comments received will then be addressed in a subsequent final rule based on the proposed rule published with this action. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action is effective November 18, 1996.

Under section 307(b)(1) of the Clean Air Act (CAA), 42 U.S.C. 7607 (b)(1), petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 18, 1996. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. [See section 307(b)(2) of the CAA, 42 U.S.C. 7607 (b)(2)].

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214–2225), as revised by a July 10, 1995 memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866 review.

Nothing in this action shall be construed as permitting or allowing or establishing a precedent for any future request for a revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the CAA do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the federal-state relationship under the CAA, preparation of a regulatory flexibility analysis would constitute federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. E.P.A.*, 427 U.S. 246, 256–66 (S.Ct. 1976); 42 U.S.C. 7410(a)(2) and 7410(k)(3).

Under Sections 202, 203, and 205 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must undertake various actions in association with proposed or final rules that include a Federal mandate that may result in estimated costs of $100 million or more to the private sector, or to State, local, or tribal governments in the aggregate.

Through submission of this state implementation plan or plan revision, the State and any affected local or tribal governments have elected to adopt the program provided for under Section 110 of the CAA. These rules may bind State, local and tribal governments to perform certain actions and also require the private sector to perform certain duties. EPA has examined whether the rules being approved by this action would impose no new requirements, since such sources are already subject to these regulations under State law. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action, and therefore there will be no significant impact on a substantial number of small entities.

Under 5 U.S.C. 801(a)(1)(A) Act (APAA) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Lead, Reporting and recordkeeping requirements.

Dated: August 15, 1996.

R.F. McGhee,

Acting Regional Administrator.

Chapter I, title 40, *Code of Federal Regulations*, is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart K—Florida

2. Section 52.520 is amended by adding paragraph (c)(91) to read as follows:

§ 52.520 Identification of plan.

* * * * *

(c) * * *

(91) The State of Florida submitted revisions to the FDEP Administrative Code for the Air Pollution Control Program on August 18, 1994. These revisions provide for the control of lead emissions from facilities in the State of Florida, and will replace the Federal Implementation Plan requirements codified in 40 CFR 52.535.

(i) Incorporation by reference. Chapters 17–296.200 (97) and (163) introductory paragraph and (e), 17–296.600–605 effective on August 8, 1994.

(ii) Other material. None.

3. Section 52.535 is removed and reserved.

[FR Doc. 96–23820 Filed 9–17–96; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 95

[PP Docket No. 93–253; FCC 96–330]

Interactive Video and Data Service

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The *Sixth Memorandum Opinion and Order* affirms the competitive bidding procedures adopted in the *Fourth Report and Order*, with several exceptions. Specifically, the *Sixth Memorandum Opinion and Order* proposes to: clarify the Commission's anti-collusion rules; permits use of simultaneous multiple round bidding for interactive video and data service (IVDS) auctions; and eliminates the tax certificate program available to investors in women- and minority-owned businesses in accordance with Congressional action. The *Sixth Memorandum Opinion and Order* also grants a petitioner's request that bidding credits be made available for both licenses in each IVDS service area. The intended effect of this action is to resolve petitions for reconsideration and

to clarify or modify the competitive bidding rules governing the methodology and procedure for auctions for IVDS licenses.

EFFECTIVE DATE: November 18, 1996.

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

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

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

I. Sixth Memorandum Opinion and Order

1. In the *Fourth Report and Order*, Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93–253, 59 FR 24947 (May 13, 1994), 9 FCC Rcd 2330 (1994), the Commission adopted competitive bidding rules for selecting between mutually exclusive applicants for IVDS spectrum. By Public Notices issued on May 23, June 17, and July 5, 1994, the Commission provided additional information concerning the IVDS auctions.

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

3. The Commission disagrees with petitioner's assertion that the Commission may not establish auction dates or publicize auctions until it has determined that mutual exclusivity exists. While the Commission recognizes that it cannot conduct an auction for licenses for which there are not mutually exclusive applications, it notes that scheduling and announcing auction dates are no more than preparatory measures. The *Fourth Report and Order,* states, that in the event the Commission receives only one application that is acceptable for filing for a particular frequency segment, then the pre-scheduled auction would be cancelled. Moreover, the Commission conducted the July 1994 auction for IVDS licenses only after mutual exclusivity had been established in all markets. Thus, it concludes that the pre-auction application procedures ensure that spectrum auctions will be conducted only in those circumstances authorized by the Communications Act.

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

5. In the *Second Report and Order,* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93–253, 59 FR 22980 (May 4, 1994), 9 FCC Rcd 2348 (1994)(*Second Report and Order*), the Commission adopted rules prohibiting collusive conduct in the context of competitive bidding. *See* 47 CFR § 1.2105(c); *see also Second Memorandum Opinion and Order*, 59 FR 44272 (August 26, 1994), 9 FCC Rcd 7245, *erratum*, Mimeo No. 50278 (October 19, 1994)(*Second Memorandum Opinion and Order*). Specifically, the Commission determined that bidders would be prohibited from discussing the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on their short-form application. It also required bidders to identify on their short-form applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements relating to the competitive bidding process. *Second Report and Order.* It also determined that auction applicants would not be permitted to make any ownership changes or changes in the identification of parties to bidding consortia once a short-form application is filed. *Id.*

6. The Commission rejected Petitioner ITV's contention that the Commission lacks the authority under the Communications Act to preclude settlements between mutually exclusive applicants for licenses in auctionable services. While the Commission has an established policy of favoring settlements in some contexts, it is within its statutory authority to restrict settlements if the Commission finds such agreements would not be in the public interest. *See, e.g., Report and Order*, MM Docket No. 90–263, 6 FCC Rcd 85 (1990), *modified in part, Memorandum Opinion and Order*, MM Docket 90–253, 6 FCC Rcd 2901 (1991) (limiting settlements between mutually exclusive applicants for broadcast construction permits). At this time, the Commission finds that prohibiting settlements after the short form filing deadline between mutually exclusive applicants for the same license in the IVDS competitive bidding process is necessary to deter collusive conduct and ensure a competitive auction, and is thereby in the public interest. The anti-collusion rules also prevent entities from filing applications solely for the purpose of demanding payment from other bidders in exchange for settlement or withdrawal.

7. Nevertheless, the Commission takes this opportunity to clarify certain aspects of the anti-collusion rules. 47 CFR § 1.2105(c). It clarifies that the anti-collusion rules apply where one applicant has a common ownership interest with another applicant. *Second Memorandum Opinion and Order.* Specifically, unless the second applicant is expressly identified as an entity with whom the first applicant has an agreement concerning bidding, these parties may not communicate with each other concerning their bids or bidding strategies. This prohibition holds even where the other bidder is identified on the applicant's short-form application as having a common ownership interest with the applicant. *Id. See also Public Notice,* Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules, DA 95–2244 (October 26, 1995); and further clarification in *Order,* Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications

Act—Competitive Bidding, DA 95–2292 (released November 3, 1995). Further, consistent with the Wireless Telecommunications Bureau's (Bureau) approach in the Broadband PCS C Block auction, amendments to the short-form application must be filed with the Commission within ten business days of any such change. *See Public Notice,* Qualified Bidders and Bidding Instructions For December 18, 1995 Broadband PCS C Block Auction, Report No. AUC–95–05, Auction No. 5 at 3 (December 8, 1995).

8. In the *Second Report and Order,* the Commission established the criteria to be used in selecting the competitive bidding methodology for each auctionable service. Generally, it concluded that awarding licenses to those parties that value them most highly will promote the rapid development and deployment of new services, and the efficient and intensive use of the spectrum. In the *Fourth Report and Order,* the Commission adopted an oral outcry competitive bidding methodology for auctioning 594 MSA licenses in IVDS. For the remaining RSA licenses, the Commission concluded that a sealed bid competitive bidding mechanism was appropriate. The Commission observed that both methods appear suited to IVDS because they are relatively inexpensive for the Commission to administer and the costs of bidder participation are fairly low. The Commission reserved discretion, however, to reconsider this competitive bidding design if, in view of its actual auctions experience, a change appears warranted.

9. The Commission anticipates that it will auction the remaining IVDS licenses using the oral outcry method. It used this method successfully to auction 594 MSA licenses on July 28 and 29, 1994 and finds that auctioning IVDS licenses in this manner continues to serve the public interest. The Commission amends its IVDS rules, however, to permit use of simultaneous multiple round bidding as well. This method, with its remote bidding capabilities, has been successful in PCS, Multipoint and/or Multichannel Distribution Service (MDS), and 900 MHz Specialized Mobile Radio (900 MHz SMR) auctions. As the Commission continues to gain experience in conducting simultaneous multiple round auctions, the costs associated with this methodology decline. As a result, the Commission reserves the option of using a simultaneous multiple round auction methodology for future IVDS auctions. It delegates authority to the Bureau to announce the type of auction and the procedures by public notice.

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

11. If the Commission elects to use simultaneous multiple round auctions, it will conduct the auction in three stages and start the auction with large bid increments, reducing the increments as bidding activity falls. The minimum bid increment in Stage I of the auction will be 5 percent of the high bid in the previous round or $.02 per bidding unit, whichever is greater. The Commission will reduce the minimum bid increment as the auction moves through its stages, with a minimum bid increment of the greater of two percent or $.01 per bidding unit in Stage II, and the greater of one percent or $.005 per bidding unit in Stage III. The Commission, however, retains the discretion in IVDS auctions to vary the minimum bid increments for individual licenses, or groups of licenses, at any time before or during the course of an auction. The Commission delegates to the Bureau the authority to exercise such discretion. *See* 47 CFR § 0.331; *see also Order,* Amendment of Part 0 of the Commission's Rules to Reflect a Reorganization Establishing the Wireless Telecommunications Bureau and to Make Changes in the Delegated Authority of Other Bureaus, 60 FR 35503 (July 10, 1995), 10 FCC Rcd 12751 (1995).

12. If the Commission decides to use simultaneous multiple round bidding for the IVDS auction, it intends to use a simultaneous stopping rule. Because of the large number of licenses likely to be auctioned at once, however, it will retain the discretion either to use a hybrid stopping rule or to allow bidding to close individually for these licenses. The specific stopping rule to conclude bidding on IVDS licenses will be announced by Public Notice prior to auction. The Commission also retains the discretion to declare at any point after 40 rounds that the auction will end after some specified number of additional rounds. The Commission believes this number of rounds will ensure that the auction will not close prematurely, while providing bidders with fair assurance that the auction will be conducted as intended. *See Fifth Report and Order,* 59 FR 37566 (July 22, 1994), 9 FCC Rcd 5532 (1994). Bids will be accepted only on licenses where the high bid has increased in the last three rounds. This will deter bidders from continuing to bid on a few low value licenses solely to delay the closing of the auction. It will also enable the Commission to end the auction when it determines that the benefits of terminating the auction and issuing licenses exceed the likely benefits of continuing to allow bidding. The Commission will announce by Public Notice the number of remaining rounds and other final bidding procedures. The Commission delegates to the Bureau the authority to exercise such discretion.

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

14. As discussed above, in order to ensure that simultaneous auctions with simultaneous stopping rules close within a reasonable period of time and to increase the information conveyed by bid prices during the auction, it is necessary to impose an activity rule to prevent bidders from waiting until the end of the auction before participating. In the *Second Report and Order,* the Commission adopted the Milgrom-Wilson activity rule as its preferred activity rule where a simultaneous stopping rule is used. The Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. Bidders are required to declare their maximum eligibility in terms of bidding units, and to make an upfront payment proportional to that eligibility level. In each round, bidders are limited

to bidding on licenses encompassing no more than the number of bidding units covered by their upfront payment. Licenses on which a bidder is the high bidder at the end of the withdrawal period in the previous round, as well as licenses on which a new valid bid is placed, count toward this limit. Under this approach, bidders have the flexibility to shift their bids among any license for which they have applied so long as, within each round, the total bidding units encompassed by those licenses does not exceed the total number of bidding units on which they are eligible to bid.

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

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

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

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

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

20. If the Commission chooses to use a simultaneous multiple round auction methodology, it intends to apply bid withdrawal provisions. In the *Second Report and Order,* the Commission determined that bid withdrawal provisions were needed to discourage insincere bidding. The Commission observed that insincere bidding, whether frivolous or strategic, distorts the price information generated by the auction process and reduces its efficiency. Accordingly, the Commission adopts the bid withdrawal provisions established in the *Second Report and Order.* 47 CFR § 1.2104(g)(1). Pursuant to these rules, any bidder who withdraws a high bid during an auction will be required to reimburse the Commission the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid. No withdrawal payment will be assessed if the subsequent winning bid exceeds the withdrawn bid. If a license is reoffered by auction, the ''winning bid'' refers to the high bid in the auction in which the license is reoffered. If a license is reoffered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder will be required to pay an amount equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission. If a license which is the subject of withdrawal is not re-auctioned but is instead offered to the highest losing bidders in the initial auction, the ''winning bid'' refers to the bid of the highest bidder who accepts the offer. Losing bidders would not be required to accept the offer, i.e., they may decline without penalty. The payment amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission. [*But see Order,* Atlanta Trunking Associates, Inc. v. MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions, FCC 96–203, (released May 3, 1996) (summarized in 61 FR 25807 (May 23, 1996)), *recon. pending;* the *Atlanta Trunking* guidelines were formally incorporated into and adopted by *Report and Order,* 61 FR 33859 (July 1, 1996), FCC 96–278 (released June 24, 1996) which amended § 24.704 of the competitive bidding rules.]

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

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

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

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

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

25. Petitioner ITV requests that, where the new bid on a license (upon reauction) exceeds the defaulting applicant's bid by 3 percent or more, no default payment be applied. In the event that the subsequent bid exceeds the defaulting bid by less than 3 percent, petitioner requests that the defaulting applicant should only be responsible for payment of the difference between the subsequent winning bid and 103 percent of the defaulting applicant's bid. Petitioner maintains that this proposal will prevent any windfall to the U.S. Treasury.

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

27. In the *Fourth Report and Order,* the Commission established several special provisions to ensure that designated entities, i.e., small businesses, rural telephone companies, and businesses owned by members of minority groups and women, are given the opportunity to participate both in the competitive bidding process for, and in the provision of, IVDS. The Commission's rules provide that on one of the two licenses in each market, a 25 percent bidding credit would be awarded to a winning bidder that is a business owned by women or minorities. 47 CFR §§ 95.816(d)(1). It declined to provide bidding credits to rural telephone companies, however, because the Commission concluded that the relatively modest build-out costs for systems in this service would make such special provisions unnecessary to ensure that they had the opportunity to participate in the provision of IVDS offerings to rural areas. The Commission also made tax certificates available to initial investors in minority and women-owned businesses, and to licensees that transfer their authorizations to minority and women-owned enterprises. *Id.* Finally, because installment payments are an effective way to promote the participation of designated entities and to distribute licenses and services among geographic areas, and because use of IVDS spectrum is very likely to match the business objectives of *bona fide* small businesses, the Commission allowed small businesses to pay for their licenses using installment payments. *Id.*

28. Also, to ensure that its special provisions for designated entities would benefit only the parties to whom they were directed, the Commission adopted ''unjust enrichment'' provisions designed to discourage trafficking in licenses obtained using these special provisions. 47 CFR §§ 1.2111, 95.816(e). For example, the unjust enrichment provisions require reimbursement of the bidding credit plus interest when the licensee assigns or transfers the license to a business not owned by minorities and/or women. In addition, the Commission requires small business licensees to pay back the full amount of the remaining principal balance upon transfer or assignment of a license to a non-qualifying entity. 47 CFR § 1.2110(c).

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

30. The Commission grants the petition on this issue. In the *Fourth Report and Order,* the Commission stated that providing bidding credits in the IVDS auctions was ''necessary to provide [the pertinent] designated entities with a significant enough advantage to ensure their ability to compete successfully for some IVDS licenses.'' *Fourth Report and Order.* The Commission notes, however, that it is not required to provide all potential special provisions to all designated entities in all auction contexts. The Commission also notes, contrary to petitioner's assertions, that it did not limit the application of bidding credits to only half of the available licenses solely to maximize auction revenues, but rather considered many other factors. The Commission chose to make bidding credits available to only half of the available licenses, rather than all of them, because the Commission believed that this substantial level of assistance, coupled with the special provision of tax certificates, fulfilled its statutory mandate to ensure that businesses owned by minorities and/or women would have a meaningful opportunity to

participate in the competitive bidding process for, and in the provision of, IVDS offerings. The Commission notes that these provisions achieved a high degree of designated entity participation in the initial IVDS auction. Of the 594 licenses, 195 (32.8%) were won by bidders claiming minority-owned status, 282 (47.5%) by bidders claiming woman-owned status, and 557 (93.8%) by bidders claiming small business status. Since that time, however, the tax certificate program has been discontinued by Congress, and, as discussed *infra,* the Commission is reconsidering the eligibility criteria for bidding credits in the IVDS context in light of the Supreme Court's recent decision in *Adarand.* Accordingly, to the extent bidding credits are retained for IVDS, the Commission will provide bidding credits for both licenses in each service area. In view of the discontinuation of the tax certificate program, the Commission believes that extending the bidding credit to both licenses is appropriate to increase the participation opportunities available for designated entities.

31. The Commission eliminates the tax certificate program available to investors in women-and minority-owned firms. The Commission adopted the tax certificate program in the *Fourth Report and Order* pursuant to authority granted in 26 U.S.C. § 1071. Congress has since repealed Section 1071. As a result, the Commission is compelled to eliminate the tax certificate provision in the IVDS rules.

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

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

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

35. The petitions are denied on this issue. As noted *supra,* the Commission has discretion to tailor the use of special provisions as necessary for each particular service. For IVDS, the Commission expects that the cost of winning licenses and subsequently building-out systems will be relatively modest, compared to the costs associated with other services subject to auctions. Petitioner notes that the *Fourth Report and Order* lacks discussion of the expected actual build-out costs of IVDS systems and the economic characteristics of rural telephone companies. While the Commission cannot yet determine with precision any average cost figures for building and operating an IVDS system, it is familiar with the technical and operational parameters of the service, and believes its assumption is reasonable that build-out costs will be modest relative to such costs for other auctionable services. In addition, the Commission has previously assessed the economic characteristics of rural telephone companies in this proceeding. As a result, the Commission expects that rural telephone companies, even without special provisions, will be able to compete effectively both during the auction and in providing service.

36. With respect to bidding credits, as discussed *infra,* the Commission is proposing to eliminate bidding credits for minority and women-owned businesses and extend a 25 percent bidding credit to small businesses only. A rural telephone company would be eligible for the bidding credit to the extent that it also qualifies as a small business. The Commission also affirms its decision not to provide installment payments for those rural telephone companies that are not also small businesses. The Commission continues to believe that qualification for installment payments should be limited to businesses that qualify as small.

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

38. *Audits.* Since the initial IVDS auction, the Commission has revised the short-form application to place applicants on notice of the Commission's authority to audit licensees and license applicants. *See* Public Information Collection Requirement Submitted to Office of Management and Budget for Review. The Commission believes the use of audits and other enforcement tools is necessary to maintain the integrity of the self-certification process it has used to the designated entity provisions. The Commission has specified this authority in its revised IVDS rules.

39. *Long-Form Application.* While IVDS applicants have previously provided their financial information by filing Form 574 as their long-form application, the Commission now requires that they use Form 600. *See* Notice of Public Information Collections Submitted to OMB for Review and Approval, 61 FR 3699 (February 1, 1996). While Form 600 contains certain instructions that IVDS applicants would be instructed to ignore, it is a more complete form than the current Form 574.

40. *Divestiture Provisions.* In establishing rules for IVDS, the Commission concluded that the best way to promote competition in the IVDS marketplace is to make at least two licenses available in each market. *Notice of Proposed Rule Making,* GEN Docket No. 91–2, 56 FR 10222 (March 11, 1991), 6 FCC Rcd 1368, 1371 (1991). The Commission's rules therefore

prohibit an IVDS licensee from acquiring an interest in another IVDS license in the same service area where it is licensed. 47 CFR § 95.813(b)(2). The Interactive Television Association (ITA) requests that the Commission initiate a rule making proceeding to eliminate this ownership restriction and permit one licensee to own both licenses in a market. Petitioner ITA maintains that, in view of several telephone and cable companies' interest in interactive television, these rules are no longer needed to promote competition. The Commission declines to grant this petition for rule making at this time. The Commission observes that the interactive television marketplace is in a relatively early state of competition. Moreover, allowing a single entity to acquire both licenses in a service area would limit the opportunity for other potential competitors to emerge. Such a result is inconsistent with Congress' mandate to facilitate the dissemination of licenses among a wide variety of applicants. 47 U.S.C. 309(j)(3)(B).

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

II. Procedural Matters

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

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

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

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

46. With respect to the *Memorandum Opinion and Order* reconsidering the rules, a Final Regulatory Flexibility Analysis (FRFA), in compliance with 5 U.S.C. Section 801, is provided as follows.

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

A. Need for and Objective of the Rules

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

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

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

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

Authorizing Use of Simultaneous Multiple Round Auctions

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

Elimination of the Tax Certificate Program

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

Bidding Credits Extended to Both Licenses in Each MSA

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

Long Form Application Changed to Form 600

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

Winning Bidders May Receive Upfront Payment Refund

54. One petitioner, ITV, requested that when upfront money on deposit exceeded the amount necessary for a winning bidder to make its down payment the excess funds be refunded to the bidder. The Commission granted the request to change its rules to alleviate one source of financial constraints on small businesses. This will not result in any changed reporting or recordkeeping. It could reduce the need to secure additional interim financing.

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

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

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

57. 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. The Small Business Administration (SBA) defines small businesses in SIC 4841 as businesses with annual gross revenues of $11 million or less. 13 CFR § 121.201. In this, the Commission proposes to extend special provisions to small businesses with annual gross revenues of $15 million or less and additional benefits to very small businesses with annual gross revenues of $3 million or less. The Commission observes that this proposal is consistent with its approach in other wireless services, *see e.g.*, the 900 MHz specialized mobile radio service, and is narrowly tailored to address the capital requirements for IVDS. The Commission is soliciting SBA approval for the small business definitions for this and other auctionable services.

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

59. 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. In the upcoming IVDS reauction of approximately 100 licenses in metropolitan service area (MSA) markets and auction of 856 licenses in rural service area (RSA) markets (two licenses per market), bidding credits and installment payments are available to encourage participation by small and very small businesses. The Commission cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under the proposed rules. Given the success of small businesses in past IVDS auctions, and that small businesses make up over 80 percent of firms in the subscription television services industry, the Commission assumes for purposes of this FRFA that all of the licenses may be awarded to small businesses, which would be affected by the rules amendments. The Commission estimates that some companies will win more than one license, as happened in the earlier IVDS auction.

60. Applicants seeking to participate in the auction also will be subject to these rule amendments. It is impossible to accurately predict how many small businesses will apply to participate in the auction. In the last IVDS auction, there were 289 qualified applicants. The Commission does not anticipate that there will be significantly more participants in the subsequent IVDS auction.

E. Steps Taken to Minimize the Burdens on Small Entities

61. The changes made in *Sixth Memorandum Opinion and Order* are designed to minimize burdens on small businesses. The extension of an

additional bidding credit to the second license in each market will assist businesses owned by women and minorities. Most of the businesses owned by women and minorities which have participated in the FCC's auctions are small businesses which will benefit from this rule. This rule change will benefit small businesses owned by women and minorities by doubling the number of bidding credits available to them.

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

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

F. Significant Alternatives Considered and Rejected

Authorizing Use of Simultaneous Multiple Round Auctions

64. The Commission does not currently have plans to use a simultaneous multiple round auction for this service. The rule is being added should it become necessary at a later time to re-auction licenses which have developed a higher degree of interdependence. Because this rule adds administrative expediency, which will speed the issuance of licenses, the Commission have chosen to add the option of an additional auction methodology for this service. The Commission is acting to minimize delays in the close of an auction by adding flexibility to its stopping and activity rules. It determined that the alternative of leaving the rules unchanged could delay the auction process at some time in the future.

Elimination of the Tax Certificate Program

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

Bidding Credits Extended on Both Licenses in Each MSA

66. This rule will apply to any small businesses owned by women or minorities that eligible for bidding credits which participate in the re-auction of MSA licenses. The Commission considered leaving the rules unchanged, but in the absence of the tax certificate program, the rules may have unfairly disadvantaged some minority or women owned small businesses while offering greater advantages to some of their competitors. Therefore, in eliminating the tax certificate program, the Commission felt it necessary to extend the bidding credit to both licenses in each market. The Commission considered the extension of bidding credits to rural telephone companies. The Commission is not required to make all benefits available to all designated entities. Consequently, in weighing the competing public policy concerns with respect to bidding credits, the Commission chose not to extend bidding credits to rural telephone companies.

Long-Form Application Changed to Form 600

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

Winning Bidders May Receive Upfront Payment Refund

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

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

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

H. Report to Congress

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

71. Authority for issuance of this *Sixth Memorandum Opinion 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. §§ 154(i), 303(r) and 309(j).

72. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), this *Sixth Memorandum Opinion and Order* is adopted, and Parts 1 and 95 of the Commission's Rules are AMENDED as set forth below.

73. *It is further ordered* that the rule changes made herein *will become effective* November 18, 1996. *It is further ordered* that, as described above, the petition for reconsideration filed by ITV *is granted* in part to the extent described above and *is denied* in all other respects, the petitions for reconsideration filed by Phase One, RCA, and USIN *are denied,* and the

petition for rule making filed by ITA *is denied*.

List of Subjects

47 CFR Part 1

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

47 CFR Part 95

Communications equipment, Radio.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Rule Changes

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

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154, 303, and 309(j) unless otherwise noted.

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

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

* * * * *

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

* * * * *

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

§ 95. 815 License application.

* * * * *

(b) Each application for an IVDS system license must be made on a separate FCC Form 600, and must be submitted to the Federal Communications Commission, Interactive Video and Data Service, P.O. Box 358365, Pittsburgh, PA 15251–5365. Each application for a CTS license where the CTS antenna exceeds 6.1m (20 feet) (see § 95.811(b)) must be made on a separate FCC Form 574, and must be submitted to the address set forth in § 1.1102 of this chapter.

* * * * *

(d) * * *

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

* * * * *

(f) * * *

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

* * * * *

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

§ 95.816 Competitive bidding proceedings.

* * * * *

(c) * * *

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

(2) Forms.

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

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

* * * * *

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

* * * * *

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

* * * * *

(d) * * *

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

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

(3) Audits.

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

(ii) Consent to such audits is part of the certification included in the short-form application (Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents, and other material (including accounting procedures and practices) regardless of form or type,

sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed IVDS and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

* * * * *

[FR Doc. 96–23939 Filed 9–17–96; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration (NOAA)

50 CFR Part 679

[Docket No. 960703187–6253–02; I.D. 062096B]

RIN 0648–AI96

Fisheries of the Exclusive Economic Zone Off Alaska; Allow Longline Pot Gear

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to allow the use of longline pot gear by vessels engaged in directed fishing for sablefish in the Bering Sea subarea (BS). Sablefish hook-and-line fishermen in the BS have faced increasing predation of hooked sablefish by killer whales. The use of longline pot gear will effectively prevent such predation. This action is necessary to protect Bering Sea sablefish harvests and is intended to resolve a conflict between fishermen and a species protected under the Marine Mammal Protection Act of 1972 (MMPA).

EFFECTIVE DATE: September 12, 1996.

ADDRESSES: Copies of the final rule and the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) for this action may be obtained from Fisheries Management Division, Attn: Lori Gravel, Alaska Region, NMFS, Room 453, 709 West 9th Street, Juneau, AK 99801, or P.O. Box 21668, Juneau, AK 99802.

FOR FURTHER INFORMATION CONTACT: James Hale, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands management area (BSAI) according to the Fishery Management Plan for the Groundfish Fishery in the Bering Sea and Aleutian Islands Area (FMP). The FMP was prepared by the North Pacific Fishery Management Council (Council) and approved by NMFS under the authority of the Magnuson Fishery Conservation and Management Act. This FMP, implemented by regulations at 50 CFR parts 600 and 679, authorizes changes to gear restrictions without amendment to the FMP. The regulations at § 679.24 specify gear types that may be employed to harvest sablefish in the BS. Killer whales (*Orcinus orca*) are protected under the MMPA, which prohibits harassment of marine mammals and authorizes the Secretary of Commerce to consult with and assist regional fishery management councils to reduce takings of marine mammals incidental to commercial fishing operations.

BS sablefish quotas have been underharvested due in part to killer whale predation of hooked sablefish. Such predation causes conservation and economic concerns that can be resolved by allowing longline pot gear in this fishery. Further information on the history of and need for this action may be found in the preamble to the proposed rule published on July 16, 1996 (61 FR 37041).

One change has been made in the final rule from the proposed rule. At proposed § 679.24(c)(4)(i), the term ''pot'' may seem ambiguous; therefore, the sentence is revised to refer to ''longline pot'' and ''pot-and-line'' gear, which are terms defined in § 679.2, Definitions.

Comments on the Proposed Rule

Comment: NMFS received one letter of comment on this action. The comment supports the implementation of this change as improving the ability of fishermen to harvest sablefish more economically and efficiently. The comment also requests that the 30-day delayed effectiveness period be waived to provide fishermen more opportunity to take advantage of this action during the current Individual Fishing Quota (IFQ) season.

Response: NMFS concurs that this action will improve the efficiency and profitability of the BS sablefish fishery. NMFS notes the commenter's desire for expeditious implementation of this regulatory change.

Classification

This final rule has been determined to be not significant for purposes of E.O. 12866.

Because this final rule allows fishermen in the BS sablefish fishery the option of using longline pot gear to protect harvests from killer whale predation, it relieves a restriction. Thus, under 5 U.S.C. 553(d)(1) it is not subject to a delay in effective date.

The Council prepared an Initial Regulatory Flexibility Analysis (IRFA), supplemented by a FRFA prepared by NMFS. These documents provide a statement of the need for and objectives of the rule, which is also summarized in this preamble. In 1996, 140 persons were issued sablefish quota shares in the BS and may be affected by this rule. It is designed to relieve a restriction that negatively affects the ability of IFQ fishermen to harvest their full sablefish quotas. By protecting those harvests from killer whale predation, the rule is expected to have a positive economic impact on small entities.

Alternative 1 of the IRFA/FRFA (the status quo) was rejected in favor of Alternative 2, because Alternative 2 alone would reduce killer whale interactions with the fishery by allowing hook-and-line fishermen to switch to longline pot gear. Although switching from hook-and-line gear to longline pots would have direct costs, fishermen are expected to evaluate the balance of costs involved in switching gears with the profits of greater harvests obtained in the absence of killer whale predation. The preferred alternative also mitigates possible disadvantages to fishermen whose vessels may be unable to carry longline pot gear by establishing a 1-month closure to longline pot gear. During that time, hook-and-line fishermen will be able to fish without gear conflicts with longline pot gear or grounds preemption.

The Administrator, Alaska Region, NMFS, determined that fishing activities conducted under this rule will have no adverse impacts on marine mammals. The express purpose of this rule is to reduce the interactions of commercial fisheries in the BS with killer whales.

List of Subjects in 50 CFR Part 679

Fisheries, Reporting and recordkeeping requirements

Dated: September 12, 1996.

Gary Matlock,

Acting Deputy Assistant Administrator, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 679 is amended to read as follows: