Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies to Promote Rural Radio Service and to	)	MB Docket No. 09-52
Streamline Allotment and	)	RM-11528
Assignment Procedures	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: April 7, 2009 **Released: April 20, 2009**

Comment Date: [60 days after date of publication in the Federal Register]
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By the Commission: Acting Chairman Copps and Commissioners Adelstein and McDowell issuing separate statements.

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I. INTRODUCTION

1. With this *Notice of Proposed Rulemaking* ("*Notice*"), we commence a proceeding to consider a number of specific changes to our rules and procedures to carry out the statutory goal of distributing radio service fairly and equitably, and to increase the transparency and efficiency of radio broadcast auction and licensing processes. This *Notice* seeks comment on a wide range of the procedures currently used to award commercial broadcast spectrum in the standard (AM) and FM broadcast bands, some of which will also apply to other auctioned services.[1] The Media Bureau, in conjunction with the Wireless Telecommunications Bureau, has used these rules successfully to license commercial AM, FM, television, FM translator, low power television ("LPTV"), and television translator stations. Based on the experience the staff has gained in conducting previous auctions, and in processing applications for new or modified services, however, we believe that it is appropriate for the Commission to consider rule and procedural changes to better encourage the fair distribution of broadcast licenses, particularly in smaller

[1] *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses,* First Report and Order, 13 FCC Rcd 15920 (1998) ("*Broadcast First Report and Order*"), *on recon.*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), *on further recon.*, Memorandum Opinion and Order, 14 FCC Rcd 14521 (1999).

communities, rural areas, and tribal areas, afford greater opportunities to participate in competitive bidding, promote the filing of technically sound applications, and deter speculation. The *Notice* also proposes to modify the noncommercial educational ("NCE") fair distribution comparative criterion by establishing a tribal priority.

II. SPECIFIC PROPOSALS

A. Modify Priority (3) and (4) Section 307(b) Radio Licensing Standards.

2. *Background*. In 1997,[2] Congress mandated that the Commission select among mutually exclusive applicants for broadcast construction permits via a competitive bidding process.[3] Because Congress directed that the competitive bidding would not alter the requirements of, *inter alia*, Section 307 of the Communications Act of 1934, as amended (the "Act"),[4] the Commission's licensing process necessarily begins with a determination, pursuant to Section 307(b) of the Act, that any proposed FM channel allotment or AM construction permit award comports with the "fair, efficient, and equitable distribution of radio service" among the States and communities.[5]

3. In the *Broadcast First Report and Order*, when establishing competitive bidding rules consistent with its statutory mandate under Section 307(b), the Commission determined that it would continue to assign FM full-service channels to the FM Table of Allotments[6] through the existing rulemaking process, with petitions for rulemaking accepted at any time.[7] The Commission also determined that the Section 307(b) analysis would continue to be conducted during the allotment process, using the four priorities set out by the Commission in 1982: (1) First fulltime aural (reception) service; (2) Second fulltime aural service; (3) First local (transmission) service; and (4) Other public interest matters.[8] A new FM channel would only be allotted after application of these priorities to a proposed allotment and any counterproposals. Thus, to effectuate the equitable distribution policy articulated in Section 307(b), the Commission determined that it would continue to favor proposals that result in new service to unserved or severely underserved populations, or first local transmission service at communities that have none.[9] Conflicts between allotment proposals that could not be resolved by application of the first three criteria would be analyzed according to the "other public interest" benefits of the proposals, pursuant to Priority (4) of the *FM Assignment Policies*.[10] Finally, the Commission decided

[2] *See* Pub. L. No. 105-33, 111 Stat. 251 (1997).

[3] *See* 47 U.S.C. § 309(j) ("Section 309(j)").

[4] *Id*. § 309(j)(6)(B).

[5] *Id*. § 307(b) ("Section 307(b)").

[6] 47 C.F.R. § 73.202(b) (the "FM Table").

[7] *Broadcast First Report and Order*, 13 FCC Rcd at 15972.

[8] *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982) ("*FM Assignment Policies*"). The FCC accords co-equal status to the second and third allotment priorities. *Id*. at 91-93.

[9] *See generally id. See also AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction*, Public Notice, 15 FCC Rcd 20449, 20451 (MMB/WTB 2000) (stating that the priorities set forth in *FM Assignment Policies* would be applied in AM Auction No. 32).

[10] *See*, *e.g.*, *Greenup, Kentucky and Athens, Ohio*, Memorandum Opinion and Order, 6 FCC Rcd 1493 (1991) ("*Greenup*") (population advantage presumptively best serves public interest).

to modify its prior practice by deciding that, after allotment through the rulemaking process, FM channels would be made available for application during subsequently announced FM auction filing windows, and would be awarded only after competitive bidding.

4. In proceedings to add new allotments to the FM Table, there is no room for a "tie" – the process must end with a decision as to which one of the competing proposals and counterproposals merits a dispositive Section 307(b) preference, so that the FM Table can be amended and the new vacant allotment thereafter set for auction. Very few applicants for new FM allotments propose a first or second aural service. Proposals for first local transmission service are more common, but many of these select communities that are located in or adjacent to an Urbanized Area, and/or would place a principal community signal over a significant portion of the Urbanized Area. In these situations, the Commission must determine whether a suburban community is sufficiently independent of a nearby metropolitan area to merit a first local transmission service preference.[11] Even when evaluating *bona fide* proposals for first local transmission service, our long-standing practice has been to award a preference to the community with the largest population.[12] Generally, we believe that practice serves the public interest, and we do not propose to change it. However, such population comparisons are appropriate only when the proposals at issue are directed toward actually providing the proposed community of license with a first local outlet for self-expression, rather than merely providing an additional reception service to a well-served Urbanized Area.

5. Increasingly, then, new FM channels are allotted based on comparisons under Priority (4), other public interest matters. While this analysis in theory can encompass any number of factors,[13] in practice the staff generally accords significant (and in many cases dispositive) weight to simple net differences in the number of persons who would receive new service. Although this factor is easily determined and applied, and the argument can be made that service to the greatest population represents the most efficient use of spectrum, as a practical matter this analysis inevitably favors proposals to allot channels near or adjacent to large cities and Urbanized Areas, especially where the proposed facilities would place a signal over a significant portion of an Urbanized Area. We are therefore concerned that the current allotment priorities, as applied in the FM allocations process, skew our Section 307(b)

[11] *See Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Rcd 5374, 5376 (1988) ("*Tuck*") (Commission will disallow a Priority (3) preference where the proposed community is interdependent with a large Urbanized Area). *Tuck* outlined eight factors that are relevant in this context: "(1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries." *Id.* at 5378.

[12] *See Blanchard, Louisiana and Stephens, Arkansas*, Report and Order, 10 FCC Rcd 9828, 9829 (1995) (when comparing first local service proposals for two well-served communities, the Commission bases its decision on a straight population comparison between the communities, even when the population differential is as small as 38 persons).

[13] According to *FM Assignment Policies*, "This comparison can take into account the number of aural services received in the proposed service area, the number of local services, the need for or lack of public radio service and other matters such as the relative size of the proposed communities and their growth rate." *FM Assignment Policies*, 90 FCC 2d at 92 n.8.

determinations toward communities near large cities, at the expense of new and needed service at smaller communities and in rural areas.

6. In the AM service, there is no table of allotments. Rather, AM applicants specify the desired technical facilities when they file their short-form (FCC Form 175) applications during an AM auction filing window. The Commission has determined that its FM allotment priorities fulfill its obligation under Section 307(b) in AM licensing proceedings.[14] Accordingly, the staff undertakes a traditional Section 307(b) analysis of mutually exclusive AM applications before auction where the mutually exclusive applicants propose different communities of license.[15] If the staff determines that an applicant in a mutually exclusive group ("MX group") merits a dispositive preference, the applicant is invited to file a long-form (FCC Form 301) application, without ever proceeding to competitive bidding, and the non-preferred applicants in the MX group neither proceed to auction nor file long-form applications. This process raises even more concerns than the FM allotment process. The Bureau has made many dispositive Section 307(b) determinations under Priority (4) in AM licensing proceedings, often on the basis of reception population coverage differences between the competing technical proposals, potentially skewing Section 307(b) determinations toward suburban communities in the same manner as in FM allocations proceedings. Such preferences are sometimes awarded based on relatively small differences in population coverage in areas already receiving abundant service.[16] Moreover, whereas all new FM allotments proceed to auction, in the AM licensing process, not only do these procedures favor larger communities, but the dispositive preference for the favored community obviates the need to proceed to competitive bidding.[17] For example, only seven AM applicants – out of 116 total mutually exclusive new AM station and major modification applications filed in the auction window – participated in Auction No. 32.[18] Thus, new entrants – many of whom propose stations in small communities and rural areas – may be excluded from the process without being able to employ the bidding credits established by the Commission to assist such applicants to gain a toehold in the industry.[19] Accordingly, we are concerned that the Commission's Section 307(b) standards, as applied in the AM

[14] The FM allotment priorities were first applied to Section 307(b) determinations in mutually exclusive AM proceedings in *Alessandro Broadcasting Co.*, Decision, 56 RR 2d 1568 (Rev. Bd. 1984). *See also Romar Communications, Inc. and KM Communications, Inc*., Memorandum Opinion and Order, 19 FCC Rcd 23128, 23129-30 (2004) ("*Romar*") (using *FM Assignment Policies* to evaluate competing AM applications).

[15] *Broadcast First Report and Order*, 13 FCC Rcd at 15964-65.

[16] We consider five or more services to be "abundant." *Family Broadcasting Group*, Decision, 53 RR2d 662 (Rev. Bd. 1983), *review denied*, FCC 83-559 (Nov. 29, 1983); *see also Bay City, Brenham, Cameron, Centerville, Edna, Ganado, Giddings, Harker Heights, Hearne, LaGrange, Matagorda, New Ulm, Point Comfort, Rollingwood, Rosenberg, and Seadrift, Texas*, Memorandum Opinion and Order, 10 FCC Rcd 3337 (1995).

[17] In some cases an auction may take place with fewer than all of the applicants in an MX group. If, for example, the staff determines that Community X merits a dispositive Section 307(b) preference, and two applicants in the MX group have proposed X as their community of license, only those two will proceed to auction.

[18] 81 of the 116 mutually exclusive ("MX") Auction No. 32 applicants had their applications resolved through Section 307(b) analyses. Of the three Auction No. 32 MX groups that proceeded to competitive bidding, all involved applicants that applied for new stations in the same community.

[19] For example, in FM Broadcast Auction No. 37, 60 percent of winning bids were subject to either a 35 or 25 percent new entrant bidding credit.

licensing process, may be inconsistent with our longstanding, fundamental policy goal of broadening participation in the broadcast industry.[20]

7. *Discussion*. As discussed above, we are concerned that reliance on the differences in populations receiving new service in already abundantly served areas may have an adverse impact on the fair distribution of service in new AM and FM station licensing, and may be inconsistent with statutory and policy goals. We tentatively conclude that, in most instances, Priority (3) preferences should not be awarded where the proposed new station would or could place a principal community signal over the majority of an Urbanized Area. In addition, we tentatively conclude that dispositive Section 307(b) preferences under Priority (4) should only be awarded to an AM new station or major change applicant in rare and exceptional circumstances, and that a dispositive preference would not be appropriate in other Priority (4) AM application cases.

8. As discussed above, while community populations and populations receiving service remain the principal metrics in a Section 307(b) comparison between applications or competing allotment proposals, population comparisons alone do not necessarily ensure that the public interest is served. In the case of competing Priority (3) applications, awarding a dispositive preference based on the population of a community located in or adjacent to an Urbanized Area may be antithetical to the public interest, especially when the proposed FM allotment or AM station would provide signal coverage over a significant proportion of the Urbanized Area. Stations may have little incentive to provide outlets for local self-expression to communities that comprise only a small portion of the total population reached by their signals. To guard against this possibility under our current regulatory approach, in analyzing a Priority (3) proposal in or near an Urbanized Area, we first examine the extent of encompassment of the Urbanized Area by the proposed facility's signal, as well as the size and proximity of the proposed community vis-à-vis the central city. If the proposed community of license is located in the Urbanized Area, or the community is outside the Urbanized Area but its proposed signal would or could cover over 50 percent of the Urbanized Area, we then apply the *Tuck* analysis, to determine whether the proposed community of license is truly independent of the larger Urbanized Area. The principal focus of a *Tuck* analysis, however, is on the proposed community's characteristics (e.g., businesses, municipal government and services) rather than on the characteristics of the radio service to be provided.

9. We believe that when evaluating proposals for new AM stations or new FM allotments,, we should place greater emphasis on the scope of the reception service to be provided to an Urbanized Area, rather than using the reception service analysis merely as a stepping-stone to a potentially dispositive *Tuck* analysis. Accordingly, we tentatively conclude that any new station proposal that would be located within an Urbanized Area or would place a daytime principal community signal over 50 percent or more of an Urbanized Area, or that could be modified to provide such coverage based on existing spectrum availability or rule-compliant power or pattern modifications from a site covering the same proposed community of license, should be deemed a proposal to serve the Urbanized Area rather than the proposed community. In such an instance, absent effective rebuttal of the presumption, we would not award a Priority (3) dispositive preference. We believe this approach would reflect a more realistic evaluation of the likely focus of the proposed new service. We seek comment on this proposal, and specifically as to any factors that should serve to rebut the presumption that an applicant proposes to serve the Urbanized Area rather than the proposed community of license. Also, given our proposed shift in emphasis to Urbanized Area coverage as the principal factor in determining whether an applicant may claim a Priority (3) preference, does the eight-factor *Tuck* analysis retain any viability?

[20] *See, e.g., Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990) ("Safeguarding the public's right to receive a diversity of views and information over the airwaves is … an integral component of the FCC's mission."), *overruled on other grounds in Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("*Adarand*").

10. As noted above, in a Priority (4) analysis the principal determining factor has been whether the proposal would provide new reception service to the greatest population. Such a raw population comparison, however, may give an unfair advantage to applicants proposing service to or near large communities or Urbanized Areas. As a threshold matter, we seek comment as to whether, in the AM licensing process, we should cease awarding dispositive Section 307(b) preferences based on a Priority (4) analysis when comparing new AM proposals. That is, if an applicant cannot qualify for a dispositive Section 307(b) preference under Priorities (1) – (3), should the staff then proceed to determine no Section 307(b) preference is appropriate? Under this approach, the mutually exclusive engineering proposals would be subject to competitive bidding procedures. In the alternative, should we permit dispositive Priority (4) findings in very narrowly defined circumstances with respect to such mutually exclusive applications? For example, should Priority (4) analysis be confined to situations in which either existing transmission or reception services to the proposed community or service area fall below a service level "floor?" We tentatively conclude that where 75 percent or more of the population within a proposed new station's principal community contour (5 mV/m) already receives more than five aural services, and where the proposed community of license already has more than five transmission services, no dispositive Section 307(b) preference should be awarded to that applicant. If an applicant's proposal falls below these floors, it would then proceed to a Section 307(b) analysis that, as discussed in more detail below, would differ from current practice. We seek comment on these proposals, and in particular on the proposed 75 percent threshold. We further seek comment on ways in which a Priority (4) analysis in the FM allocations process could or should be modified to de-emphasize service population totals, to alleviate the problem of unduly advantaging proposals for new FM allotments in or near large communities. Are there, for example, other factors that would more accurately reflect the need for new FM service?

11. We further seek comment on other modifications to a Priority (4) Section 307(b) analysis that would serve to level the playing field between proposals to serve larger and more populous communities and those to serve smaller communities and rural areas. The Commission has modified the comparison of raw population totals, in the FM allocations context, by permitting the computation of a "service value index."[21] Essentially, the service value index ("SVI") is a method of discounting raw population totals based on the number of services received, enabling the proponent to claim that its application would better serve the public interest by serving underserved areas.[22] We believe that this method could prove useful in comparing proposals for new AM service as well.

12. In the FM allocations context, the applicant proposing the higher SVI receives an allotment. The Commission in *Greenup* stated that a difference in SVI of 18.8 percent was dispositive.[23] As noted above, comparison of competing FM allotment proposals must arrive at a clear winner. We believe, however, that a substantially higher SVI differential should be required before a dispositive preference should be awarded to an AM applicant proposing new service. If AM applications do not demonstrate a sufficiently large SVI differential, no dispositive 307(b) preference would be awarded on this basis and the mutual exclusivity between competing applications must then be resolved through an auction. We tentatively conclude that at least a 50 percent SVI differential, for reception service, must be shown by an AM applicant in order to qualify for a dispositive Section 307(b) preference under Priority

[21] *Greenup*, 6 FCC Rcd at 1495.

[22] The SVI is computed as follows: the proposed service area or gain area is divided into "pockets" of population based on the number of aural services received in each pocket. The population within each pocket is divided by the number of aural services received, and the results for each pocket are then added together. *Greenup*, 6 FCC Rcd at 1495.

[23] *Id*.

(4). We seek comment on this proposal, including comments on the magnitude of the dispositive SVI differential, and on whether using such a method to allow more applications to proceed to competitive bidding serves the public interest. Alternately, we seek comment on whether, when evaluating mutually exclusive AM proposals, we should only engage in a Priority (4) analysis when both conditions occur: the proposed community does not meet a specified transmission and/or reception "floor," and there is at least a 50 percent differential in SVI between or among competing communities.

13. In addition, we seek comment on a priority for AM auction and FM allotment proposals that would provide new third, fourth, or fifth reception service to a substantial number of listeners. We seek comment on whether to establish an "underserved listeners" priority – co-equal to Priorities (2) and (3) – for proposals that would provide a third, fourth, or fifth aural reception service to a substantial portion of the proposed service population. Should such a priority be limited to proposals that would provide such service to at least 15, 25, 35, or 50 percent of the proposed service population? Should such an "underserved listeners" priority outweigh a Priority (3) proposal only if the total number of underserved listeners exceeds the population of the community for which a first local service is proposed? We invite comment on these alternatives, as well as the specifics of their application. For instance, commenters could suggest alternate metrics for defining underserved populations or rural areas. We also invite comments as to combinations of the alternatives referenced above, or other methods by which we could promote additional transmission services at smaller communities or those that serve as the population centers for rural areas. Finally, we seek comment on how the proposals stated above would affect small business entities, including those owned by minorities and women.

14. Our goal, again, in proposing these changes is not only to give effect to Congress's statutory mandates, but also to promote broadcast ownership diversity by affording a variety of applicants, including those that may qualify for new entrant bidding credits, opportunities to seek AM and FM licenses, as well as to promote the introduction of new service to smaller communities and rural areas. We seek comment on these proposals, and on the best means of achieving these goals.

B. Limit Moves of Existing Stations from Smaller Communities.

15. *Background*. Recently, we amended our rules to allow existing licensees and permittees to change their communities of license by means of first come-first served minor modification applications.[24] As part of the new application process, the Commission required applicants to submit "a detailed exhibit demonstrating that the proposed change constitutes a preferential arrangement of allotments under Section 307(b) of the Act as compared to the existing allotment(s)," and emphasized that it would carefully apply the *Tuck* factors to assure "that a first local service preference will not be awarded to a community that is largely interdependent with the Urbanized Area or surrounding communities."[25] Applicants availing themselves of this procedure must demonstrate that relocation to a new community comports with the goals underlying Section 307(b), including an absolute bar on removing the sole local transmission service at a community. Thus, applicants using this procedure have submitted Section 307(b) showings in their applications largely based upon Section 307(b) precedent from the FM Allocations context. Based on our experience with such proposals, we believe that certain modifications or clarifications in these standards may be warranted. Additionally, we wish to address the

[24] *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14227-30 (2006) ("*2006 Community of License Order*") (petitions for reconsideration pending).

[25] *Id*. at 14218-19.

comments of certain parties in other proceedings, who are concerned about the loss of radio service to smaller and more rural communities.[26]

16. *Discussion*. In keeping with the Section 307(b) priorities, we propose that a community of license change that creates "white" or "gray" areas (areas with no or only one reception service) should not be allowed under any circumstances. Given that provision of first or second reception service are the first two Section 307(b) priorities, we believe that such an absolute bar is necessary to ensure that the least well-served populations do not suffer further drops in the level of reception service. We seek comment on our proposal.

17. We further propose that the presumption of Urbanized Area service described above should also be used in evaluating AM and FM applications to change existing stations' communities of license, to ensure that applicants claiming preference under Priority (3) are not using the streamlined procedures as a way of relocating from smaller communities to large urbanized areas, under the guise of providing first local transmission service to a smaller community in or adjacent to an Urbanized Area.[27] Thus, in evaluating a modification application to move a station to become a new community's first local transmission service, we propose to treat such an application as proposing service to the Urbanized Area if the new facilities would be located in or would or could place a daytime principal community signal over 50 percent or more of an Urbanized Area. We seek comment on this proposal, and specifically on whether it would help restrict the migration of stations to metropolitan areas with larger audiences, and more effectively fulfill the Commission's Section 307(b) mandate.

18. Additionally, we seek comment on other criteria that should be considered in evaluating a proposed change of community of license or move of facilities, including possibly outweighing even a Priority (3) preference. To the extent that a proposed station move would deprive a significant population of its third, fourth, or fifth reception service, we seek comment on whether such a move should be presumed contrary to the public interest. For example, what should be considered a "significant population?" Should the loss of reception service pose an absolute bar to the proposed move-out, or should the magnitude of the increased level of service, or the size of the new community, be weighed in some fashion against the size of the population losing reception service? Should such a policy favoring preservation of service to underserved populations over new first local transmission service be limited to the move-out context only, or both move-outs and proposals for new service, as discussed above?[28] We likewise seek comment as to whether removal of the second local transmission service from a community, even to provide a first local service to a new community, should be prohibited. Alternatively, should removal of second local service not be an absolute bar, but rather be weighed against a proposed station move, and if so how much weight should be accorded this factor? We also seek comment on the effect of any changes on station ownership by small businesses, including those owned by minorities and women.

C. Establish Section 307(b) Priority for Native American and Alaska Native Tribal Groups Serving Tribal Lands.

19. *Background*. As of the 2000 U.S. Census, there are more than 4.1 million Native Americans and Alaska Natives living in the United States. There are 563 federally recognized American

[26] *See*, *e.g.*, *id*. at 14216 and nn.28-30.

[27] *See supra* paragraphs 8-9.

[28] *See* Paragraphs 10-13.

Indian Tribes and Alaska Native Villages (referred to collectively as "Tribes").[29] At present, there are approximately 41 full-power noncommercial educational ("NCE") FM radio stations in the United States licensed to federally recognized tribes or affiliated groups, with another 31 construction permits for full-power NCE FM stations having been granted to such Tribes.

20. Several tribal groups have expressed concern about their ability to establish radio service to their people and tribal lands.[30] As noted above, the problem is most acute in the case of tribal lands that are near large Urbanized Areas, or where the suburbs of such Urbanized Areas have begun to encroach upon areas adjacent to tribal lands. In such instances, spectrum scarcity may limit the opportunities for new radio service. Further, while communities located on tribal lands may well qualify for first local transmission service priorities in a Section 307(b) analysis, obtaining such a priority hinges upon the absence of other proposals for first local transmission service in larger communities.

21. It is well established that Tribes are inherently sovereign Nations, with the obligation to "maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life," within their jurisdictions.[31] Moreover, the Commission, as an independent agency of the United States Government, has an historic federal trust relationship with Tribes, and a longstanding policy of promoting tribal self-sufficiency and economic development.[32] We

[29] "The term 'Indian Tribe[s]' or 'Federally-Recognized Indian Tribes' means any Indian or Alaska Native tribe, band, nation, pueblo, village or community which is acknowledged by the federal government to constitute a government-to-government relationship with the United States and eligible for the programs and services established by the United States for Indians. *See The Federally Recognized Indian Tribe List Act of 1994* (Indian Tribe Act), Pub. L. 103-454. 108 Stat. 4791 (1994) (the Secretary of the Interior is required to publish in the Federal Register an annual list of all Indian Tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians)." *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080 (2000) ("*Tribal Policy Statement*").

[30] *See*, *e.g.*, *Native Public Media Policy Priorities* at 6 (Dec. 16, 2008) (http://www.nativepublicmedia.org/images/stories/documents/Native-Public-Media-Policy-OTT-rev-1-09.pdf?phpMyAdmin=rdBoOHZ4pOvZjmRZQuW5G1JK9Pb, accessed Mar. 3, 2009). As used here, "tribal lands" means both "reservations" and "near reservation" lands. "Reservations" is defined as any federally recognized Indian tribe's reservation, pueblo or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlements Act (85 Stat. 688), and Indian allotments. 47 C.F.R. § 54.400(e). "Near reservation" is defined as "those areas or communities adjacent or contiguous to reservations which are designated by the Department of Interior's Commission of Indian Affairs upon recommendation of the Local Bureau of Indian Affairs Superintendent, which recommendation shall be based upon consultation with the tribal governing body of those reservations, as locales appropriate for the extension of financial assistance and/or social services on the basis of such general criteria as: Number of Indian people native to the reservation residing in the area; a written designation by the tribal governing body that members of their tribe and family members who are Indian residing in the area, are socially, culturally and economically affiliated with their tribe and reservation; geographical proximity of the area to the reservation and administrative feasibility of providing an adequate level of services to the area." *Id.* Thus, "tribal lands" includes American Indian Reservations and Trust Lands, Tribal Jurisdiction Statistical Areas, Tribal Designated Statistical Areas, Hawaiian Homelands, and Alaska Native Village Statistical Areas, as well as the communities situated on such lands. To the extent that tribal lands are "checkerboarded" with fee lands, we will use the outer boundaries of such lands to delineate the coverage area, and will not deduct fee lands not owned by members of Tribes from the coverage percentage.

[31] S.Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879) (quoted in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 102 S.Ct. 894, 903, 71 L.Ed.2d 21 (1981)).

[32] *Tribal Policy Statement*, 16 FCC Rcd at 4080-81 (2000).

therefore believe that it is in keeping with our policy toward and relationship with Tribes, as well as the public interest, to aid Tribes and tribal consortia in their efforts to provide educational and other programming to their members residing on tribal lands, as well as to assist them in acquiring and operating commercial stations for purposes of business and commercial development.

22. *Discussion*. Accordingly, we tentatively conclude that it is in the public interest to provide federally recognized Tribes with a Section 307(b) priority in FM allotments, AM filing window applications, and NCE FM filing window applications. To qualify for the new priority, an applicant would have to demonstrate all of the following: (1) the applicant would have to be either a federally recognized Tribe or tribal consortium, a member of a Tribe, or be an entity more than 70 percent owned or controlled by members of a Tribe or Tribes; (2) at least 50 percent of the daytime principal community contour of the proposed facilities would have to cover tribal lands,[33] in addition to meeting all other Commission technical standards; and (3) the applicant would have to propose at least first local transmission service to the proposed community of license, which would have to be located on tribal lands. We propose that such a tribal priority fit between the current Priority (1) and co-equal Priorities (2) and (3).[34] In other words, the tribal priority would not take precedence over a proposal to provide first reception service to a greater than *de minimis* population, but would take precedence over the provision of second local reception service or, more importantly, over a proposal for first local transmission service. While this would place the proposed tribal priority very high in the Section 307(b) analysis, we believe such placement would be justified due to the inherent sovereignty of Tribes and their obligations to their members on tribal lands, and the fact that the priority is specifically designed to facilitate those obligations by Tribes or tribal members. The proposed tribal priority would be applied only at the allotment stage of the commercial FM licensing procedures, as this is the only point at which a Section 307(b) analysis is currently conducted. It would be applied to commercial or NCE AM applications filed during an AM filing window, as part of the threshold Section 307(b) analysis. The tribal priority would be applied to applications filed in an NCE FM filing window as the first part of the fair distribution analysis, before application of the "first or second reserved channel NCE service" criterion set forth in Section 73.7002(b) of our rules.[35] NCE applicants also would be required to meet all NCE eligibility and licensing requirements.[36]

23. This tribal priority would likely be dispositive in many situations. Accordingly, we tentatively conclude that a holding period, commencing with the award of a construction permit until the completion of four years of on-air operation, should apply to any station or allotment awarded pursuant to the tribal priority. In the case of an AM or NCE FM station awarded to a tribal applicant, the holding period would prohibit any change in ownership that would lower the 70 percent tribal ownership threshold, change of community of license, or technical change that would cause less than 50 percent of the principal community contour to cover tribal lands. In the case of a commercial FM allotment, the restriction would apply only to any proposed change of community of license or technical change as described in the preceding sentence. We believe that the restriction in technical or community changes would serve to make such allotments more attractive to Tribal members and entities. However, even a non-Tribal owner that is awarded a permit would still be required to provide broadcast service primarily to tribal lands for four years.

[33] The principal community contour is set forth in 47 C.F.R. §§ 73.24(i), 73.315(a), and 73.515.

[34] *See FM Assignment Policies* at 91-93.

[35] 47 C.F.R. § 73.7002(b).

[36] *See id*. §§ 73.503, 73.561.

24. We seek comment on the proposals and tentative conclusions set forth above. In particular, we request comment on the proposed compositional requirements and on the specific composition that should be required of applicant entities to claim the proposed tribal priority; on the percentage of the principal community contour that must serve tribal lands; on whether we should impose any other requirements for qualifying for the priority; on the length and parameters of the holding period proposed above; or on any other matters relating to the goal of providing Tribes with greater access to broadcast frequencies covering their lands. With regard to FM commercial allotments and applications in the non-reserved band, and given that we have traditionally performed Section 307(b) analyses only at the FM commercial allotment stage, we specifically seek comment as to the effect, if any, of applying the tribal priority, particularly the compositional component, only at the allotment stage. Is the geographic component of the proposed tribal priority sufficient to limit interest in such allotments to tribal applicants, or is there a way to further prioritize tribal applicants within our existing Section 307(b) framework for commercial FM applications? Alternately, should we eliminate the compositional requirement in the allocations Section 307(b) analysis, relying solely on the geographic component in the FM commercial context? We also seek comment on modifications to the tribal priority that could apply to Tribes that do not have tribal lands, or to Tribes seeking to provide service to significant tribal populations living in communities that are not, or are not primarily, located on tribal lands. Additionally, we seek comment on any statutory or constitutional issues raised by this proposal. In particular, we invite comment on whether the Commission's discretion under Section 307(b), which mandates "such distribution of licenses … among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same," is broad enough to establish such a priority,[37] as well as on whether the proposed priority, which as set forth above is premised on principles of tribal sovereignty and the federal trust responsibility, would be likely to be deemed a racial classification subject to strict judicial scrutiny.[38]

D. Absolute Prohibition Against Downgrading Proposed AM Facilities After Receiving Dispositive Section 307(b) Preference.

25. To the extent that a mutually exclusive AM auction filing window applicant receives a dispositive preference under Section 307(b), we believe it is critical that the applicant not be allowed to downgrade that proposal such that it serves a smaller population, or otherwise negates the factors that led to the award of a dispositive preference. To do so merely encourages "gaming" of the Section 307(b) process, leading applicants to promise more service in their applications than they plan to deliver, and can therefore undermine confidence in the fairness of our procedures for awarding new construction permits. For example, NCE FM applicants who receive a decisive preference for fair distribution of service are precluded from downgrading service to the area on which the preference is based for a period of four

[37] 47 U.S.C. § 307(b). *See Winter Park Comm'ns, Inc. v. FCC*, 873 F.2d 347, 352 (D.C. Cir. 1989) ("The FCC has broad discretion under section 307(b) to determine the public interest, and nothing in the Communications Act prevents the FCC from defining the term 'community' differently in different contexts, or from adopting an interpretation that strays considerably from political boundaries"); *Nat'l Assoc. of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984) (upholding FCC approval of cable TV licenses on a nationwide basis and stating that "the constituency to be served is people, not municipalities").

[38] *Compare Adarand*, 515 U.S. at 227 ("All racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."), *with Morton v. Mancari*, 417 U.S. 535, 554 (1974) (in upholding legislation benefitting federally recognized Indian tribes, explaining that benefits were "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.") *and Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335, 1340 (D.C. Cir. 1998) ("ordinary rational basis scrutiny applies to Indian classifications just as it does to other non-suspect classifications under equal protection analysis.").

years of on-air operations.[39] We tentatively conclude that AM licensees or permittees receiving Section 307(b) preferences likewise should be required to provide service substantially as proposed in their short-form tech box submissions. We seek comment on this tentative conclusion, in particular on the amount of time such a licensee or permittee should be precluded from downgrading. Should it be four years, as with NCE FM applicants, or is some other period of time needed to deter such behavior?

E. Establish "Technically Eligible for Auction Processing at Time of Filing" Criteria for New and Major Change Applications in the AM Broadcast Service

26. *Background*. New and major change applicants in the AM broadcast service must submit certain basic engineering data along with their short-form applications.[40] In the *Broadcast First Report and Order*, the Commission concluded that, at this pre-auction stage, the staff would examine such data "only to the extent necessary to determine the mutually exclusive groups of applications," but not to determine the "acceptability or grantability of an applicant's technical proposal."[41] By deferring extensive technical review of the submitted engineering data in this manner, the Commission expected to "minimize the potential for delay and . . . promote the deployment of new broadcasting service to the public as expeditiously as possible."[42]

27. *Discussion*. Although this auction processing rule was designed to reduce staff burdens by limiting comprehensive technical reviews only to singleton applications, recipients of dispositive Section 307(b) preferences, and auction winners, we believe that it has instead contributed to the filing of patently defective applications, undermined the accuracy and reliability of our mutual exclusivity and Section 307(b) determinations, and frustrated the staff's ability to manage the window filing process efficiently. Moreover, such defective applications preclude the filing of meritorious modification applications by existing facilities, which must protect the prior-filed defective applications. Many of the AM applications filed in previous auctions have been so fraught with engineering problems that they were deemed ineligible to participate in the auction process. In fact, in AM Auction No. 84 the Media Bureau appropriately determined that 69 AM tech boxes were ineligible for further processing, for failing to provide even the minimal requested information needed to make a mutual exclusivity determination.[43] Even among those applications that clear the current threshold, many likely cannot be perfected, yet create unnecessary mutual exclusivities while they remain on file or, if they are singletons, languish with little or no hope of successful resolution. For example, of the 1,311 tech box proposals filed in AM Auction No. 84, the staff determined that 188 (14.3 percent) were ineligible for further processing. The staff also found significant technical deficiencies in 68 of the 230 singleton applicants (29.5 percent) that

[39] 47 C.F.R. § 73.7005(b).

[40] *See* FCC Forms 175 and 301. The technical information, sometimes referred to as the "tech box," is a subset of the information required for the Form 301 long-form application submitted in conjunction with Form 175. As discussed in the *Broadcast First Report and Order*, this short-form procedure is employed in the AM, FM and TV translator, and LPTV services, where mutual exclusivity is determined by analysis of engineering data. *Broadcast First Report and Order*, 13 FCC Rcd at 15977-79.

[41] *Id*. at 15978-15979; *see also* 47 C.F.R. § 73.3571(h)(1)(ii).

[42] *Broadcast First Report and Order*, 13 FCC Rcd at 15979.

[43] *Certain AM Auction No. 84 Filing Window Applications Are Determined Ineligible for Auction Processing*, Public Notice, 19 FCC Rcd 4844 (MB 2004).

filed long-form applications,[44] and, to this point, has dismissed 55 singletons altogether, with only 20 original singleton applications still pending.[45]

28. In light of this unacceptably high percentage of defective filings, we tentatively conclude that Section 73.3571(h)(1)(ii) should be modified to require that applicants in future AM broadcast auctions must at the time of filing meet basic technical eligibility criteria, including community of license coverage (day and night),[46] and protection of co- and adjacent-channel stations and prior-filed applications (day and night).[47] We also tentatively conclude that the rules should be modified to prohibit the amendment of applications that, at time of filing, are technically ineligible to proceed with auction processing, and prohibit applicants that propose such technically ineligible applications from participating in the auction.[48] This proposal would preclude attempts to amend or correct data submitted in Form 175 or the tech box, including proposals to change community of license before an applicant has been awarded a construction permit.[49] We invite comment on this proposal.[50]

F. Codify the Permissibility of Non-Universal Engineering Solutions and Settlement Proposals.

29. *Background*. The broadcast auction anti-collusion rules apply generally upon the filing of a short-form application.[51] Section 73.5002(d) of the Commission's rules, however, provides applicants in certain mutually exclusive application groups a limited opportunity to resolve conflicts by means of technical amendment or settlement.[52] This exception to the anti-collusion rules applies only to those groups that include either (1) at least one AM major modification; (2) at least one noncommercial educational application; or (3) applications for new stations in the secondary broadcast services.[53] Currently, the rule neither prohibits the Commission from accepting non-universal technical amendments

[44] The staff initially identified a total of 321 singleton applications from the 1,311 proposals submitted in the AM Auction No. 84 filing window. Thus, of the singleton applicants who filed long-form applications, more than 28 percent filed defective long-form applications.

[45] These deficiencies are not limited to applications in the AM service. Over 1,250 of the more than 4,500 LPTV applications received in Auction No. 81 were dismissed because of technical problems.

[46] 47 C.F.R. § 73.24(i).

[47] *Id*. §§ 73.37, 73.182.

[48] *Broadcast First Report and Order*, 13 FCC Rcd at 15976.

[49] *See Rivers, L.P.*, Letter, 23 FCC Rcd 4521 (MB 2008) (singleton applicant with ungrantable application could not file minor modification application to change community of license, because short-form Tech Box showing was not "original authorization" with which modification application could be mutually exclusive; minor modification community of license change procedure not intended to provide applicants an opportunity to perfect ungrantable proposals after filing window closed). *Accord Rainey Broadcasting, Inc.*, Letter, 23 FCC Rcd 9143 (MB 2008).

[50] Given the limited technical requirements for FM translators, the likelihood that applicants will voluntarily resolve conflicts between these secondary service proposals, and their ongoing obligation to resolve all complaints of actual interference to primary stations, we do not believe that a parallel requirement in this service would promote processing efficiency.

[51] 47 C.F.R. § 73.5002(d).

[52] *Id.*

[53] *Id.*

or settlement proposals – which reduce the number of applicants in a group but do not completely resolve the mutual exclusivities of that group – nor requires it to do so. In two previous auctions, the Media Bureau specifically accepted non-universal technical amendments and settlement proposals in the "interest of expediting new service to the public."[54]

30. *Discussion*. We believe that this established staff practice provides an appropriate and effective means of facilitating the introduction of new service, so long as the proposed non-universal technical amendment or settlement proposal results in the grant of at least one application. We tentatively conclude, therefore, that the staff should be given delegated authority, at its discretion and where appropriate, to permit non-universal technical amendments and settlement proposals that make at least one application grantable. We propose, however, that an applicant submitting a technical amendment pursuant to this policy must resolve *all* of its mutual exclusivities with respect to the other applications in the specified mutually exclusive group. If the applicant cannot resolve all of its own application's mutual exclusivities, its amendment will not be accepted. We invite comment on this tentative conclusion.

G. Cap on Number of AM Applications That May Be Filed in an Auction Window.

31. *Background*. At the present time, there is no limit to the number of AM tech box submissions that may be filed with FCC Form 175 during an AM auction filing window.[55] An increasing number of applicants have availed themselves of the opportunity to file multiple technical submissions. In AM Auction No. 32, 171 applicants filed a total of 258 technical proposals. In the next filing window, for AM Auction 84, 460 discrete applicants filed a total of 1,311 technical proposals.[56]

32. *Discussion*. The figures cited above, among other factors, raise a question as to whether a significant percentage of AM auction window applicants are filing speculative applications. As noted above, many AM auction tech box submissions are defective and, ultimately, cannot be granted. One reason for this may be speculation on the part of AM auction applicants, who file many applications anticipating that some will be singletons or will receive dispositive Section 307(b) preferences, thus obviating the need to participate in an auction. As further evidence of possible speculation, many AM Auction 84 applicants who were singletons, or who received dispositive Section 307(b) preferences, have declined to file FCC Form 301 long-form applications for some of their multiple technical submissions. This suggests that many AM applicants are using multiple proposals merely to maximize their chances of having some granted without auction, circumventing auction participation. However, such a practice increases the likelihood of mutually exclusive applications, leads to large and technically complex mutually exclusive groups, and as discussed in connection with our proposal to require pre-auction study of application acceptability, may impose undue burdens on Commission staff.

33. We therefore seek comment on whether to give the Media Bureau and Wireless Telecommunications Bureau delegated authority to determine, in an AM auction window, whether there should be a limit on the number of AM applications that may be filed by individual applicants and, if so, the appropriate application cap. The Bureaus routinely announce application filing procedures by public

[54] *See Settlement Period Announced for Certain Mutually Exclusive Application Groups*, Public Notice, 20 FCC Rcd 10563 (MB/WTB 2005).

[55] Applicants filing FCC Form 175 during an auction filing window pay no filing fee for doing so.

[56] Of that group, 197, or 43 percent, filed more than one application; 43, or nine percent, filed more than five applications. Ten applicants filed more than 20 applications, while one married couple, filing individually under their own names and also under their wholly owned company name, accounted for 85 applications.

notice,[57] and could announce application caps by public notice as well. We note that in 1991, the Media Bureau imposed a five-application limit on applicants and a strict one percent attribution rule for calculating the number of low power television and television translator station applications that could be filed by any party.[58] We are also concerned that some applicants may seek to avoid cap limits by using affiliates or even sham entities. We seek comment on whether, under this proposal, we should apply Commission attribution standards to determine the number of filings submitted by any party. Should the Commission also adopt special attribution rules beyond those set forth in Note 2 to Section 73.3555 of our rules?[59] The use of application caps could force applicants to focus on preferred proposals, deter speculation, and ease staff processing burdens, thereby facilitating more frequent filing windows, speedier processing of window-filed applications, and shorten the time between application filing and auction. On the other hand, a cap may restrict new entrants into markets and programming choices for listeners. We seek comment on whether allowing the Bureaus to impose application caps would be a useful mechanism to balance our competing interests in promoting new and expanded broadcast services and our statutory obligation to prevent abuses of our licensing procedures, including trafficking in new AM station construction permits. Finally, we seek comment on how application caps could impact small business entities.

H. Modify Section 73.5005 to Provide Flexibility in the Deadline for Filing Post-Auction Long-Form Applications.

34. *Background*. The Commission's rules currently provide, without exception, that each winning bidder in a broadcast auction must submit an appropriate long-form application "[w]ithin thirty (30) days following the close of bidding."[60] This lack of flexibility has proven to be problematic. For example, major FM auctions recently have been commenced during the first week of November, with bidding closing in mid- to late November. As a result, the long-form application filing deadline has fallen during the holiday season, creating predictable inconvenience both for applicants and their consultants.

35. *Discussion*. We tentatively conclude that Section 73.5005 of the rules should be modified to delegate authority to the Media Bureau and the Wireless Telecommunications Bureau to extend the filing deadline for the submission of long-form applications in broadcast auctions, as circumstances warrant. We believe that incorporating such flexibility will benefit all involved in the auction process. We invite comment on this conclusion.

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[57] *See, e.g., FCC Adopts Limit for NCE FM New Station Applications in October 12-October 19, 2007 Window,* Public Notice, 22 FCC Rcd 18699 (2007). *See also Auction of FM Broadcast Construction Permits Scheduled for March 7, 2007; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 70*, Public Notice, 21 FCC Rcd 12957, 12967 (WTB/MB 2006).

[58] *See Notice of Limited Low Power Television/Television Translator Filing Window from April 29, 1991 through May 3, 1991,* Public Notice, Mimeo No. 12124 (rel. March 12, 1991).

[59] 47 C.F.R. § 73.3555, Note 2.

[60] *Id*. § 73.5005(a). *See* 47 U.S.C. § 309(j)(15)(A) (authorizing the Commission to "determine the timing of and deadlines for the conduct of competitive bidding under this subsection, including the timing of and deadlines for qualifying for bidding; conducting auctions; collecting, depositing, and reporting revenues; and completing licensing processes and assigning licenses.").

I. Prohibit FM Translator "Band Hopping" Applications.

36. *Background*. On February 6, 2003, the Media Bureau and the Wireless Telecommunications Bureau announced a five-day window, from March 10, 2003, to March 14, 2003, for the filing of applications for new FM translator stations and major modifications to authorized FM translator facilities in the non-reserved band (channels 221-300) as part of Auction No. 83.[61] The Commission has yet to open a similar window for reserved band (channels 201-220) proposals for NCE FM translator stations.

37. Despite the fact that the Commission is not accepting applications for new FM translator stations in the reserved band, a number of Auction No. 83 applicants attempted to "hop" into the reserved band upon grant of their initial construction permits by filing minor change applications that proposed changes to first-, second-, or third-adjacent channels, or intermediate frequency channels.[62] Upon relocation to a channel in the reserved band, such FM translators would be able to operate under the less restrictive NCE rules, which permit the use of alternative methods of signal delivery, such as satellite and terrestrial microwave facilities.[63]

38. *Discussion*. The filing of such band-hopping applications by FM translator stations prior to construction of their facilities wastes staff resources and is patently unfair to those potential applicants that have waited for the opening of a reserved band FM translator window. The same problem can arise with applicants in the next reserved band FM translator window attempting to "hop" into the non-reserved band, while those waiting for a new non-reserved band window are precluded from applying. We tentatively conclude, therefore, that Section 74.1233 of the Commission's rules should be modified to prohibit this practice. Specifically, we propose to require that applications to move into the reserved band from the non-reserved band, or to move into the non-reserved band from the reserved band, may only be filed by FM translator stations that have filed license applications or are licensed, and that have been operating for at least two years. We invite comment on this proposal. We also tentatively conclude that there should be a holding period for new FM translator permittees before they are allowed to "hop" from one band to the other, and that the holding period should be two years of on-air operation following the filing of a license application. We solicit comment on this proposal, and as to the duration of the proposed holding period.

J. Codify Technical Standards for Determining AM Nighttime Mutual Exclusivity among Window-Filed AM applications.

39. *Background*. The first and most essential step in the AM auction process is the staff determination as to which applications filed during the relevant filing window are mutually exclusive with

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[61] *FM Translator Auction Filing Window and Application Freeze; Notice and Filing Requirements Regarding March 10-14, 2003 Window for Certain FM Translator Construction Permits; Notice Regarding Freeze on the Acceptance of FM Translator and FM Booster Minor Change and FM Booster New Construction Permit Applications from February 8 to March 14, 2003,* Public Notice, 18 FCC Rcd 1565 (MB/WTB 2003).

[62] 47 C.F.R. § 74.1233.

[63] *Id*. § 74.1231(b).

each other.[64] Two AM applications filed during the same filing window are considered mutually exclusive if either fails to fully protect the other as required by the Commission's technical rules.[65]

40. In *Nelson Enterprises, Inc.*,[66] the Commission held that the staff properly calculated predicted nighttime interference levels, pursuant to Section 73.182(k) of the rules, by considering interference caused to or received from other window-filed applications as well as to existing stations.[67] It also rejected the contention that window-filed applications should not be considered mutually exclusive if they could be granted by processing them in a particular sequence and treating one application as having been "first filed," and therefore entitled to cut-off protection.[68]

41. *Discussion*. We tentatively conclude that we should modify Section 73.3571 to codify the Commission's decision in *Nelson Enterprises, Inc.*, by explicitly providing that Section 73.182(k) interference standards are applicable in determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window. That is, two applications would be deemed to be mutually exclusive if either application would be subject to dismissal because it would enter the 25 percent limit of the other.[69] We anticipate that this rule change would promote the strict interference standard that the Commission has determined is necessary to revitalize the AM service.[70] We invite comment on this tentative conclusion.

K. Clarify Application of the New Entrant Bidding Credit Unjust Enrichment Rule.

42. *Background*. In order to encourage participation by small, minority- and women-owned businesses, the Commission incorporated a system of "new entrant" bidding credits ("NEBC") as part of the broadcast auction process, enabling qualifying applicants to lower the cost of their winning bid.[71] We propose to clarify certain issues concerning such bidding credits that have arisen during the course of previous auctions.

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[64] *See Broadcast First Report and Order*, 13 FCC Rcd at 15978.

[65] 47 C.F.R. §§ 73.37, 73.182, and 73.187.

[66] Memorandum Opinion and Order, 18 FCC Rcd 3414 (2003). *See id*. at 3417 ("In the AM service, mutual exclusivity may occur during three operational timeframes: daytime, critical hours, and nighttime. Prohibited daytime contour overlap is determined by Section 73.37 and critical hours mutual exclusivity by Sections 73.37 and 73.187.").

[67] *Id*. at 3419.

[68] *Id.*; *see also* 47 C.F.R. § 73.3571.

[69] *See Nelson Enterprises, Inc.*, 18 FCC Rcd at 3417 ("*AM Improvement Report and Order* [, 6 FCC Rcd 6273 (1991), *recon. granted in part and denied in part*, 8 FCC Rcd 3250 (1993)] establishes three classes of nighttime interference contributors: (a) a high-level interferer is defined as a station that contributes to the fifty percent exclusion root-sum-square ("RSS") nighttime limit of another station; (b) a mid-level interferer is defined as a station that enters the twenty-five but not fifty percent RSS of another station and (c) a low-level interferer is defined as a station that does not enter into the twenty-five percent RSS of another station.").

[70] *See id*. ("The Commission specifically adopted the twenty-five percent exclusion RSS limit to 'prevent continually increasing interference in the existing AM band [and] also reduce, in some cases, existing levels of interference.'"), quoting *AM Improvement Report and Order*, 6 FCC Rcd at 6294.

[71] *See Broadcast First Report and Order*, 14 FCC Rcd at 15993-15997; 47 C.F.R. § 73.5007(a).

43. *Discussion*. First, under Section 73.5007(b) of the Commission's rules, a winning bidder is not eligible for the NEBC if it, or any party with an attributable interest in the winning bidder, has an attributable interest in any existing mass media facility in the "same area" as the proposed new facility.[72] The existing and proposed facilities are in the "same area" if the principal community contours of the two facilities would overlap.[73] We propose to clarify that, for purposes of the NEBC, the contour of a proposed new FM broadcast facility is defined by the *maximum class facilities at the allotment site*. Thus, for example, an applicant could not seek to avoid principal community contour overlap and, thereby, qualify for a credit, by specifying preferred site coordinates in its short-form application. Applying the same principle, a winning bidder found eligible for the NEBC because there is no contour overlap between its existing facility and the proposed facility would not be required to reimburse the Commission if, in its long-form application, it employs a one-step upgrade to the proposed facility that would create an overlap with its existing station. Despite the overlap, there would be no diminishment to the applicant's originally claimed bidding credit because the maximum class facilities at the original allotment site would control for purposes of the bidding credit. We seek comment on this proposal.

44. Second, to prevent unjust enrichment by parties that acquire broadcast permits through the use of the NEBC, Section 73.5007(c) of the Commission's rules requires that such parties must reimburse the government for all or part of the credit, plus interest, upon a subsequent assignment or transfer of control of the permit or license, if the proposed assignee or transferee is not eligible for the same bidding credit.[74] This rule is routinely applied to assignment or transfer of control applications filed on FCC Forms 314 and 315, respectively. We tentatively conclude that the analysis should apply to assignments or transfers of control that are considered *pro forma* in nature and may be filed on FCC Form 316.[75] This is designed to eliminate confusion among applicants who, noting that the rule as written does not distinguish between *pro forma* and non-*pro forma* assignments and transfers of control, continue to seek staff advice on whether the unjust enrichment rules apply to *pro forma* applications. We seek comment on this tentative conclusion.

L. Clarify Maximum New Entrant Bidding Credit Eligibility.

45. *Background*. Applicants filing FCC Form 175 applications to participate in broadcast auctions must indicate their eligibility for the NEBC as of the time of filing. However, in broadcast auctions the Media Bureau and Wireless Telecommunications Bureau routinely announce, by Public Notice, that events subsequent to Form 175 filing, particularly the acquisition of additional attributable interests in media of mass communications, can and will reduce an applicant's NEBC eligibility before auction.

46. *Discussion*. We have found that despite clear announcements of this policy in Public Notices and other documents, certain parties have acquired attributable interests after the Form 175 filing deadline, arguing that their NEBC eligibility is frozen as of the filing deadline.[76] Even when faced with

[72] 47 C.F.R. § 73.5007(b).

[73] *Id.*

[74] 47 C.F.R. § 73.5007.

[75] *See id*. § 73.3540(f).

[76] *See*, *e.g.*, *Liberty Productions, a Limited Partnership*, Memorandum Opinion and Order, 16 FCC Rcd 12061, *stay denied*, 16 FCC Rcd 18966 (2001), *aff'd sub nom, Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155 (D.C. Cir.), *cert. denied*, 540 U.S. 981 (2003) ("*Liberty Productions*").

precedent such as *Liberty Productions*, applicants attempt to draw factual distinctions between such precedent and their own cases, in an attempt to preserve maximum NEBC eligibility despite having acquired interests that negate their "new entrant" status.[77]

47. While applicants are free to advance legitimate legal arguments in support of their positions, we believe that this policy is sufficiently important to warrant codification so as to avoid further confusion among applicants. Accordingly, we propose to amend Section 73.5007(a) of the rules to state unequivocally that the NEBC eligibility set forth in an applicant's FCC Form 175 application is the maximum NEBC eligibility for that auction, but that such bidding credit may be diminished based upon post-filing changes, and that such changes must be reported promptly. Under this proposal, we would continue to make final determinations regarding an applicant's eligibility to hold a construction permit, including eligibility for the NEBC, when we are ready to grant the post-auction long-form construction permit application. In the event that an applicant's eligibility for the NEBC changes between the final payment deadline and the date on which we grant the construction permit application, the applicant would be required to make any additional payment prior to the issuance of the permit or license.[78]

M. Codify Guidelines for Section 73.313(e) Supplemental Showings.

48. *Background*. Section 73.313(e) of the Commission's rules states that alternate methods for predicting FM contours may be employed in cases where the terrain in one or more directions from the antenna site "departs widely" from the average elevation used by the staff in predicting contours.[79] The standard method measures the average terrain in a segment of a given radial from three to 16 kilometers from the antenna site, and assumes a terrain roughness factor of 50 meters, which is considered to be representative of average terrain in the United States.[80] Often, applicants will submit contour calculations using alternate prediction methods, usually to demonstrate that their proposed facilities will meet Commission technical standards, for example, those requiring certain levels of signal coverage of the community of license.[81]

49. Since 2001, the staff has informally used two different standards to determine whether terrain "departs widely" from the standard assumption. First, terrain has been considered to depart widely when the antenna height above average terrain ("HAAT") along a single radial in the direction of a community's center, from three to 16 kilometers from the antenna site (i.e., the Commission's standard measurement methodology), varies by more than 30 percent from the HAAT along the same radial, measured from three kilometers from the antenna site to the community's outer boundary. Second, when there is line of sight coverage from the antenna to the community of license, the staff has found terrain to depart widely when the actual terrain roughness factor, measured along the radial running from the antenna site to the community center from a distance of 10 to 50 kilometers from the antenna site, is less than or equal to 20 meters or greater than or equal to 100 meters (known as "delta-h").[82] If one of these

[77] *See*, *e.g.*, *Matinee Radio, LLC*, Letter, 20 FCC Rcd 13713 (MB 2005), *review pending*.

[78] *See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Report and Order, 21 FCC Rcd 891, 909 n.84 (2006).

[79] 47 C.F.R. § 73.313(e).

[80] *See id*. § 73.313(h)(1).

[81] *See*, *e.g., id*. §§ 73.24(i), 73.315(a).

[82] *See id*. § 73.333 Figure 4.

two conditions is met, the staff will allow a contour showing using an alternate prediction method, provided that (a) the contour predicted by the alternate method is at least ten percent greater than that predicted by the standard methodology, and (b) for stations in the non-reserved FM band, the 70 dBμ principal community contour predicted by the alternate method is not greater than the 60 dBμ contour predicted by the standard methodology.[83] While these standards have been used by the staff, the Commission has thus far declined to specify guidelines for determining when terrain "departs widely" under Section 73.313(e).[84]

50. *Discussion*. We propose, in order to provide a measure of certainty to applicants, to codify the standards set forth in paragraph 50, above, as the showings required in order to justify submission of contour calculations by methods other than the Commission's standard methodology. Such guidelines would be set forth in a note to Section 73.313(e). We note that, because a principal community contour calculated using alternate prediction methods must be at least ten percent larger than the contour calculated using standard methodology, and because the 60 dBμ principal community contour of an NCE FM station in the reserved band is the same as its protected contour,[85] these guidelines preclude the use of alternate contour prediction methods for NCE FM stations in the reserved band. We invite comment on this proposal, or on any modifications to, additions to, or substitutions for these guidelines.

III. ADMINISTRATIVE MATTERS

A. Filing Requirements.

51. *Ex Parte Rules*. This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Commission's rules.[86] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[87] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

52. *Comments and Reply Comments*. Pursuant to sections 1.415 and 1.419 of the Commission's rules,[88] interested parties must file comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System ("ECFS"); (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[89]

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[83] Under our current practice, FM stations may not use alternate contour prediction methods to specify a principal community contour that extends farther than the station's protected contour, as calculated by the standard methodology. *See Ms. Rebecca L. Dorch*, Letter, 9 FCC Rcd 2753, 2756 (MMB 1994).

[84] *See CMP-Houston-KC, LLC*, Memorandum Opinion and Order, 23 FCC Rcd 10656, 10658 (2008).

[85] 47 C.F.R. §§ 73.509, 73.515.

[86] *Id*. § 1.1206(b), as revised.

[87] *See id.* at § 1.1206(b)(2).

[88] *Id*. §§ 1.415, 1.419.

[89] *See Electronic Filing of Documents in Rulemaking Proceedings*, Memorandum Opinion and Order, 63 Fed. Reg. 24121 (1998).

53. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cbg/ecfs, or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the Websites for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

54. Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, DC 20554.

55. People with Disabilities: Contact the FCC to request materials in accessible formats (Braille, large print, electronic files, audio format, etc.) by e-mail at FCC504@fcc.gov, or call the Consumer & Governmental Affairs Bureau at 202-418-0531 (voice), 202-418-7365 (TTY).

56. *Additional Information*. For additional information on this proceeding, contact Thomas S. Nessinger, Thomas.Nessinger@fcc.gov, of the Media Bureau, Audio Division, (202) 418-2700. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact Brian Millin at (202) 418-7426 (voice), (202) 418-7365 (TTY), or via e-mail at Brian.Millin@fcc.gov.

B. Initial Regulatory Flexibility Analysis.

57. The Regulatory Flexibility Act of 1980, as amended ("RFA"), requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

58. With respect to this Notice, an Initial Regulatory Flexibility Analysis ("IRFA") under the Regulatory Flexibility Act[90] is contained in Appendix A. Written public comments are requested in the IFRA, and must be filed in accordance with the same filing deadlines as comments on the *Notice*, with a distinct heading designating them as responses to the IRFA. The Commission will send a copy of this *Notice*, including the IRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, a copy of this *Notice* and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the *Federal Register*.

C. Paperwork Reduction Act Analysis.

59. This *Notice* may lead to a *Report and Order* that would contain information collection(s) subject to the Paperwork Reduction Act of 1995 ("PRA"), Public Law 104-13. This *Notice* will be submitted to the Office of Management and Budget ("OMB") for review under the PRA. OMB, the general public and other Federal agencies are invited to comment on the possible information collections, such as FCC form revisions, contained in this proceeding. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Specifically, this item proposes to require additional technical information from AM applicants at the short-form (FCC Form 175) or NCE FM (FCC Form 340) application stage. It also proposes to allow AM applicants and FM allotment proponents, where applicable and as determined by the applicants/proponents, to provide calculations of the Service Value Index ("SVI") and/or information regarding the provision of third, fourth, or fifth receptive service, as part of a Priority (4) showing. The new information collection requirements will be submitted to OMB for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding.

60. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees." Written comments on possible new and modified information collections must be submitted on or before 60 days after date of publication in the *Federal Register*. In addition to filing comments with the Secretary, a copy of any Paperwork Reduction Act comments on the information collection(s) contained herein should be submitted to Cathy Williams, Federal Communications Commission, Room 1-A804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to Cathy.Williams@fcc.gov, and to Nicholas Fraser, OMB Desk Officer, Room 10234 NEOB, 725 17th Street, N.W., Washington, DC 20503 via the Internet to Nicholas_A._Fraser@omb.eop.gov or by fax to 202-395-5167.

61. For additional information concerning the information collection(s) contained in this document, contact Cathy Williams at 202-418-2918, or via the Internet at Cathy.Williams@fcc.gov.

[90] *See* 5 U.S.C. § 603.

IV. ORDERING CLAUSES

62. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 307, and 309(j), that this *Notice of Proposed Rulemaking* IS ADOPTED.

63. IT IS FURTHER ORDERED that the Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, and shall cause it to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *Notice of Proposed Rulemaking*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice of Proposed Rulemaking* ("*NPRM*") provided in paragraph 53. The Commission will send a copy of this entire *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the *NPRM* and the IRFA (or summaries thereof) will be published in the Federal Register.[3]

2. **Need For, and Objectives of, the Proposed Rules.** This rulemaking proceeding is initiated to obtain comments concerning the Commission's proposals to change its rules regarding analysis and processing procedures for AM commercial applications subject to competitive bidding rules, and certain procedures for analyzing and processing proposals for new FM allotments and noncommercial educational FM channel assignments. Specifically, the NPRM proposes to add a presumption that a proposal that would cover more than 50 percent of an Urbanized Area not be able to receive a dispositive Priority (3) preference if it proposes first local transmission service at a community located in or adjacent to the Urbanized Area; proposes to eliminate Priority (4) preferences in AM auction applications except in extraordinary circumstances, such as when a defined service "floor" exists, an applicant proposes a Service Value Index 50 percent greater than a competing applicant, or an applicant proposes to provide third, fourth, or fifth reception service to a significant population, and to prohibit downgrading such service if an applicant receives a dispositive Section 307(b) preference based on such a proposal; to limit or prohibit station community of license changes from rural, small, and underserved communities; to add a new Section 307(b) priority for applications filed by members of, or entities owned by members of, federally recognized Native American and Alaska Native tribes; to require that AM auction applications be technically eligible for auction processing when the short form is filed; to allow non-universal settlements among certain mutually exclusive AM auction applicants; to delegate to the Media Bureau authority to cap the number of AM applications that may be filed, to be more flexible in setting filing deadlines for post-auction long-form applications, and to allow requests for dismissal of "tech box" information submitted with a short-form application; to prohibit FM translator licensees from "hopping" from the reserved to non-reserved bands and vice-versa; and to codify or clarify the technical standards for determining AM nighttime mutual exclusivity among window-filed AM applications, application of the new entrant bidding credit unjust enrichment rule, and new entrant bidding credit eligibility. The Commission believes these proposals will speed the licensing process, better conform broadcast and auction ownership disclosure rules, promote the filing of technically sound applications, deter speculation, and encourage the fair distribution of broadcast licenses.

3. **Legal Basis.** The authority for this proposed rulemaking is contained in Sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 307, and 309(j).

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id*. § 603(a).

4. **Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.** The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.[4] The RFA generally defines the term "small entity" as encompassing the terms "small business," "small organization," and "small governmental entity."[5] In addition, the term "small Business" has the same meaning as the term "small business concern" under the Small Business Act.[6] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[7]

5. **Radio Stations.** The proposed rules and policies potentially will apply to all AM and commercial FM radio broadcasting applicants and proponents for new FM allotments. The "Radio Stations" Economic Census category "comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources."[8] The SBA has established a small business size standard for this category, which is: such firms having $7 million or less in annual receipts.[9] **According to BIA Advisory Services, L.L.C., MEDIA Access Pro Database on March 17, 2009, 10,884 (95%) of 11,404 commercial radio stations have revenue of $6 million or less.** Therefore, the majority of such entities are small entities. We note, however, that in assessing whether a business concern qualifies as small under the above size standard, business affiliations must be included.[10] In addition, to be determined to be a "small business," the entity may not be dominant in its field of operation.[11] We note that it is difficult at times to assess these criteria in the context of media entities, and our estimate of small businesses may therefore be over-inclusive.

6. **Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.** The proposed rule and procedural changes may, in some cases, impose different reporting requirements on existing and potential radio licensees and permittees, insofar as they would require or allow certain applicants to file new technical and population coverage information after the short form application (FCC 175) or in the noncommercial educational long form application (FCC 340).

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[4] *Id*. § 603(b)(3).

[5] *Id*. § 601(6).

[6] *Id*. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[7] 15 U.S.C. § 632.

[8] U.S. Census Bureau, 2007 NAICS Definitions, "515112 Radio Stations"; http://www.census.gov/naics/2007/def/ND515112.HTM#N515112.

[9] 13 C.F.R. § 121.201, NAICS code 515112 (updated for inflation in 2008).

[10] "Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists." 13 C.F.R. § 121.103(a)(1) (an SBA regulation).

[11] 13 C.F.R. § 121.102(b) (an SBA regulation).

However, the information to be filed is already familiar to broadcasters, and the information requested to claim the tribal priority is similar to current Section 307(b) showings, so any additional burdens would be minimal. We seek comment on the possible cost burden these requirements would place on small entities. Also, we seek comment on whether a special approach toward any possible compliance burdens on small entities might be appropriate.

7. **Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.** The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[12] We are seeking to clarify and modify certain application processing rules, which in many cases are designed to improve access to our auctions for small and new entities that are new entrants to the radio broadcasting industry. The Commission seeks comment on procedures to award commercial broadcast licenses through Section 307(b) analyses and competitive bidding that will, in most instances, reduce the burdens on all broadcasters, including small entities, compared to current procedures. The Commission further seeks comment on changes proposed in this NPRM to FM allotment procedures that may reduce the burdens on broadcasters, including small entities, or will not increase the burdens compared to current procedures. The Commission also seeks specific comments on the burden our proposals may have on small broadcasters. There may be unique circumstances these entities may face and we will consider appropriate action for small broadcasters at the time when a Report and Order is considered.

8. **Federal Rules Which Duplicate, Overlap, or Conflict With, the Commission's Proposals.** None.

[12] 5 U.S.C. § 603(b).

APPENDIX B

Proposed Rule Changes

Part 73 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. Section 73.313(e) is proposed to be amended, in part, to read as follows:

§ 73.313 Prediction of coverage.

(e) In cases where the terrain in one or more directions from the antenna site departs widely from the average elevation of the 3 to 16 kilometer sector, the prediction method may indicate contour distances that are different from what may be expected in practice. For example, a mountain ridge may indicate the practical limit of service although the prediction method may indicate otherwise. In such cases, the prediction method should be followed, but a supplemental showing may be made concerning the contour distances as determined by other means. Such supplemental showings should describe the procedure used and should include sample calculations. Maps of predicted coverage should include both the coverage as predicted by the regular method and as predicted by a supplemental method. When measurements of area are required, these should include the area obtained by the regular prediction method and the area obtained by the supplemental method. In directions where the terrain is such that antenna heights less than 30 meters for the 3 to 16 kilometer sector are obtained, an assumed height of 30 meters must be used for the prediction of coverage. However, where the actual contour distances are critical factors, a supplemental showing of expected coverage must be included together with a description of the method used in predicting such coverage. In special cases, the FCC may require additional information as to terrain and coverage.

Note to Section 73.313(e). Terrain will be considered to "depart widely" under the following conditions: (1) When the antenna height above average terrain ("HAAT") along a single radial in the direction of a community's center, from three to 16 kilometers from the antenna site (i.e., the Commission's standard measurement methodology), varies by more than 30 percent from the HAAT measured along the same radial, measured from three kilometers from the antenna site to the community's outer boundary; (2) When there is line of sight from the antenna to the community of license, when the actual terrain roughness factor, measured along the radial running from the antenna site to the community center from a distance of 10 to 50 kilometers from the antenna site, is less than or equal to 20 meters or greater than or equal to 100 meters. If one of these two conditions is met, the staff will allow a contour showing using an alternate prediction method, providing that (a) the contour predicted by the alternate method is at least ten percent greater than that predicted by the standard methodology, and (b) for stations in the non-reserved FM band, the 70 dBμ contour predicted by the alternate method may not be greater than the 60 dBμ contour predicted by the standard methodology.

2. Section 73.3571 is proposed to be amended, in part, to read as follows:

§ 73.3571 Processing of AM broadcast station applications.

(h)(1)(ii) Such AM applicants will be subject to the provisions of §§1.2105 and 73.5002

regarding the submission of the short-form application, FCC Form 175, and all appropriate certifications, information and exhibits contained therein. To determine which AM applications are mutually exclusive, AM applicants must submit the engineering data contained in FCC Form 301 as a supplement to the short-form application. **Such engineering data will be studied for compliance with the technical requirements of §§73.24, 73.37, and 73.182 and will be protected from subsequently filed applications as of the close of the window filing period.**

Note 1 to §73.3571: For purposes of paragraph (h)(1)(ii) of this section, determinations of mutual exclusivity will be made in accordance with the Commission's decision in *Nelson Enterprises, Inc.*, 18 FCC Rcd 3414 (2003).

3. Section 73.5002 is proposed to be amended, in part, to read as follows:

§ 73.5002 Application and certification procedures; return of mutually exclusive applications not subject to competitive bidding procedures; prohibition of collusion.

(e) The staff may permit applicants seeking to resolve their mutual exclusivities by means of engineering solution or settlement as specified by public notice, pursuant to paragraph (d) of this section, to submit a non-universal engineering solution or settlement proposal, so long as such engineering solution or settlement proposal results in the grant of at least one application from the mutually exclusive group. A technical amendment submitted under this subsection must resolve all of the applicant's mutual exclusivities with respect to the other applications in the specified mutually exclusive application group.

4. Section 73.5005 is proposed to be amended, in part, to read as follows:

§ 73.5005 Filing of long-form applications.

(a) Within thirty (30) days following the close of bidding and notification to the winning bidders, **unless the Commission staff extends such period in a public notice**, each winning bidder must submit an appropriate long-form application . . .

5. Section 73.5007 is proposed to be amended, in part, to read as follows:

§ 73.5007 Designated entity provisions.

(a) New entrant bidding credit. A winning bidder that qualifies as a "new entrant" may use a bidding credit to lower the cost of its winning bid on any broadcast construction permit. Any winning bidder claiming new entrant status must have de facto, as well as de jure, control of the entity utilizing the bidding credit. A thirty-five (35) percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have no attributable interest in any other media of mass communications, as defined in § 73.5008. A twenty-five (25) percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have an attributable interest in no more than three mass media facilities. No bidding credit will be given if any of the commonly owned mass media facilities serve the same area as the proposed broadcast or

secondary broadcast station, or if the winning bidder, and/or any individual or entity with an attributable interest in the winning bidder, have attributable interests in more than three mass media facilities. Attributable interests held by a winning bidder in existing low power television, television translator or FM translator facilities will not be counted among the bidder's other mass media interests in determining eligibility for a bidding credit. **Eligibility for new entrant status must be specified in an applicant's FCC Form 175 application, and such eligibility represents the applicant's maximum bidding credit eligibility for that auction. Any change in the applicant's new entrant status subsequent to filing FCC Form 175 may result in diminishment or loss of the new entrant bidding credit. Any post-filing change in an applicant's new entrant status must be reported promptly to the Commission. Final determinations regarding new entrant status will be made at the time of long-form application grant. Applicants whose eligibility is lost or diminished subsequent to Form 175 filing must, before a license or permit will be issued, make such payments as are necessary to account for the difference between claimed and actual bidding credit eligibility.**

*** * ***

Note 1 to §73.5007: For purposes of paragraph (b)(3)(ii) of this section, the contour of the proposed new FM broadcast station is defined by the maximum class facilities at the allotment site.

Part 74 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. Section 74.1233 is proposed to be amended, in part, to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

(a)(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. For FM translator stations, a major change is any change in frequency (output channel) except changes to first, second or third adjacent channels, or intermediate frequency channels, and any change in antenna location where the station would not continue to provide 1 mV/m service to some portion of its previously authorized 1 mV/m service area. **In addition, any change in frequency relocating an unbuilt station to the reserved band will be considered major.** All other changes will be considered minor. . .

STATEMENT OF
ACTING CHAIRMAN MICHAEL J. COPPS

Re: *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures,* MB Docket No. 09-52

This rulemaking is long overdue. Our allotment and assignment policies have been transformed over time into an arcane parlor game that only industry insiders know how to play. It is time to level the playing field. We need fair and transparent rules to meet our statutory obligations and, more importantly, our obligations to the American people.

Section 307(b) of the Communications Act mandates that we "provide a fair, efficient, and equitable distribution of radio service" to "the several States and communities." That means that rural as well as urban communities are entitled to a fair distribution of service. All too often, however, we have twisted or ignored our 307(b) mandate as rural communities lose out on desperately needed new radio service or watch their current stations pick up and move to "greener" pastures.

In particular, I welcome taking a hard look at our preference for so-called "first local transmission service." That rule gives applicants a Section 307(b) priority if they can find a small suburb of a large city that does not yet have a station formally licensed to it and they can convince the Commission that the suburb is sufficiently independent to warrant its own radio service. An applicant wins the game if it can convince the Commission to give it a preference for providing "first service" to the small suburb while blanketing the larger market with a powerful signal. I have expressed concern about the potential for abuse in these cases, especially since our *Tuck* standard—which is supposed to keep the game honest—is so feeble. While stations' desire to migrate to more populated areas is understandable and has the potential to serve the public interest, our 307(b) analysis must be far more rigorous and examine the broader interests at stake.

Similarly, I am pleased that we will consider changes to our auctions process. I am especially concerned about potential new entrants in the AM band who have been unable to employ bidding credits for a particular allotment because no auction was ever held. Instead, the Commission typically awards a dispositive preference for the application that proposes to serve the most people—even if the difference is minimal. The end result is that more rural applicants often never even get the chance to bid at auction because the most urban applicant is awarded a dispositive preference. This process not only forecloses many applicants from participating in auctions, it is time-consuming and delays the delivery of new radio service to the public.

As I have noted before, the erosion of broadcast localism is not the result of a particular rule change or single event. Nor is it an accident. It is the result of countless decisions over the past twenty-five years that make it more and more difficult for localism to hold its ground. We have clear-cut the forest and wonder why the precious topsoil is being washed away. It is time to plant a few saplings.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures,* MB Docket No. 09-52

I am very pleased to support this Notice of Proposed Rule Making, which will allow the Commission to more effectively carry out our obligation to distribute radio service fairly throughout the United States, especially rural and underserved areas. Today, the Commission also aims to increase transparency in the process of broadcast radio broadcast auctioning and licensing.

The Commission's objective in the auctioning and licensing process is to prioritize the needs of communities that do not already have local radio. Community radio stations do not merely serve the towns in which they are located. In rural areas across the country, local community radio stations reach out to keep farmers, ranchers and all those beyond the town limits informed and connected. Perhaps most importantly, these stations are essential components in our national Emergency Alert System safety net. In sum, the value and importance of these stations should not be underestimated.

The current process by which licenses are granted has become rife with inequalities. In the case of both AM and FM licensing, our standards focus primarily on the largest proposed population to be served. In communities on the outskirts of more urbanized areas, potential licensees have taken advantage of our procedures by using nearby communities as backdoors to reach larger, well-served, urban areas. This NPRM will allow us to close this loophole, and ensure that licensees are committed to serving areas that truly need their own voice on the radio.

Through this item, the Commission also proposes to open AM radio to new licensees. By creating more competitive bidding auction opportunities for AM license applicants, new applicants will be able to take advantage of bidding credits, or discounts on their winning bids. This will ease the financial burden on small entities that want to bring radio into unserved, underserved, and rural areas.

Overall, this NPRM encourages equitable licensing procedures, expands broadcast radio to populations that have been largely ignored, and contributes to the growth and vitality of a diverse community of broadcast radio licensees. For these reasons, I support this item and look forward to public comment.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures,* MB Docket No. 09-52

It has been more than a decade since the Commission last considered rules that seek to balance our statutory obligation to implement "fair, efficient, and equitable distribution of radio service" under Section 307(b) of the Communications Act with our statutory obligation to award licenses through competitive bidding. That period of time has afforded the Commission considerable insights into the strengths and weaknesses of the current regulations. Although I do not necessarily agree with all of the tentative conclusions associated with the questions set forth in this Notice, I appreciate the flexibility afforded me in the editing process. I thank the staff for its hard work at making a complex subject comprehensible, and I will review with interest comments we receive on the many issues that the item raises.