in the context of larger spectrum blocks (e.g., undercapitalization) are not present. We also find that, because of the expected relatively low capital entry requirements for the IVDS and the potential variety of offerings[89] that might result from the service, the IVDS will offer a bona fide business opportunity to small businesses.

54. Therefore, we will permit the use of installment plans for all IVDS auctions, and follow the general procedures given in the Second Report and Order for the use of this preference.[90] The installment payment option will enable all small businesses to pay the full amount of their winning bid in installments (less the upfront payment, which must be paid in full, and the down payment, half of which is due five days after the auction closes and the other half five days after the application is granted). Timely payments of all installments will be a condition of the license grant, and failure to make such timely payments on or before the date due may be grounds for revocation.[91]

---

[87] Second Report and Order at ¶¶ 231-233.

[88] Id. at ¶¶ 234-237. We noted that the legislative history of the Budget Act indicates that large entities with established revenue streams are not intended beneficiaries of the installment payments preference. Id. at ¶ 236.

[89] See note 3, supra.

[90] Under these general procedures, for example, only interest payments will be due for the first two years, with principal and interest both being amortized over the remaining years of the license. Also, interest charges will be fixed at the time of licensing at a rate equal to that of five-year U.S. Treasury notes, to track the IVDS license term of five years. See Second Report and Order at ¶ 239. If a small business making installment payments seeks to transfer a license to a non-small business entity during the term of the license, we will require payment of the remaining principal balance as a condition of the license transfer. Id. at ¶ 263.

[91] Limited grace periods for defaulting licensees may be considered on a case-by-case basis. Id. at ¶ 240.

VII. CONCLUSION

55. In summary, the rules and procedures we adopt in this Fourth Report and Order for auctioning licenses in the IVDS are designed to minimize the regulatory burdens on both applicants and the Commission, reduce the potential for delay of service to the public, and maintain safeguards to preserve the integrity of the bidding process. The rules also seek to meet Congressional objectives and serve two basic goals: promoting economic growth, and enhancing access to telecommunications service offerings for consumers, producers, and new entrants. We also take account of Congress' desire that designated entities previously underrepresented in the provision of telecommunications services be afforded preferences to encourage their participation. We expect that these procedures will lead to the development and rapid deployment of IVDS offerings across the country.

VIII. FINAL REGULATORY FLEXIBILITY ANALYSIS

56. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis is as follows:

A. Need for, and purpose of, this action

As a result of the Budget Act referenced above, the Commission may utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis, see generally 5 U.S.C. § 603, within the Notice of Proposed Rule Making in this proceeding, and published a Final Regulatory Flexibility Analysis within the Second Report and Order (at ¶¶ 299-302). As noted in that previous final analysis, this proceeding will establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out Congressional mandates that certain designated entities be afforded an opportunity to participate in the competitive bidding process and the provision of spectrum-based services.

B. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis

In regard to the specific IVDS issues addressed by this Fourth Report and Order, no comments were submitted in response to our Initial Regulatory Flexibility Analysis.

C. Significant alternatives considered

Although, as described in (B) above, no comments were received pertaining to IVDS, the Second Report and Order addressed at length the general policy considerations raised as a result of the new legislation.

IX. ORDERING CLAUSES

57. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), this Fourth Report and Order is adopted, and Parts 0, 1, and 95 of the Commission's Rules ARE AMENDED as set forth in the attached Appendix.

58. IT IS FURTHER ORDERED that the rule amendments set forth in the Appendix WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretarv

APPENDIX

Final Rule

Parts 0 and 95 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

Part 0 - Commission Organization

1. The authority citation for Part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.131 is amended by adding new paragraph (j) to read as follows:

§ 0.131 Functions of the Bureau

* * * * *

(j) Develops, in coordination with the Office of Plans and Policy, policies for selection of licensees from mutually exclusive applicants in the Private Radio Services subject to competitive bidding; issues Public Notices announcing auctions of Private Radio Services licenses; specifies the licenses to be auctioned, the time, place and method of competitive bidding, including applicable bid submission procedures, bid withdrawal procedures, stopping rules and activity rules; specifies the filing windows for short-form applications, bidder certifications, and the deadlines for submitting filing fees, upfront payments and down payments.

Part 1 - Practice and Procedure

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

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 C.F.R. 154, 303: Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

4. Section 1.912 is amended by redesignating paragraph (e) as paragraph (f) and adding new paragraph (e) to read as follows:

§ 1.912 Where applications are to be filed.

* * * * *

(e) Applicants submitting long-form applications pursuant to competitive bidding procedures (see §1.2107(c)) must mail or otherwise deliver their application to: Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, Attention: Auction Application Processing Section.

* * * * *

5. Section 1.922 is amended by adding two entries at the beginning of the table to read as follows:

§ 1. 922 Forms to be used.

FCC Form	Title
175	Application to Participate in an FCC Auction
175-S	Supplemental Application to Participate in an FCC Auction.

* * * * *

6. In Section 1.972, paragraph (a)(1) is amended by removing the words "Part 95-Subpart F-Personal Radio Services" and paragraph (c) is amended by removing the words "or part 95-subpart F" and adding the word "or" after "part 90" in the first sentence.

Part 95 - Personal Radio Services

7. 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.

8. New Section 95.816 is added to read as follows:

§ 95.816 Competitive bidding proceedings.

(a) Mutually exclusive IVDS initial applications are subject to competitive bidding.

(b) The General Procedures set forth in 47 C.F.R. Part 1, Subpart Q are applicable to competitive bidding proceedings used to select among mutually exclusive applicants for initial IVDS licenses.

(c) The specific procedures applicable to auctioning particular IVDS licenses will be set forth by Public Notice. Generally, the following competitive bidding procedures will be used to auction mutually exclusive IVDS licenses. The Commission, however, may design and test alternative procedures.

(1) Competitive bidding design. Sequential oral (oral outcry) auctions will be used to assign licenses in and around large urban areas and single-round sealed bidding will be used for rural areas unless otherwise specified by the Commission. See 47 C.F.R. §§ 1.2103 and 1.2104.

(2) Forms.

(i) Applicants must submit short-form applications (FCC Form 175) as specified in Commission Public Notices. Minor deficiencies may be corrected prior to the auction. Major modifications such as changes in ownership, failure to sign an application or failure to submit required certifications will result in the dismissal of the application. See 47 C.F.R. § 1.2105(a) and (b).

(ii) Applicants must submit a long-form application (FCC Form 574) within ten (10) business days after being notified that it is the winning bidder for a license. See 47 C.F.R. § 1.2107(c) and (d).

(3) Upfront payments. For oral outcry bidding, applicants will be required to show the Commission or its representative, immediately prior to the auction, a cashiers check for at least $2500 in order to get a bidding number and secure a place in the room where the bidding will take place. Bidders will be required to have $2500 upfront money for every five licenses they win. No upfront payment will be required from applicants in single round sealed bid auctions. See 47 C.F.R. § 1.2106.

(4) Down payments. Within five (5) business days after an oral outcry auction is over, or within five (5) business days after being notified that it is the high bidder in a single round sealed bid auction, a high bidder on a particular license(s) must submit to the Commission's lockbox bank such additional funds as are necessary to bring total deposits (upfront payment plus down payment) up to twenty (20) percent of the high bid(s). Small businesses eligible and electing to use installment payments pursuant to § 95.816(d)(3) are required to bring their total deposits up to ten (10) percent of their winning bid. The remainder of the twenty (20) percent down payment must be submitted within five (5) business days of the grant of their license(s). See 47 C.F.R. § 1.2107(b)

(5) Full payment. Auction winners, except for small businesses eligible for installment payments, must pay the balance of their winning bids in a lump sum within five (5) business days following the grant of their license(s). The grant of a license(s) to an auction winner(s) will be conditioned on the timely payment of all monies due the Commission. See 47 C.F.R. § 1.2109(a).

(6) Default or disqualification, see 47 C.F.R. § 1.2104(g).

(i) Sequential oral auctions. If a high bidder, after signing a bid confirmation form, fails to make the required down payment, fails to pay for a license, or is otherwise disqualified, it will be assessed a penalty equal to the difference between the its winning bid and the winning bid the next time the license is auctioned by the Commission, plus three (3) percent of the lower of these two amounts.

(ii) Single round sealed bid auctions. If a high bidder withdraws its bid prior to making the required down payment, it will be assessed a penalty equal to the difference between its bid and the next highest bid. If a high bidder, after having made the required down payment for a license, fails to pay the remaining amount for the license, or is otherwise disqualified, it will be assessed a penalty equal to the difference between its winning bid and the winning bid the next time the license is auctioned by the Commission plus three (3) percent of the lower of these two amounts.

(d) Designated entities. Designated entities are small businesses, and businesses owned by members of minority groups and/or women, as defined in 47 C.F.R. §1.2110(b).

(1) Bidding credits. A winning bidder that qualifies as a business owned by women and/or minorities may use a bidding credit of twenty five (25) percent to lower the cost of its winning bid. A bidding credit is available for a license for either frequency segment A or frequency segment B in each service area. A bidding credit, however, may be applied to only one of the two licenses available in each service area.

(2) Tax certificates. Any initial investor in a business owned by minorities and/or women and who provides "start-up" financing, which allows such business to acquire a IVDS license(s), and any investor who purchases ownership in an interest in a IVDS license owned by minorities and/or women within the first year after license issuance, which allows for the stabilization of the entity's capital base, may, upon the sale of such investment or interest, request from the Commission

a tax certificate, so long as such investor transaction does not reduce minority or female ownership or control in the entity below 50.1 percent. Any IVDS licensee who assigns or transfers control of its license to a business owned by minorities and/or women may request that the Commission issue it a tax certificate.

(3) Installment payments. Small businesses, including small businesses owned by women and/or minorities may elect to pay the full amount of their bid in installments over the term of their licenses. See 47 C.F.R. § 1.2110(d).

(e) Unjust enrichment. Any business owned by minorities and/or women that obtains a IVDS license 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.

9. Section 95.819 is revised to read as follows:

§ 95.819 License transferability.

(a) IVDS system licenses acquired through competitive bidding procedures may be transferred, assigned, sold, or given away only in accordance with the provisions and procedures set forth in 47 C.F.R. § 1.2111.

(b) Except for licenses acquired through competitive bidding procedures, the licensees may not transfer, assign, sell, or give the IVDS system licenses or any component CTS licenses to any other entity until the five year construction benchmark (50 percent coverage) has been met.

(c) Once the five year construction benchmark has been met, licensees of IVDS systems that were not acquired through competitive bidding may transfer, sell, assign, or give the IVDS system licenses together with all of its component CTS licenses to any other entity in accordance with the provisions of § 95.821. If the licensee sells or gives away the apparatus the new owner must obtain a new IVDS system license and CTS licenses before placing it in operation.