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	)	

FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULE MAKING

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By the Commission: Commissioners Copps, McDowell, and Clyburn issuing separate statements.

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I. INTRODUCTION

1. On April 20, 2009, the Commission released a *Notice of Proposed Rule Making* in *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*.[1] The *Rural NPRM* contained several proposals for changes to our assignment and allotment procedures, including detailed proposals to adjust the manner in which we award preferences to applicants under the provisions of Section 307(b) of the Communications Act of 1934, as amended (the "Communications Act").[2] It also contained a proposal for a new Section 307(b) priority that would apply only to federally recognized American Indian Tribes and Alaska Native Villages (collectively "Tribes"), as well as their members and entities owned or controlled by such Tribes and their members, when they propose new

[1] 24 FCC Rcd 5239 (2009) ("*Rural NPRM*").

[2] 47 U.S.C. § 307(b) ("Section 307(b)").

radio services that primarily would serve tribal lands (the "Tribal Priority"). Several other proposals would codify or clarify certain allotment, assignment, auction, and technical procedures.

2. With this *First Report and Order* ("*First R&O*"), we address the Tribal Priority proposal, as well as a number of other proposals set forth in the *Rural NPRM*. The record provides ample support for immediate action on these matters. This approach will enable us to analyze comments on the remaining proposals in depth, to research certain matters brought up in those comments, and to devote the proper time and analysis to those major reforms without delaying action on a number of less complex but also important matters. Accordingly, in this *First R&O* we make certain changes to our assignment and allotment, auction, and technical procedures, as proposed in the *Rural NPRM*. In particular, we adopt the Tribal Priority with modifications. We also release a *Further Notice of Proposed Rule Making* ("*FNPRM*") containing further proposals related to the Tribal Priority, but requiring further comment.

3. With regard specifically to AM application processing, we adopt, with certain modifications, the proposal to prohibit the downgrading of proposed AM facilities that receive a dispositive preference under Section 307(b) and thus are not awarded through competitive bidding. We also adopt our proposal that technical proposals for AM facilities filed with Form 175 applications meet certain minimum technical standards to be eligible for further auction processing, with some modifications, and adopt the proposal to grant the Media Bureau and the Wireless Telecommunications Bureau (collectively, the "Bureaus") delegated authority to cap the number of AM applications that may be filed in an AM auction filing window. We also adopt proposals to streamline auction application processing; to codify the permissibility of non-universal engineering solutions and settlement proposals; to give the staff delegated authority and flexibility in setting the post-auction long-form application filing deadline; to clarify application of the new entrant bidding credit unjust enrichment rule; and to clarify maximum new entrant bidding credit eligibility.

II. DISCUSSION

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

4. *Background*. In the *Rural NPRM*, the Commission noted the marked disparity in the Native American and Alaskan Native population of the United States, compared to the number of radio stations licensed to, or providing significant signal coverage to, lands occupied by members of federally recognized American Indian Tribes and Alaska Native Villages.[3] The Commission also emphasized the historic federal trust relationship between itself and the Tribes, as part of the relationship between the United States government and the sovereign nations that are Tribes.[4] More specifically, the Commission noted that Tribes have an 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,[5] and that the Commission has a longstanding policy of promoting tribal self-sufficiency and economic development, as well as providing adequate access to communications services to Tribes.[6]

[3] *Rural NPRM*, 24 FCC Rcd at 5247-48.

[4] *Id*. at 5248-49.

[5] 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)).

[6] *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080-81 (2000) ("*Tribal Policy Statement*").

5. Accordingly, the Commission tentatively concluded that it would be in the public interest to provide Tribes with a Section 307(b) priority when proposing FM allotments, and filing AM and noncommercial educational ("NCE") FM filing window applications. As set forth in the *Rural NPRM*, an applicant would qualify for the Tribal Priority if: (1) the applicant is either a federally recognized Tribe or tribal consortium, a member of a Tribe, or 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 covers tribal lands;[7] (3) the applicant proposed a first (Priority (1)) or second (Priority (2)) aural (reception) service to more than a *de minimis* population, or proposed a first local transmission service (Priority (3)) at the proposed community of license; and (4) the proposed community of license is located on tribal lands.[8] The Commission further proposed that such a Tribal Priority rank between the current Priority (1) and co-equal Priorities (2) and (3).[9] 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. The proposed Tribal Priority would apply only at the allotment stage of the commercial FM licensing procedures; as part of the threshold Section 307(b) analysis with respect to commercial or NCE AM applications filed during an AM filing window; and as the first part of the fair distribution analysis of applications filed in an NCE FM filing window, before application of the "first or second reserved channel NCE service" criterion set forth in Section 73.7002(b) of the Commission's Rules (the "Rules").[10] NCE applicants also would be required to meet all NCE eligibility and licensing requirements.[11] Certain "holding period" restrictions, commencing with the award of a construction permit until the completion of four years of on-air operation, would apply to any station or allotment awarded pursuant to the Tribal Priority. In the case of an AM or NCE FM construction permit awarded pursuant to a Tribal Priority, the permittee/licensee would be prohibited during this period from making any change in ownership that would lower tribal ownership below the 70 percent threshold, changing the station's community of license, or implementing a facility modification that would cause the principal community contour to cover less than 50 percent of 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. 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.[12]

6. The Commission sought comment as to the various components of the Tribal Priority as proposed, e.g., the percentage of tribal member ownership of business entities and the percentage of tribal lands to be covered to qualify for the priority. The Commission also sought comment on the constitutionality of providing such a priority to members of discrete groups such as Tribes, although it

[7] The principal community contours of AM, FM and NCE FM stations are defined in 47 C.F.R. §§ 73.24(i), 73.315(a), and 73.515, respectively.

[8] For purposes of simplicity in reference, as used generally in this section the term "applicant" also refers to a party filing a Petition for Rule Making to amend the FM Table of Allotments, 47 C.F.R. § 73.202.

[9] *See Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC2d 88, 91-93 (1982) ("*FM Assignment Policies*").

[10] 47 C.F.R. § 73.7002(b).

[11] *See id*. §§ 73.503, 73.561.

[12] *Rural NPRM*, 24 FCC Rcd at 5249.

also cited case law suggesting that adoption of the Tribal Priority would not trigger the strict scrutiny analysis set forth in *Adarand Constructors, Inc. v. Pena*.[13]

7. *Discussion*. Based on our examination of the record in this proceeding, we adopt a Section 307(b) priority for Tribes or tribal consortia, and entities majority owned or controlled by Tribes, proposing service to tribal lands as proposed in the *Rural NPRM*. We adopt some commenters' suggestions for modification of the Tribal Priority. In addition, on our own motion we clarify the application of the Tribal Priority in commercial and NCE contexts and modify ownership requirements, eliminating the priority for individual members of Tribes or entities owned by such individuals, and instead extend the Tribal Priority only to Tribes, consortia of Tribes, and to entities that are majority owned or controlled by a Tribe or Tribes.

8. We find that application of our traditional allocation priorities has not realized our Section 307(b) mandate to "make such distribution of licenses … among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service"[14] with regard to tribal lands.[15] Tribal lands comprise 55.7 million acres, or 2.3 percent of the area of the United States (exclusive of the State of Alaska).[16] Roughly one-third of the 4.1 million American Indian and Alaska Native population of the United States live on tribal lands,[17] which are governed by Indian tribal governments that have a unique legal relationship with the federal government as domestic dependent nations with inherent sovereign powers over their members and territory.[18] Because of their status as sovereign nations responsible for, among other things, "maintaining and sustaining their sacred histories, languages, and traditions,"[19] Tribes have a vital role to play in serving the needs and interests of their

[13] 515 U.S. 200, 227 (1995) ("*Adarand*").

[14] 47 U.S.C. § 307(b).

[15] 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.

[16] Joint Reply Comments of Native Public Media and National Congress of American Indians (jointly "NPM/NCAI") at 4.

[17] *See id.*; U.S. Census Bureau, We the People: American Indians and Alaska Natives in the United States at 13 (issued Feb. 2006), available at http://www.census.gov/prod/2006pubs/censr-28.pdf.

[18] *See Consultation and Coordination With Indian Tribal Governments*, Executive Order No. 13175, 65 Fed.Reg. 67249 (Nov. 6, 2000). *See also Tribal Policy Statement*, 16 FCC Rcd at 4080.

[19] NPM/NCAI Joint Comments at 7.

local communities. A resolution submitted to the Commission by the National Congress of American Indians, for example, provides that tribal-owned stations have the potential to "support several fundamental missions of Tribal entities within their communities, which include increasing the deployment of services, strengthening local programming, providing public safety, obtaining diversity of viewpoint, creating cultural preservation and language revitalization, and prov[id]ing a modern technological outlet to engage community members, especially youth, in the positive development of their values, identity, and quality of life."[20] Despite this, only 41 radio stations currently are licensed to federally-recognized Indian tribes or affiliated groups, representing less than one-third of one percent of the more than 14,000 radio stations in the United States.[21] We conclude that the establishment of an allocation priority for the provision of radio service to tribal lands by Indian tribal government-owned stations will advance our Section 307(b) goals and serve the public interest by enabling Indian tribal governments to provide radio service tailored to the needs and interests of their local communities that they are uniquely capable of providing.[22]

9. We also find that the Tribal Priority adopted herein will advance the Commission's longstanding commitment, in accordance with the federal trust relationship, "to work with Indian Tribes on a government-to-government basis … to ensure, through its regulations and policy initiatives, and consistent with Section 1 of the Communications Act of 1934, that Indian Tribes have adequate access to communications services."[23] Pursuant to that commitment, the Commission has recognized "the rights of Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership."[24] The new Tribal Priority will promote those sovereign rights by enabling Tribes to provide vital radio services to their communities.

10. Further, we conclude that the establishment of a Tribal Priority will promote the policies and purposes of the Communications Act favoring diversity of media voices.[25] As set forth above, Indian

[20] The National Congress of American Indians Resolution #NGF-09-007, Establishment of a Tribal Priority for Broadcast Spectrum Allocations at the Federal Communications Commission, FCC Docket 09-30, at 2, attached to NPM/NCAI Joint Comments. *See* NPM/NCAI Joint Comments at 4 ("Native radio stations play an important role in supporting the Native American communities by providing programming and information that is critically important to residents of various reservations. Given the overall lack of available telecommunications infrastructure on most reservations, the important role of Native radio stations in relaying critical messages cannot be overstated.").

[21] *Rural NPRM*, 24 FCC Rcd at 5248 ¶ 19. *See* NPM/NCAI Joint Comments at 6. *See also Tribal Policy Statement*, 16 FCC Rcd at 4078 (recognizing that, notwithstanding the Commission's efforts to ensure that all Americans, in all regions of the United States, have the opportunity to access telecommunications and information services, "certain communities, particularly Indian reservations and Tribal lands, remain underserved, with some areas having no service at all."). Currently, there are 563 federally recognized tribal governments in the United States. NPM/NCAI Joint Comments at 3.

[22] *See Winter Park Communications, 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.") (citations omitted).

[23] *Tribal Policy Statement*, 16 FCC Rcd at 4079.

[24] *Id*.

[25] It is well established that the Commission's public interest mandate encompasses the goal of fostering viewpoint diversity. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990) ("*Metro Broadcasting*"), *reversed on other grounds*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *FCC v. National Citizens Committee*

tribal governments are uniquely capable of providing radio service tailored to the culture, language and heritage of their local communities, yet they account for only a tiny percentage of the radio station licenses in this country. By broadening the opportunities for Indian tribal governments to obtain Commission licenses and provide new and diverse programming to often-underserved communities, "we seek to strengthen the diverse and robust marketplace of ideas that is essential to our democracy."[26]

11. Turning to the constitutionality of a Tribal Priority, of the eleven commenters addressing this issue,[27] three argue that it constitutes, or might constitute, an illegal race-based preference. This includes Booth, Freret, Imlay & Tepper, P.C. ("BFIT"), which provides no support for its argument.[28] BFIT further argues that the Tribal Priority is designed to privilege a specific group, rather than serving the Section 307(b) goal of fairly distributed service.[29] Additionally, BFIT states that such a priority would wreak technical "havoc" in the AM service due to nighttime mutual exclusivity.[30] Instead, BFIT argues that Tribes should receive a bidding credit akin to those awarded to new entrants.[31] Catholic Radio Association ("CRA") opposes the Tribal Priority, likening it to one given to "any identity group – whether tribal, Catholic, or (fill in the blank with any ethnic or faith group)."[32] CRA further contends that it is fallacious to assume that allowing such a priority would increase programming diversity.[33] CRA concludes that the Tribal Priority is only valid if the applicant's proposal would solely serve members of a Tribe and not other populations.[34] Jorgenson Broadcast Brokerage, Inc. ("JBB") merely questions the constitutionality of the proposed Tribal Priority, without analysis.[35]

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for Broadcasting, 436 U.S. 775, 795 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 409 (1969). *See also Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 663-64 (1994) ("[I]t has long been a basic tenet of national communications policy that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," quoting *Midwest Video*, 406 U.S. 649, 668 n.27 (plurality opinion) and *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). Section 257(b) of the 1996 Act also directs the Commission to "promote the policies and purposes of this Act favoring diversity of media voices" in carrying out its Section 257 responsibilities. 47 U.S.C. § 257(b). And Section 309(j) directs the Commission to promote the dissemination of broadcast licenses to a wide variety of applicants as part of a broad policy of fostering economic opportunity. 47 U.S.C. § 309(j)(4)(D). Section 309(j)(4)(D) requires the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" to achieve its goals.

[26] *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5924 (2008), quoting *Metro Broadcasting*, 497 U.S. at 567.

[27] The eleven commenters filed nine comments, as Prometheus Radio Project and the National Federation of Community Broadcasters (jointly "Prometheus/NFCB") filed joint comments, as did NPM/NCAI. The National Association of Broadcasters ("NAB") mentioned the Tribal Priority in its Comments but did not substantively comment on this specific issue. NAB Comments at 2.

[28] BFIT Comments at 7-8.

[29] *Id*. at 8.

[30] BFIT Reply Comments at 4.

[31] BFIT Comments at 8.

[32] CRA Comments at 6.

[33] *Id*. at 6-7.

[34] *Id*.

[35] JBB Comments at 3 ("Such preferences have been found to be unconstitutional.").

12. In their Joint Comments, NPM/NCAI engage in a detailed analysis of the constitutional issues presented by the proposed Tribal Priority, concluding that the priority would not trigger the strict scrutiny analysis of *Adarand*, but rather a rational basis standard of review. This is because, as stated in the seminal Supreme Court case of *Morton v. Mancari*,[36] the proposed benefit would be granted to Tribes and their members "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the [Bureau of Indian Affairs] in a unique fashion."[37] NPM/NCAI also cite more recent federal precedent for the proposition that benefits aimed at Indians and Tribes do not constitute impermissible racial classifications.[38] We agree with NPM/NCAI that the priority established herein for the benefit of federally recognized Tribes is not constitutionally suspect because it is based on "the unique legal status of Indian tribes under Federal law."[39] As the D.C. Circuit explained in 2003, the Supreme Court's decisions leave no doubt that federal government action directed at Indian tribes, "although relating to Indians as such, is not based on impermissible racial classifications."[40] As set forth above, the Tribal Priority established herein will further our Section 307(b) mandate and other Commission policies by enabling Indian tribal governments to provide radio service tailored to the needs and interests of their local communities. Furthermore, as discussed above, we find that Indian tribal governments are uniquely situated to provide such service to tribal lands. Accordingly, we believe that the Tribal Priority is consistent with the Equal Protection Clause of the Fifth Amendment.

13. While BFIT is correct in stating that Section 307(b) is designed to provide fair distribution of radio service, the Tribal Priority we establish in this *First R&O* promotes this goal for the reasons discussed above. As proposed, the Tribal Priority also ties the preference to the needs of tribal

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[36] 417 U.S. 535 (1974) ("*Morton*").

[37] *Id*. at 554. The Court went on to observe that the preference in question "is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Id*. at 554 n.24. As discussed below, the proposed Tribal Priority will apply only to Tribes or entities that are majority owned by one or more Tribes.

[38] NPM/NCAI Joint Comments at 6-10. Cases cited include *United States v. Cohen*, 733 F.2d 128, 139 (D.C. Cir. 1984) (en banc) ("[T]he Constitution itself provides support for legislation directed specifically at Indian tribes."), and the post-*Adarand* case *American Federation of Government Works, and AFL-CIO v. U.S.*, 330 F.3d 513, 523 (D.C. Cir. 2003), *cert. denied* 540 U.S. 1088 (2003) ("*AFGE*") ("The Court's decisions 'leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based on impermissible racial classifications,'" quoting *United States v. Antelope*, 430 U.S. 641, 645 (1977)). NPM/NCAI also cite a Department of Justice Memorandum of Legal Guidance from 1995 that cites *Morton* in concluding that "*Adarand* does not require strict scrutiny review for programs benefiting Native Americans as members of federally recognized Indian tribes." Memorandum to General Counsels, Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc. v. Pena, at 8 (June 28, 1995).

[39] *Morton*, 417 U.S. at 551-52.

[40] *AFGE*, 330 F.3d at 520, quoting *United States v. Antelope*, 430 U.S. 641, 645 (1977) ("federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions."). *See United States Air Tour Assoc. v. Federal Aviation Admin.*, 298 F.3d 997, 1012 n.8 (D.C. Cir. 2002) (refusing to apply strict scrutiny to agency regulation imposing cap on total number of commercial air tours that operators could run in Grand Canyon National Park because it exempted flights to and from the Hualapai Indian Reservation from each tour operator's annual allocation and upholding the exception against an equal protection challenge under rational basis review).

communities by requiring that, to qualify for the priority, commercial applicants must propose either a first or second aural service, or a first local transmission service at a community located on tribal lands.[41] As discussed above, however, Tribes are uniquely situated to provide programming meeting their members' needs. The existence of a non-tribal commercial station or stations at a community located on tribal lands should not, in our view, preclude the establishment of a first local transmission service owned by a Tribe or Tribes.[42] Thus, we modify the service criterion for the Tribal Priority to require that a qualifying commercial applicant propose first or second aural (reception) service, or a first local tribal-owned commercial transmission service at the proposed community. Currently, there are only a handful of tribal-owned radio stations operating on a commercial basis. We recognize that the cost, complexity and uncertainty of participating in the Commission's FM allotment and radio auctions processes have deterred tribal participation. We believe that it is important to provide a robust and meaningful opportunity for Tribes to pursue commercial licensing opportunities and to determine, over time, how commercial stations can best serve tribal needs. Thus, a commercial tribal-owned applicant may qualify for a Tribal Priority, notwithstanding the fact that a tribal-owned NCE station is licensed at the same community. We reiterate, as the Commission proposed in the *Rural NPRM*, that the Tribal Priority will not take precedence over a *bona fide* proposal to provide first reception service to a significant population, but will rank higher than a competing proposal to provide second reception service or a first local non-tribal-owned transmission service.[43]

14. As for the cited commenters' other concerns, we find little merit. BFIT's protestation of technical "havoc" ignores the fact that the qualifying applicant is required to meet all other Commission technical standards.[44] As for CRA's proposal to award the priority only if the proposed facility would exclusively serve tribal lands, the laws of physics and the historical development of tribal lands make such a suggestion impractical at best. We further reject CRA's attempt to liken the situation of Tribes to that of Catholics or other faith or ethnic groups. As explained in detail in the *Rural NPRM*, the federal government has a relationship with Tribes that is unique, and not analogous to any relationship with the groups CRA cites.[45] We also disagree with CRA's bare assertion that increasing tribal ownership of radio stations will not increase program diversity with regard to Tribes. Our experience and the record suggest otherwise.[46]

15. Commenter Frank McCoy ("McCoy") states that the proposed Tribal Priority is "unnecessary," due to what he perceives as a surfeit of FM spectrum in tribal areas of the western United

[41] *Rural NPRM*, 24 FCC Rcd at 5249. *See also infra* paras. 22-23, in which we set forth separate Section 307(b) evaluation criteria for tribal NCE applicants.

[42] *See* Cherokee Nation ("CN") Comments at 1, 4-5 (Cherokee Nation is headquartered at Tahlequah, Oklahoma, which already has two licensed commercial, non-tribal-owned radio stations).

[43] *Rural NPRM*, 24 FCC Rcd at 5249. As the Commission has stated previously, first reception service is so widely available that it will outweigh the Tribal Priority only in rare cases. *See Amendment of the Commission's Rules Regarding Modifications of FM and TV Authorizations to Specify a New Community of License*, Memorandum Opinion and Order, 5 FCC Rcd 7094, 7096 (1990).

[44] *Id*.

[45] *Id*. at 5248-49.

[46] *See, e.g., Seminole Tribe of Florida*, Letter, 24 FCC Rcd 2845, 2848 (MB 2009), in which the staff waived community coverage requirements in part because the Seminole Tribe "made it clear that its proposed station would be focused on programming of interest to the Seminole people."

States.[47] McCoy offers his consulting services to Tribes on a *pro bono* basis, to assist in finding available channels; to the extent spectrum is not available, McCoy suggests we waive spacing requirements to permit such allotments and assignments.[48] In reply NPM/NCAI point out – correctly, in our estimation – that the principal impediment to new radio service to tribal lands is not a lack of technical knowledge. Rather, Tribes often find themselves unable to compete on an even playing field with other applicants for new service, especially when tribal lands lie near to urbanized or suburban areas.[49] While McCoy's intentions are laudable, we continue to believe that structural changes are needed.

16. Some commenters do not oppose the Tribal Priority, but rather suggest changes to the priority as proposed. Hatfield & Dawson ("H&D") protests that the priority would be practically unworkable in the commercial FM context, as the priority would be applied only at the allotment stage. Thus, H&D contends that there is a real risk that the tribal applicant that went to the time, trouble, and expense of prosecuting the allotment proceeding would still lose at auction to a high bidder that may not provide tribal-oriented programming.[50] Thus, H&D proposes that we limit the Tribal Priority to non-tabled services such as AM, NCE FM, and low-power FM ("LPFM"). Mullaney Engineering, Inc. ("MEI") makes several suggestions: first, in lieu of the proposed holding period, that any facility obtained using the Tribal Priority be permanently restricted to ownership by qualifying Tribes, tribal members, or tribal-owned entities; second, that the proposed tower site be located on tribal lands unless not permissible under Commission, FAA, or other federal rules; third, if less than 50 percent of the principal community contour of such a station covers tribal lands, that the facility be permanently operated on an NCE basis; and fourth, that Tribal entities should be granted the maximum permissible bidding credit if they do not own any other commercial stations the principal community contours of which overlap that of the proposed facility.[51]

17. We recognize, as the Commission did in the *Rural NPRM*,[52] the risks inherent in applying a Section 307(b) preference at the allotment stage for auctionable non-reserved band spectrum. We believe, however, that the fact that such allotments would be required to place a majority of their principal community contours over tribal lands would make these allotments most attractive to tribal applicants. Moreover, should a non-tribal applicant win the allotment at auction, market forces would tend to favor programming appealing to the tribal audience even if not originated by Tribes or qualifying entities. NPM/NCAI urge that, in order to address the concerns raised by H&D (and as suggested by MEI and BFIT), we propose a tribal-specific bidding credit, separate from and additional to our current new entrant bidding credits, as a way of helping to ensure tribal ownership of facilities added to the Table of Allotments by qualifying Tribes or tribal-owned entities. We discuss the possibility of adding a tribal bidding credit in the *FNPRM*, below.

18. As for MEI's other proposals, we believe, for the reasons discussed in the *Rural NPRM*, that the four-year holding period is sufficient to discourage trafficking. We also believe that limiting the Tribal Priority to Tribes and entities controlled by Tribes substantially reduces the potential for

[47] McCoy Comments at 13-14.

[48] *Id.*

[49] NPM/NCAI Joint Reply Comments at 3-4.

[50] H&D Comments at 3-4.

[51] MEI Comments at 6-7. We presume MEI refers to the "same area" definition of 47 C.F.R. § 73.5007(b).

[52] *Rural NPRM*, 24 FCC Rcd at 5249.

trafficking. Further restrictions on alienability of radio facilities could potentially harm those communities that the Tribal Priority is intended to benefit. For example, a Tribe that has an existing facility, but is later able to move to another community or site that would provide superior signal coverage to tribal lands, might wish to sell the original facility in order to raise capital to build the newer, superior facility. We thus believe the proposed four-year holding period to be the wisest course, subject, as always, to further review if it appears that it does not serve its intended function of deterring trafficking. However, we will make one modification, suggested by NPM/NCAI, to allow assignments or transfers within the four-year holding period provided that the assignee/transferee also qualifies for the Tribal Priority in all respects.[53] This modification would enable a qualified applicant that encounters financial or other difficulties to assign the authorization to another qualified applicant, rather than lose the allotment or assignment entirely. We further agree with NPM/NCAI's suggestion to permit gradual changes in the governing board of an NCE permittee or licensee during the four-year holding period, as is the case with other NCE holding period restrictions, as long as the tribal control threshold is maintained.[54]

19. We need not address MEI's proposal for perpetual NCE operation by facilities covering less than 50 percent of tribal lands with a principal community signal, as the Tribal Priority requires 50 percent or greater coverage of tribal lands.[55] Finally, we reject restrictions on the siting of towers. As long as signal coverage requirements are met, we find that further restrictions on transmitter site locations are both unnecessary and ill-advised. We would not, for example, want to require a tribal NCE station to erect a new tower if an existing tower, off tribal lands, would enable the station to provide the requisite signal coverage.

20. NPM/NCAI and CN, the only Native American-affiliated groups to file comments, support the Tribal Priority, as do Prometheus/NFCB. Both NPM/NCAI and CN point out what they perceive to be minor shortcomings in the priority as proposed in the *Rural NPRM*, and suggest adjustments.

21. NPM/NCAI would require, in addition to the eligibility criteria set forth in the *Rural NPRM*, that qualifying individuals be enrolled with federally recognized Tribes or tribal consortia, and that qualifying entities be owned or controlled by individuals enrolled with federally recognized Tribes.[56] While this suggestion is sensible when applied to the Tribal Priority as proposed, our elimination of individual members and member-controlled entities from qualification for the priority renders this suggestion moot. Also moot is NPM/NCAI's request to clarify that the 70 percent ownership criterion should not require that all owners be members of the same Tribe.[57] However, as discussed below, qualifying entities may be owned or controlled by more than one Tribe.

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[53] NPM/NCAI Joint Comments at 11.

[54] *See, e.g., Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7425-26 (2000) ("*NCE R&O*"), *clarified and aff'd on recon*. 16 FCC Rcd 5074 (2001) ("*NCE MO&O*").

[55] *See Rural NPRM*, 24 FCC Rcd at 5248 n.30 ("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.").

[56] *Id.*

[57] NPM/NCAI Joint Reply Comments at 9-10.

22. CN, in its comments, specifically addresses issues concerning NCE stations. As proposed, the Tribal Priority would be available only to an applicant proposing a first local transmission service or better.[58] As CN points out, in the NCE context, a fair distribution analysis does not include credit for providing a first local transmission service at a particular community; rather, NCE FM applicants only state whether they will provide either or both of first or second NCE reception service to a specified percentage of its principal community contour and a significant population.[59] CN is concerned that certain communities located on tribal lands already have non-tribal-owned commercial transmission services, and that the existence of such stations would unfairly preclude the initiation of tribal-owned NCE service.[60] We understand CN's concern, given our observation that radio stations owned by Tribes are not only scarce, but are necessary to provide specific programming developed to meet tribal needs. Those needs may be met, in different ways, by commercial and NCE stations, and given the above-noted under-representation of tribal radio ownership in both the commercial and NCE spheres, the goals underlying the Tribal Priority are not undermined by allowing Tribes to claim the priority for both types of station in the same community. That is, a tribal-owned NCE applicant may qualify for a Tribal Priority, notwithstanding the fact that a tribal-owned commercial station is licensed at the same community. We are convinced that such an accommodation should be made to recognize the unique nature of tribal-owned radio services, and thus modify the third prong of the test for tribal-owned NCE applicants as we did for commercial applicants.[61] To qualify for the Tribal Priority, we conclude that a tribal applicant seeking NCE facilities will promote Section 307(b) goals by meeting the tribal lands 50 percent signal coverage and community of license requirements, and also by demonstrating that it will provide the first tribal-owned NCE transmission service at the proposed community of license. If a tribal NCE applicant meets these criteria, it will not be compared to other mutually exclusive applicants on a fair distribution basis, but will be the tentative selectee. As is the case with commercial applicants, the Tribal Priority will not take precedence over a *bona fide* proposal to provide first aural reception service to a significant population.

23. If two or more mutually exclusive proposals from tribal NCE applicants qualify for a Tribal Priority, proposing first local tribal-owned NCE service at the same community, the tentative selectee will be the applicant proposing service to the greatest population on tribal lands. The goals of the Tribal Priority would not be served if the priority were to be negated any time mutually exclusive tribal NCE applicants propose the same community on tribal lands. We will not require the 5,000-person differential that exists in the current NCE analysis, but we add the "on tribal lands" requirement so as to award the permit to the applicant most successfully meeting the Tribal Priority's goal of providing service to underserved tribal communities. Moreover, we will make this comparison even if the mutually exclusive tribal applicants propose first local NCE service at different communities, unlike the usual Priority (3) analysis, under which the most populous community receives a dispositive Section 307(b) preference.[62] We believe the goals of the Tribal Priority are better served by selecting a smaller

[58] In other words, the Tribal Priority as proposed would be available to applicants claiming to provide first aural (reception) service, second aural service, or first local transmission service, Priorities (1) through (3) of the four priorities set out by the Commission in making Section 307(b) analysis. The Commission accords co-equal status to the second and third allotment priorities. *FM Assignment Policies*, 90 FCC 2d at 91-93.

[59] *See NCE R&O*, 15 FCC Rcd at 7396-99; *NCE MO&O*, 16 FCC Rcd at 5087-91. *See also* 47 C.F.R. § 73.7002(b).

[60] *See supra* note 42.

[61] *See supra* para. 13.

[62] *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).

community that provides greater reception service than by choosing a more remote, but slightly larger, community. Thus, we will apply the foregoing comparison between mutually exclusive NCE applicants claiming the Tribal Priority, whether they propose the same or different communities of license. For the same reason, mutually exclusive applicants claiming the Tribal Priority for commercial facilities, and proposing first local transmission service at the same community or at different communities, will be compared based on service to the greatest population on tribal lands.

24. We do not, however, adopt CN's request that we open a supplemental filing window for tribal NCE applicants with pending applications in mutually exclusive groups from the October 2007 NCE filing window that do not as yet have tentative selectees. CN argues that the Commission may apply modified processing policies and rules to pending applications.[63] However, the Media Bureau has made tentative selections in a substantial majority of those mutually exclusive NCE groups that will be determined under the fair distribution criterion. We do not believe it fair to subject the minority remainder to the new rules. Thus, we will begin applying the Tribal Priority to NCE applicants beginning with the next NCE filing window.

25. Upon our own consideration of the *Rural NPRM*, and review of pertinent federal law, we are no longer convinced that extending the Tribal Priority to individual members of Tribes, or entities owned by individuals without ownership by the Tribes themselves, advances the Commission's interest in helping promote tribal self-sufficiency and economic development, and endeavoring to ensure that Tribes and tribal communities have adequate access to communications services.[64] It is well established that the Commission deals with Tribes on a government-to-government basis, and that our trust relationship is with the Tribes and tribal governments themselves, rather than individual members of Tribes.[65] A reading of the *Tribal Policy Statement* makes clear that, as an independent federal agency, we look to the tribal governments, rather than to individual members of Tribes, to determine communications policies that best serve the needs of their respective communities.[66] This policy recognizes that Tribes and their governments are primarily concerned with the needs of all tribal citizens. As explained by NPM and NCAI:

> As more Tribal broadcasters develop and broadcast culturally related content, unique to their Tribal subject matter and often in Tribal languages, the Commission would be advancing the important federal goal of providing for Tribal cultural and historic preservation. Importantly, the Commission would also be rationally furthering the laudable goal it has pursued since 2000, found in the very first and very last of its enumerated *Tribal Policy Statement Goals and Principles*, by addressing in a government-to-government manner with Tribes the development of policy to remove regulatory barriers to the deployment of, and adequate access to, communications service to Tribes and their communities.[67]

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[63] CN Comments at 5-6.

[64] *Rural NPRM*, 24 FCC Rcd at 5248-49. *See also Tribal Policy Statement*, 16 FCC Rcd at 4080-81.

[65] *Id*. at 4079-81.

[66] *See, e.g*., *id*. at 4081 ("The Commission will endeavor to work with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance to ensure, through its regulations and policy initiatives, and consistent with Section 1 of the Communications Act of 1934, that Indian Tribes have adequate access to communications services.").

In contrast, individual members of tribes are not necessarily bound to take such factors into account, but may make programming decisions based on their own preferences or business reasons. We therefore believe that by limiting the Tribal Priority to Tribes themselves, we not only further "the legitimate governmental objective of preserving Native American culture,"[68] but we also promote the federal government's interest in furthering tribal self-government.[69]

26. Thus, we conclude that the Tribal Priority should extend only to (1) Tribes; (2) tribal consortia; or (3) entities that are 51 percent or more owned or controlled by a Tribe or Tribes. We will use our general attribution rules to determine the ownership or control of any such qualifying entities.[70] We also add the requirement that qualifying Tribes or tribal entities must be those at least a portion of whose tribal lands lie within the proposed station's principal community contour. The principal community contour must still cover at least 50 percent of tribal lands (subject to the provisos proposed in the *Rural NPRM*, including those on "checkerboarded" tribal lands),[71] but they need not all be the same Tribe's lands. Tribes whose lands are not covered by the proposed facility may invest or sit on controlling boards, but their investments or board membership will not count toward the 51 percent threshold.

27. Accordingly, we adopt the Tribal Priority as proposed in the *Rural NPRM* with the following modifications: (1) we will allow assignments or transfers of permits or licenses obtained using the Tribal Priority during the four-year holding period, provided that the assignee/transferee also qualifies for the Tribal priority in all respects;[72] (2) with regard to NCE permittees or licensees who obtained their authorization using the Tribal Priority, we will permit gradual changes in the governing board during the four-year holding period, as long as the 51 percent tribal control threshold is maintained;[73] (3) eligibility to claim the Tribal Priority is limited to Tribes, tribal consortia, or entities 51 percent or more owned or controlled by a Tribe or Tribes;[74] (4) with regard to entities 51 percent or more owned or controlled by Tribes, the 51 or greater percent need not consist of a single Tribe, but the qualifying entity must be 51 percent or more owned or controlled by Tribes at least a portion of whose tribal lands lie within the facility's principal community contour;[75] (5) the requirement of principal community coverage of 50 percent or more of tribal lands does not require that those lands belong to the same Tribe;[76] (6) to qualify

[67] NPM/NCAI Joint Comments at 9. *See also* CN Comments at 2 ("The Cherokee Nation Proposed Stations will educate with Cherokee language programming and provide Cherokee Nation citizens access to news about issues and events important to the Cherokee community and culture, programming which is not otherwise easily accessible.").

[68] *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991).

[69] *See*, *e.g.*, *Morton*, 417 U.S. at 555.

[70] Our attribution rules are found in 47 C.F.R. § 73.3555 and Notes 1 and 2 to that rule.

[71] *Id*. at 5248-49 and n.30.

[72] *See supra* para. 18.

[73] *Id*.

[74] *See supra* para. 26.

[75] *Id*.

[76] *Id*.

for the priority, a tribal commercial applicant must propose first or second aural (reception) service or first local commercial tribal-owned transmission service at the proposed community of license;[77] and (7) to qualify for the priority, a tribal NCE applicant must propose a first local NCE tribal-owned transmission service at the proposed community of license.[78] As did Prometheus/NFCB, NPM/NCAI request that the Tribal Priority be implemented immediately. However, NPM/NCAI also request that we promulgate an FNPRM addressed to two issues: (1) the implementation of a bidding credit to be employed by qualifying Tribal applicants in auctions, and (2) a mechanism for non-landed Tribes to make a showing qualifying them for the Tribal Priority. These issues are addressed at paragraph 64, below.

B. Limit the Downgrading of Proposed AM Facilities After Receiving Dispositive Section 307(b) Preference.

28. *Background*. In the *Rural NPRM*, the Commission stated that when a mutually exclusive AM auction filing window applicant receives a dispositive preference under Section 307(b), it should not be allowed to downgrade that proposal to serve a smaller population, or otherwise negate the factors that led to the award of the dispositive preference. Such actions, in the Commission's view, would encourage "gaming" of the Section 307(b) process.[79] As such, it tentatively concluded that AM licensees or permittees receiving Section 307(b) preferences should be required, for a period of four years, to provide service substantially as proposed in their short-form tech box submissions, in the same manner that 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 years of on-air operations.[80] In addition to seeking general comment on this proposal, the Commission sought specific comment on the amount of time such a licensee or permittee should be precluded from downgrading, i.e., whether it should be four years, as with NCE FM applicants, or some other period of time.

29. *Discussion*. For the reasons set forth below, based on an examination of the record, we adopt a modified version of our proposal to limit the downgrading of proposed AM facilities that receive a dispositive Section 307(b) preference. We believe that this limitation will protect the integrity of the application process while adequately addressing the challenges faced by AM broadcasters. Eight commenters addressed this issue, voicing varying degrees of concern. H&D urges the Commission to provide some level of flexibility for new AM stations that have received a dispositive Section 307(b) preference, and notes that if applicants must operate facilities "substantially as proposed" then the Commission should provide a bright-line definition of this phrase, to provide certainty for applicants and Commission staff.[81] Several commenters call the proposal "impractical," stating that post-grant

[77] *See supra* para. 13.

[78] *See supra* paras. 22-23.

[79] *Rural NPRM*, 24 FCC Rcd at 5250.

[80] 47 C.F.R. § 73.7005(b).

[81] H&D Comments at 4. H&D also suggests that we should more actively enforce the requirement that applicants have reasonable site assurance at the time of filing, noting that lack of reasonable site assurance "can lead to a situation where a subsequent amendment or modification cannot serve substantially the same area." *Id.* However, site availability is not relevant in the context of technical proposals submitted with a short-form application (FCC Form 175), which are the foundation for our Section 307(b) determinations. Instead, the issue before us is whether an applicant can receive a dispositive Section 307(b) preference over mutually exclusive auction applicants, but then submit a different technical proposal, without the proposed Section 307(b) benefits, in its FCC Form 301 application. Up to this point, we have relied upon informal processing policies to prevent such a change.

transmitter site modifications (and resulting changes in coverage) are often necessary for business, technical, and environmental reasons.[82] MEI states that such an approach in the NCE context has proved to be "overly burdensome," while BFIT and AMS each contend that adoption of the proposal would result in a reduction in the number of new AM stations licensed from each auction filing window.[83] As an alternative, AMS, MEI and Educational Media Foundation ("EMF") suggest that we allow winning applicants to change sites and coverage areas so long as they continue to serve substantially the same number of underserved persons who would have received service under the initial proposal, such that the modified coverage area would be essentially equivalent from a Section 307(b) perspective.[84]

30. We continue to believe that certain procedural safeguards are necessary to protect the integrity of our Section 307(b) analyses. However, we agree with commenters that, given the realities faced by licensees and permittees in securing and maintaining transmitter sites, allowing a certain level of flexibility in implementing AM proposals will help expedite the commencement of new service and reduce the possibility of unbuildable construction permits. Thus, to the extent underserved populations (under Priority (1), Priority (2), and potentially Priority (4)) or service totals (under Priority (4)) are relevant to our analysis, we will adopt the "equivalency" proposal described above: an AM licensee or permittee receiving a dispositive Section 307(b) preference may modify its facilities so long as it continues to provide the same priority service to substantially the same number of persons who would have received such service under the initial proposal, even if the population is not the same population that would have received service under the initial proposal.[85] As used here, "substantially" means that any proposed modification must not result in a decrease of more than 20 percent of any population figure that was a material factor in obtaining the dispositive Section 307(b) preference.[86] Moreover, a licensee or permittee that has received a dispositive preference under Priority (3) will be prohibited from changing its community of license.[87] Because we received no comments suggesting any alternative timeframes, we will impose these restrictions for a period of four years of on-air operations, consistent with our rules

[82] American Media Services ("AMS") Comments at 4; BFIT Comments at 7; Amador S. Bustos and Bustos Media Holdings, LLC ("Bustos") Comments at 4; Vir James Comments at 7. *See also* JBB Comments at 3 ("Commission policies must reflect … economic reality").

[83] MEI Comments at 7; BFIT Comments at 7; AMS Comments at 4.

[84] AMS Comments at 4; MEI Comments at 7; EMF Comments at 9. MEI further suggests that both AM and NCE FM proposals should be permitted to change the original area served provided the raw Section 307(b) "population" is not reduced by more than 15 percent, and provided that the resulting value would still result in the preference awarded over other mutually exclusive applicants. MEI Comments at 8.

[85] The Media Bureau bases its Section 307(b) determinations on its analysis of parties' Section 307(b) showings, submitted in response to a public notice announcing the mutually exclusive groups among the parties that submitted FCC Forms 175 for a particular auction. The dispositive Section 307(b) preference is established in the Media Bureau's decision announcing such a preference within a mutually exclusive group.

[86] For example, if an AM licensee or permittee receives a dispositive Priority (4) preference for proposing to provide a third aural service to a population of 500 persons and service to an overall population of 100,000, it may not file an FCC Form 301 application that would provide a third aural service to fewer than 400 persons or service to an overall population of less than 80,000. The same analysis applies to any party that receives a dispositive Priority (1) or Priority (2) preference. We recognize that in some cases this may result in a reduction of service below that presented by a competing proposal in the Section 307(b) analysis, but there is no guarantee that the competing proposal could have been effectuated as proposed in such cases.

[87] *See Rivers, L.P.*, Letter, 23 FCC Rcd 4521 (MB 2007).

governing NCE FM stations. Construction permits and licenses issued to these parties will contain conditions delineating these restrictions.

31. We believe that the unique technical challenges involved in building a new AM station justify our decision to adopt a more flexible standard than that which is currently applied in the NCE context. Except in unusual cases, a new AM transmission system will be a directional (i.e., multi-tower) array, rather than the single tower used for a new FM station.[88] Such a system presents difficult issues of cost, complexity and zoning/environmental compliance.[89] Given these issues, coupled with our commitment to help revitalize the AM band,[90] we believe that such additional flexibility is warranted for new AM stations, and find the "equivalency" proposal adopted herein both adequately addresses the realities faced by AM broadcasters and furthers our goal of protecting the integrity of the application process.

C. Establish "Technically Eligible for Auction Processing at Time of Filing" Criteria for AM New and Major Change Applications.

32. *Background*. In the *Rural NPRM*, the Commission observed that our current auction processing rules limit technical review of basic engineering data filed with AM short-form applications "only to the extent necessary to determine the mutually exclusive groups of applications."[91] This practice, stated the Commission, has contributed to the filing of patently defective applications, which potentially undermine the accuracy and reliability of mutual exclusivity and Section 307(b) determinations, and frustrate the staff's ability to manage the window filing process efficiently.[92] The Commission further stated that it believed that such defective applications may preclude the filing of meritorious modification applications by existing facilities, which must protect the prior-filed defective applications. It noted that in AM Auction No. 84, the Media Bureau appropriately determined that of the 1,311 tech box proposals filed, 188 were ineligible for further processing. Moreover, applicants failed to submit long-form applications for 91 of the 321 Form 175 singleton proposals. Finally, the staff found technical deficiencies in 68 of the 230 singleton long-form applications.[93]

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[88] *See* MEI Comments at 7.

[89] *Id.*; *see also* AMS Comments at 4; Australian Communications and Media Authority, "AM radio issues" (January 2006) at 41-42 (http://www.acma.gov.au/webwr/_assets/main/lib100068/amradio_issues.pdf, accessed Dec. 7, 2009).

[90] *See, e.g., Review of Technical Assignment Criteria for the AM Broadcast Service*, Report and Order, 6 FCC Rcd 6273 (1991) (subsequent history omitted).

[91] *Rural NPRM*, 24 FCC Rcd at 5251. *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, 15996-97 (1998) ("*Broadcast Auction First Report and Order*"), *on recon.*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999) ("*Broadcast Auction MO&O*"), *on further recon.*, Memorandum Opinion and Order, 14 FCC Rcd 14521 (1999). The basic engineering 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. This short-form procedure is employed in the auctionable AM, FM, FM translator, TV translator, and LPTV services, where mutual exclusivity is determined by analysis of engineering data.

[92] *Rural NPRM*, 24 FCC Rcd at 5251.

[93] *Id.*

33. Given the high percentage of defective filings, the Commission tentatively concluded 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 the following basic technical eligibility criteria: (1) community of license coverage (day); (2) community of license coverage (night);[94] (3) daytime protection of existing AM facilities and prior-filed proposed AM facilities; and (4) nighttime protection of existing AM facilities and prior-filed proposed AM facilities.[95] It also tentatively concluded 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 process. The Commission stated that the 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.[96]

34. *Discussion*. Based on our examination of the record, we adopt the basic technical eligibility criteria proposed in the *Rural NPRM*, but we will provide applicants with a one-time opportunity to amend their short-form applications to conform to our rules pursuant to the procedures set forth below. The commenters addressing this issue were largely supportive of the proposal, agreeing with the Commission's determination that requiring compliance with basic technical rules would deter patently defective, frivolous, and speculative filings.[97] EMF states that defective applications unnecessarily impact potential minor changes of existing stations and can have serious adverse public interest consequences.[98] H&D notes that defective proposals create larger and more cumbersome mutually exclusive groups ("MX Groups"), and complicate engineering solutions and settlements.[99] It further observes that dismissal of a technically flawed application could split one large MX group into two or more smaller MX groups, thus allowing the Commission to award additional construction permits.[100]

35. Lynch emphasizes that "basic technical eligibility criteria" should include compliance with community coverage standards, and daytime and nighttime interference protection of existing stations and prior-filed proposals.[101] MEI states that applications with proposed daytime facilities that would result in prohibited contour overlap to outstanding authorizations or prior-filed pending domestic

[94] 47 C.F.R. § 73.24(i).

[95] *Id*. §§ 73.37, 73.182.

[96] *Rural NPRM*, 24 FCC Rcd at 5252.

[97] EMF Comments at 10; H&D Comments at 5; Bustos Reply Comments at 1-2; BFIT Comments at 8; Robert A. Lynch ("Lynch") Comments at 6 (noting that current system places well-researched technical proposals on same footing as hasty, "slipshod" initiatives); Vir James Comments at ¶ 9 (stating that patently defective applications should be culled from the filings).

[98] EMF Comments at 10.

[99] H&D Comments at 5. H&D also asks that we "extend this principle to the NCE FM service." *Id.* Issues relating to the FM reserved band are beyond the scope of this proceeding, and we therefore will not consider this proposal.

[100] *Id.*

[101] Lynch Comments at 6. Lynch goes on to state that "any pending application from AM Auctions Nos. 32 and 84 should be made subject to the pre-auction criterion, and that participants in these auctions should be given a "reasonable opportunity to correct their proposals in ways that would not eliminate mutual exclusivities or constitute major modifications," thus ensuring that "only buildable stations would be subject to bid." *Id.*

applications should be considered patently defective if the "linear distance of said objectionable overlap exceeds more than 25 percent of the distance to the pertinent interference contour. . . ."[102] It further states that nighttime proposals that "enter 50 percent RSS exclusion of those same types of stations should be considered patently defective."[103] On the other hand, MEI asserts that AM applications being processed as "singletons" or as "auction winners" that propose a change in city of license prior to grant of the initial permit should be "routinely permitted to do so," maintaining that these types of applications are not subject to 307(b) analysis and thus "should be permitted to improve [their proposals] or even cure a lack of principal community coverage in this way."[104] It maintains that to prohibit such changes "simply denies additional radio service to the public."[105]

36. While generally supportive of the proposal, several commenters cautioned that subjecting applicants to what they consider the functional equivalent of the former FM "hard look" doctrine[106] is impractical, because uncertainties created by the Commission's purported use of unpublished technical policies, the differences between the Commission's computer programs and those used by consulting engineers,[107] and issues surrounding protection of international stations often necessitate the filing of modifications.[108] JBB states that retaining the "30-day letter" policy[109] is critical, and urges the Commission not to modify its policy regarding minor curative amendments.[110] Other commenters echoed this sentiment, urging the Commission to retain some measure of flexibility in its pre-auction procedures.[111]

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[102] MEI Comments at 9.

[103] *Id*.

[104] *Id*. at 9-10.

[105] *Id*. at 10.

[106] Under the former "hard look" processing policies, the Commission would not accept *nunc pro tunc* curative amendments to correct certain patent defects in commercial broadcast station application filings. *See Amendment of Sections 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast Applications*, Report and Order, MM Docket No. 84-750, 50 FR 19936 (May 13, 1985), *recon. denied*, Memorandum Opinion and Order, 50 FR 43157 (Oct. 24, 1985), *affirmed sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987).

[107] BFIT Comments at 8 (noting Commission's use of "unpublished" technical policies and differences between the Commission's computer programs and those used by consulting engineers); JBB Comments at 4; Vir James Comments at ¶ 9 (noting alleged discrepancies between the Commission's computer programs and the formulas set forth in Part 73 of the Rules).

[108] MEI Comments at 9 (stating that because protection of foreign stations is hampered by problems with data reliability, such evaluation by Commission staff should only be required prior to grant); Lynch Comments at 7 (stating that applications can be subject to policy changes or revisions of international agreements which can alter the standing of Canadian or Mexican authorizations); BFIT Comments at 8 (discussing international considerations); JBB Comments at 4 ; Vir James Comments at ¶ 9.

[109] *See* 47 C.F.R. §§ 73.3522(c)(2) and 73.3564(a)(3).

[110] JBB Comments at 4.

[111] MEI Comments at 9 (protection of foreign stations should be evaluated only prior to grant); Lynch Comments at 7 (noting that sometimes a defect is not noted until the applications is in the processing line; proposing a two-stage procedure where applicants first file their short-form application followed by a full engineering submission after the Commission identifies competing proposals); Vir James Comments at ¶ 9 (urging some level of flexibility at early

37. For the reasons stated above, and as supported by the majority of commenters responding to this issue, we adopt the proposed rule changes set forth in the *Rural NPRM*. As discussed above, there are four "basic technical eligibility criteria" that must be met at the time of filing.[112] However, to alleviate concerns raised by some commenters, we will provide applicants with a one-time opportunity to file curative amendments to their short-form applications. Specifically, if the staff review shows that an application does not meet one or more of the four eligibility criteria, it will be deemed "technically ineligible for filing" and will be included on a Public Notice (the "Technically Ineligible Notice"). The Technically Ineligible Notice will list defective applications identified by the staff during their initial review of the application, will identify which of the four defects that the applicant must correct, and will set the deadline for doing so. Only applicants whose applications are included in the Technically Ineligible Notice may file curative amendments.[113] Applicants cannot modify any part of a proposal not directly related to an identified deficiency in their curative amendments. Specifically, applicants may only modify the AM technical parameters of the short-form application, such as power, class (within the limits set forth in Section 73.21 of the Rules),[114] antenna site or other antenna data. Amendments seeking to change a proposed community of license or frequency will not be accepted. We emphasize that by this rule change we do not intend to disturb our determination that full technical review of applications will not occur until winning bidders file long-form applications after an auction.[115] We further note that this opportunity to cure is not a settlement opportunity under Section 73.5002(d) of our Rules, and will occur prior to the disclosure by the Commission of any information on applications submitted during the short-form filing window.[116] We believe that this approach will accomplish our administrative goals without depriving applicants of needed flexibility. If we find that many MX groups are being delayed significantly because of the dismissal/amendment process, or if it appears that many applicants are attempting to use this process to gain an unfair advantage over those applicants initially filing technically acceptable applications, the Commission may revisit the issue prior to subsequent AM windows.

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

auction proposal stage).

[112] As a threshold matter, we note that all applications must contain the following data: (1) community of license; (2) frequency; (3) class; (4) hours of operations (day, night, critical hours); (5) power (day, night, critical hours); (6) antenna location (day, night, critical hours); and (7) antenna data (nondirectional or directional; day, night, critical hours). Applications lacking any of these categories of data will be immediately dismissed without an opportunity for amendment.

[113] This one-time opportunity to file a curative amendment is restricted to the tech box submission portion of new and major change AM broadcast applications and is distinct from the limited opportunity to cure defects provided under Section 1.2105(b)(2), which occurs later in the pre-auction process.

[114] 47 C.F.R. § 73.21.

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

[116] Accordingly, under Sections 1.2105(c) and 73.5002(d) of the Commission's Rules, which apply upon the filing of short-form applications, applicants for construction permits in any of the same geographic license areas are prohibited from communicating with each other about bids, bidding strategies, or settlements unless such applicants have identified each other on their short-form applications. 47 C.F.R. §§ 1.1205(c) and 73.5002(d).

38. *Background*. In the *Rural NPRM*, the Commission noted that the broadcast anti-collusion rules apply generally upon the filing of a short-form application.[117] However, Section 73.5002(d) of the Rules provides applicants in certain MX Groups a limited opportunity to communicate during specified settlement periods in order to resolve conflicts by means of technical amendment or settlement.[118] This exception to the anti-collusion rules applies only to those MX Groups that include either (1) at least one AM major modification; (2) at least one NCE application; or (3) applications for new stations in the secondary broadcast services. Currently, the rule neither prohibits the Commission from accepting non-universal technical amendments 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.[119] In two previous AM auctions, the Media Bureau specifically accepted non-universal technical amendments and settlement proposals in the "interest of expediting new service to the public,"[120] provided that the filing would result in the grant of at least one singleton application.

39. Given the success of this established staff practice, the Commission tentatively concluded that it should codify this processing policy. The Commission further proposed to limit technical amendments filed pursuant to this policy to amendments that resolve all technical conflicts between the amending application and each of the other applications in the particular MX Group. If the applicant did not resolve all of its own application's mutual exclusivities, its amendment would not be accepted.

40. *Discussion.* Based on our examination of the record, we codify the permissibility of non-universal engineering solutions and settlement proposals as proposed in the *Rural NPRM*. Each of the five comments filed on this issue supported this proposal.[121] These commenters agreed that this approach was successful in the October 2007 NCE FM filing window,[122] and would facilitate settlements.[123] MEI states that this processing policy could break large MX Groups into smaller groups and result in a greater number of grants.[124] EMF suggests that we allow applicants to file settlements as soon as applications are on file, rather than only during designated windows.[125] H&D proposes that the Commission codify the policy employed in the October 2007 NCE FM filing window, which allowed an applicant to file an amendment as long as at least one application becomes a singleton.[126] Likewise, CRA states that the

[117] *Rural NPRM*, 24 FCC Rcd at 5252.

[118] 47 C.F.R. § 73.5002(d).

[119] *Rural NPRM*, 24 FCC Rcd at 5252-53.

[120] *See, e.g., AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction, Settlement Period Announced for Certain Mutually Exclusive Application Groups*, Public Notice, 20 FCC Rcd 10563 (MB/WTB 2005).

[121] CRA, EMF, H&D, MEI, and NPM/NCAI filed comments on this issue.

[122] H&D Comments at 6.

[123] CRA Comments at 7-8.

[124] MEI Comments at 10.

[125] EMF Comments at 10-11.

[126] H&D Comments at 6-7.

Commission should permit technical amendments that would produce any singleton regardless of whether the amendment produces singleton status for the amending applicant.[127]

41. As the Commission tentatively concluded in the *Rural NPRM*, we agree with the commenters that accepting non-universal technical amendments and settlement proposals is an effective means for facilitating the introduction of new service, as long as this process results in at least one singleton application that proceeds to long-form processing. This practice worked well in the October 2007 NCE window. In this regard, we are unpersuaded by commenters' arguments to permit technical amendments that do not result in the potential grant of at least one singleton application. We find that the proposed restriction not only promotes the initiation of new service, but also fairly balances burdens between applicants to resolve all conflicts with respect to at least one application and the Commission to expeditiously process the thousands of applications typically submitted during a short-form or application filing window for new radio stations. Accordingly, we will revise our rules to permit non-universal technical amendments and settlement proposals that result in at least one singleton application from an MX Group. Finally, we note that NPM/NCAI, apparently misunderstanding our proposal, express concern that "creating a burden to resolve all mutual exclusivities with respect to the other applications in the specified [MX] group may create significant technical difficulties that Tribes and small communities with fewer resources will be less capable of meeting."[128] However, an applicant submitting a technical amendment pursuant to this policy is required only to resolve all mutual exclusivities for at least one application in the relevant MX Group, but need not resolve all technical conflicts among all applications in that group.

E. Delegate Authority to Cap Number of AM Applications That May Be Filed in a Short-Form Filing Window.

42. *Background***.** The Commission observed in the *Rural NPRM* that the Rules currently do not limit the number of AM Tech Box applications[129] that may be filed with the (non-feeable) FCC Form 175 during an AM short-form filing window.[130] It noted that an increasing number of applicants had availed themselves of the opportunity to file multiple technical submissions, and questioned whether a significant percentage of AM short-form filing window applications were merely speculative.[131] Accordingly, the Commission sought comment on whether (1) to delegate to the Bureaus authority to limit, in an AM short-form filing window, the number of tech box submissions that an applicant could file with Form 175 and, if so, the appropriate limitation on this delegation; and (2) to apply Commission attribution standards to determine the number of filings submitted by any party, to guard against the use of affiliates or even sham entities to circumvent such a cap. The Commission also sought comment on how application caps could impact small business entities, and whether caps would be a useful

[127] CRA Comments at 8.

[128] NPM/NCAI Joint Comments at 14.

[129] The AM "Tech Box" is Section III-A of Form 301-AM. *See, e.g., AM New Station and Major Modification Auction Filing Window*, Public Notice, 18 FCC Rcd 23016 (MB 2003).

[130] *Rural NPRM* at 5253 and n.55.

[131] Specifically, in AM Auction No. 32, 171 applicants filed a total of 258 technical proposal, and in AM Auction 84, 460 discrete applicants filed a total of 1,311 technical proposals.

mechanism to balance the Commission's competing interests in promoting new and expanded broadcast services and its statutory obligation to prevent abuses of its licensing procedures.[132]

43. *Discussion*. Based on examination of the record, we adopt our proposal to delegate authority to the Bureaus to limit the number of Tech Box submissions that an applicant may file with Form 175 in an AM short-form filing window. Commenters focused principally on application caps rather than the delegated authority issue. Eight commenters favored specific AM auction application caps, ranging from five to ten applications. BFIT and NPM/NCAI state that a five-application cap would reduce the number of applications filed by speculators.[133] Lynch states that a five-application cap would diversify broadcast ownership and maximize opportunities for new entrants.[134] H&D,[135] JBB,[136] and Vir James[137] each support adoption of a ten-application cap. MEI supports an application cap, but only to applications that are located within 25 miles of another application by the same entity.[138] Only H&D commented on the issue of attribution, suggesting that the Commission adopt the attribution standards utilized in the October 2007 NCE filing window.[139]

44. Conversely, EMF states that an application cap would limit an applicant's choices and strategies in an application window.[140] It further asserts that imposition of a cap would deter applicants from submitting proposals that would serve smaller markets and rural areas.[141] To the extent that a cap is imposed, EMF asserts that it should only apply to applications that propose to serve larger markets, such as the Top 100 Arbitron markets.

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[132] *Rural NPRM* at 5254.

[133] BFIT Comments at 5; NPM Comments at 13-14. *See also* Bustos Comments at 4 (supporting a seven-application cap, maintaining that a cap would prevent abuses during AM filing windows).

[134] Lynch Comments at 8. *See also* NPM Comments at 13-14.

[135] H&D Comments at 8.

[136] JBB Comments at 2.

[137] Vir James Comments at 4. Vir James also voices concern over the length of time between auction windows and construction permit grants, noting that it requires applicants to guess where service will be desirable as much has eight to 10 years in the future. *Id.*

[138] Mullaney Comments at 10. Mullaney notes that if an applicant files only one application that turns out to be mutually exclusive with another application, it could lose the opportunity to become an AM broadcaster altogether. It also urges the Commission to allow applicants to file amendments to a non-adjacent frequency, stating that this would be beneficial in areas where multiple frequencies are available. *Id.*

[139] H&D Comments at 8. In the October 2007 NCE filing window, the Bureau determined that a party to an application could hold attributable interests in no more than ten applications filed in the window based on the NCE attribution standards set forth at 47 C.F.R. § 73.3555(f) . *See FCC Adopts Limits for NCE FM New Station Application in October 12 – October 19, 2007 Window*, Public Notice, 22 FCC Rcd 18699, 18704 (2007) ("*NCE Cap Order*").

[140] EMF Comments at 11.

[141] *Id.*

45. Although we did not specifically seek comment on this issue, several commenters also suggested that the Commission implement a filing fee for short-form applications. BFIT proposes that a $3,000 application fee should be charged in order to cover the costs incurred in processing and evaluating Section 307(b) criteria in mutual exclusivity situations.[142] JBB and Bustos propose fees of several thousand dollars, and further propose we require applicants to submit a full engineering showing with each application.[143]

46. We find that delegating authority to the Bureaus to impose application caps in AM short-form filing windows will help to prevent speculative applications. This will decrease the likelihood of mutually exclusive applications, which will in turn decrease the likelihood of large, technically complex, and administratively burdensome MX Groups. By reducing the administrative burden on the Bureaus, which have limited resources, a cap also can help expedite application processing and prevent abuses of our licensing procedures. We believe the same considerations that led the Commission to impose an application cap in the 2007 NCE FM window apply equally to AM application filing windows. We anticipate that a cap on applications also will enable the Media Bureau to open AM short-form filing windows more frequently, thereby promoting – rather than restricting – new entrant opportunities.[144] Accordingly, we delegate authority to the Bureaus to determine, for each AM short-form window, whether to limit the number of AM applications that may be filed by an applicant and, if so, the appropriate application cap. This approach will permit tailoring of any limitations to the particular circumstances presented by future auctions. We also delegate to the Bureaus authority to adopt attribution standards to effectuate the goals of an application cap, and to ensure compliance with this restriction. We direct the Bureaus to provide notice and an opportunity for comment on a cap limit and attribution standards prior to imposing these potential filing restrictions. In the event that the Bureaus determine that an application cap is warranted, the cap limit and attribution standards will be announced in the Public Notice establishing the dates for the Form 175 filing window. We decline, however, to impose a filing fee, as suggested by some commenters, as we believe that the application cap, coupled with the new requirement of technically acceptable submissions with applicants' short-form applications, will adequately deter speculative filings and prevent abuses of the Commission's licensing processes.

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

47. *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."[145] In the *Rural NPRM*, the Commission observed that this inflexible 30-day time frame has, at times, proved to be problematic. For example, some FM auctions have 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.[146]

[142] *Id. See also* Vir James Comments at 4 (stating that a filing fee would offset administrative costs).

[143] JBB Comments at 2; Bustos Comments at 4 (proposing $2,500 filing fee).

[144] *See NCE Cap Order*, 22 FCC Rcd at 18701.

[145] 47 C.F.R. § 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.").

[146] *See Rural NPRM*, 24 FCC Rcd at 5254.

48. *Discussion*. We adopt the Commission's tentative conclusion in the *Rural NPRM* that delegating authority to the Bureaus to extend the filing deadline for the submission of post-auction long-form applications would benefit all involved in the auction process. Most commenters addressing the issue agree that the current 30-day period does not allow time to compile the required technical data, especially during holidays.[147] MEI notes that giving applicants additional time to file reduces the need for filing amendments with the Commission because applicants would have more time to incorporate the required approvals (e.g., zoning and environmental) into the applications.[148] McCoy, however, suggests that instead of granting deadline extensions, auctions should be scheduled to avoid the holidays, stating that permitting extensions will encourage requests for extensions and engender uncertainty.[149] Although the Commission remains sensitive to the burdens of imposing filing deadlines at certain times of the year, we find that McCoy's proposal would unreasonably limit the Commission's ability to schedule and hold auctions. H&D and MEI, while agreeing with the need for change, favored the predictability of amending Section 73.5005 of the Rules[150] to include a firm, longer deadline of 60 or 90 days.[151] We decline to adopt this proposal, because we are not persuaded that a longer filing period is necessary as a general matter, and because this change would still not provide the flexibility to extend the deadline based on particular circumstances. For example, if we were to take H&D and MEI's suggestion and provide a firm 60-day post-auction filing deadline, we would still encounter the same problem when the 60th day fell in late December or early January.[152] Given the variable dates of auctions and holidays, we believe the Commission's proposal granting the staff delegated authority, on an auction-by-auction basis, to modify the post-auction long-form filing deadline as needed provides optimal flexibility, enabling the staff to take into account any and all factors that might impact auction winners.[153] Accordingly, we will modify Section 73.5005(a) of the Rules,[154] as set forth in the *Rural NPRM*,[155] to delegate authority to the Bureaus to extend the filing deadline for the post-auction submission of long-form applications.[156]

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[147] NPM/NCAI Joint Comments at 14, H&D Comments at 8-9 and MEI Comments at 12.

[148] MEI Comments at 12.

[149] McCoy Comments at 14. McCoy appears to believe that the Commission's proposal was to provide *ad hoc* extensions of time for individual auction applicants. A reading of the *Rural NPRM* and the proposed modification to 47 C.F.R. § 73.5005(a), however, should make it clear that the Commission proposed to delegate authority to staff to extend the post-auction long-form application filing deadline for *all* applicants. *See Rural NPRM*, 24 FCC Rcd at 5254, 5267.

[150] 47 C.F.R. § 73.5005(a).

[151] MEI Comments at 12. H&D Comments at 8-9.

[152] This is not to suggest that there are not other times of year that could be similarly problematic, for example, the Jewish High Holidays in the early autumn.

[153] We also note that, in the initial Public Notice announcing an auction, the staff specifically seeks comment on various auction procedures. At that time, potential applicants may offer their suggestions as to the post-auction filing deadline they believe should apply to the auction.

[154] 47 C.F.R. § 73.5005(a).

[155] *Rural NPRM*, 24 FCC Rcd at 5267.

[156] We do not make any change here to the deadlines contained in the rule on auction payments, 47 C.F.R. § 73.5003.

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

49. *Background*. To promote Section 309(j) objectives and further its long-standing commitment to broadcast facility ownership diversity, the Commission adopted a tiered new entrant bidding credit ("NEBC") for broadcast auction applicants with no, or very few, other media interests.[157] To meet the statutory obligation to prevent unjust enrichment, and to ensure that the NEBC had the intended effect of aiding eligible individuals and entities to participate in broadcast auctions, the Commission, following the general Part 1 auction rules, adopted rules in the *Broadcast Auction First Report and Order* requiring, under certain circumstances, reimbursement of bidding credits used to obtain broadcast licenses.[158]

50. *Discussion*. In the *Rural NPRM*, the Commission proposed to clarify certain issues concerning the unjust enrichment provisions of the NEBC that had been raised during previous broadcast auctions. Very few commenters addressed these specific issues. MEI pressed the Commission to take this opportunity to revisit its implementation of the entire NEBC, calling for additional restrictions to be put in force.[159] For example, MEI recommends that the NEBC only be applied toward the four most expensive allotments that an entity acquires in an auction, and suggests that entities seeking the NEBC be required to comply with the ownership restrictions at least 12 months prior to the auction. MEI offers no explanation as to why such measures are needed to either preserve or advance the integrity of the current designated entity policies. To the extent that MEI advocates a fundamental overhaul of specific NEBC requirements, and their application in the broadcast auction processes in general, its requests are beyond the scope of this rulemaking proceeding. Nor are we persuaded that a different approach is warranted at this time. We find that the existing NEBC procedures best complement broadcast auctions, and provide the optimum means for new entrants to successfully participate in broadcast service auctions, in accordance with Section 309(j) of the Act.

51. *Definition of contour overlap for "same area" determination*. Under Section 73.5007(b) of the Rules,[160] 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 media facility in the "same area" as the proposed new facility. The existing and proposed facilities are considered in the "same area" if specified service contours of the two facilities overlap. In the FM service, in the pre-auction Form 175 application, an applicant may submit a set of "preferred site coordinates" as an alternative to the reference coordinates for the vacant FM allotment upon which it intends to bid. The Commission recognized that an applicant's ability to protect its preferred site could be an important factor in establishing the monetary value of a vacant FM allotment and a key consideration in its bidding strategy. Accordingly, the Commission provided that the preferred site coordinates specified by prospective auction participants would be entered into the Commission's database and protected from subsequent filings.

52. As described in the *Rural NPRM*, we sought to clarify that, for purposes of defining the "same area" restriction for the NEBC, the contour of the proposed FM facility would be identified by "*the*

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[157] *Broadcast Auction First Report and Order*, 13 FCC Rcd at 15992-97.

[158] *See* 47 U.S.C. § 309(j)(4)(E) (in designing competitive bidding systems, Commission must require "antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment"). *See also* 47 C.F.R. § 73.5007(c).

[159] MEI Comments at 15.

[160] 47 C.F.R. § 73.5007(b).

maximum class facilities at the FM allotment site."[161] In that way, applicants could not attempt to avoid the overlap of contours which defines "same area," and thereby qualify for the bidding credit, by specifying preferred site coordinates in their Form 175 application. Commenter H&D supported this rule clarification.[162] We adopt this proposal, which will provide certainty to applicants and help safeguard the diversity and competition goals on which the NEBC is based by eliminating the potential for applicant manipulation of our "new entrant" standards.

53. H&D requested further clarification regarding the description of the contour of the proposed FM facility, contending that it remains unclear whether the Commission intended that the identified language ("the maximum class facilities at the FM allotment site") means the perfectly circular standard 70 dBµ contour distance for the class of station, or the 70 dBµ contour as calculated pursuant to Section 73.313 of the Rules for a class standard facility at the allotment site coordinates.[163] The distinction between "circular" and "calculated" is a significant one, contends H&D, particularly in the mountainous areas of the western United States. Normally, the Commission does not evaluate specific terrain data in allotment proceedings. Instead, the Commission assumes that a station's city grade coverage contour is a circle with a defined radius based on maximum class facilities from the pertinent allotment site.[164] As in allotment proceedings, we will base this proposed FM facility contour standard on an assumption of uniform terrain, which results in a perfectly circular standard 70 dBµ contour.[165] We clarify Section 73.5007(b)(3) of the Rules accordingly.

54. *Pro forma assignments and transfers of control*. To prevent unjust enrichment by parties that acquire permits through the use of a NEBC, Section 73.5007(c) of the Rules requires reimbursement to the Commission of all or part of the credit upon a subsequent assignment or transfer, if the proposed assignee or transferee is not eligible for the same percentage of bidding credit.[166] The rule is routinely applied to "long form" assignment or transfer of control applications filed on FCC Forms 314 and 315. The rule as written, however, does not distinguish between *pro forma* and non-*pro forma* assignments or transfers of control. In the *Rural NPRM* the Commission raised the question and invited comment as to whether the unjust enrichment analysis should also apply to assignments or transfers that are *pro forma* in nature and filed on Form 316.[167] *Pro forma* assignments and transfers of control may be either voluntary[168] or involuntary.[169] The Commission tentatively concluded that the unjust enrichment

[161] *Rural NPRM*, 24 FCC Rcd at 5257 (emphasis in original).

[162] H&D Comments at 14.

[163] 47 C.F.R. § 73.313.

[164] *See, e.g., Woodstock and Broadway, Virginia*, Memorandum Opinion and Order, 3 FCC Rcd 6398, 6399 (1988).

[165] As a related clarification, since the facilities of "existing" FM stations are established, the principal community contours of existing FM stations are defined by their authorized or licensed facilities and the prediction methodology of 47 C.F.R. § 73.313.

[166] 47 C.F.R. § 73.5007(c).

[167] *Rural NPRM*, 24 FCC Rcd at 5257. As a general rule, transactions for assignments or transfers of control that are either involuntary or that do not involve a substantial change in ownership or control may file *pro forma* applications. *See generally* 47 C.F.R. §§ 73.3540(f), 73.3541.

[168] *See* 47 C.F.R. § 73.3540(f) (providing illustrative examples of voluntary assignments and transfers of control that do not involve a substantial change in ownership).

provisions should apply in the context of *pro forma* assignment and transfer of control applications, thus eliminating any applicant confusion on the issue.

55. Notwithstanding the disagreement of the one commenter who briefly addressed this issue,[170] we find it appropriate generally to apply the unjust enrichment provisions contained in Section 73.5007(c) of the Rules to *pro forma* applications to assign or transfer broadcast licenses and permits pursuant to Section 73.3540(f) of the Rules. We believe that this policy will help preserve the integrity of the designated entity measures adopted in the *Broadcast Auction First Report and Order*.[171] The NEBC and unjust enrichment rule provisions are formulated in terms of parties with attributable interests.[172] A *pro forma* assignment or transfer can include new parties, including parties with attributable interest holdings that would nullify or diminish the eligibility of the assignee or transferee for the bidding credit. This is especially the case in transactions eligible for *pro forma* treatment involving corporate reorganizations where a new attributable interest holder with other media interests is added.[173]

56. Moreover, such an unjust enrichment analysis allows for consistency in the application of the rule. It further ensures that applicants do not use the summary *pro forma* assignment and transfer procedures to circumvent the unjust enrichment requirements. We clarify, however, that we will only apply the unjust enrichment analysis to voluntary *pro forma* transactions, and not to involuntary *pro forma* transactions.[174] Notwithstanding this decision, we will continue to address, on a case-by-case basis, any conduct engaged in by auction participants with the evident intention of manipulating the eligibility standards for, or frustrating the purpose of, the NEBC.[175] We find it appropriate to make such a change in our existing bidding credit reimbursement methodology at this time, and we therefore adopt the unjust enrichment analysis recommended in the *Rural NPRM*.

H. Clarify Maximum New Entrant Bidding Credit Eligibility.

[169] *See id.* § 73.3541 (setting forth procedures following the death or legal disability of an individual permittee or licensee, a member of a partnership, or a person directly or indirectly in control of an entity which is a permittee or licensee).

[170] Munbilla Broadcasting Services, LLC Comments at 14.

[171] *See Broadcast Auction First Report and Order*, 13 FCC Rcd at 15992-96.

[172] *See* 47 C.F.R. § 73.5007(a) (35 percent bidding credit given to winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, has no other attributable interests; 25 percent bidding credit given to winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, has an attributable interest in no more than three mass media facilities). *See also* 47 C.F.R. § 73.5008(c) (an attributable interest in a winning bidder or in a medium of mass communications shall be determined in accordance with 47 C.F.R. § 73.3555 and Note 2).

[173] *See, e.g.*, 47 C.F.R. § 73.3540(f)(4).

[174] The rules require that the personal representative notify the Commission within 30 days of death or disability and to request assignment or transfer to a successor in interest, such as a court-appointed receiver, executor, guardian or trustee. Given both the involuntary nature of the triggering event and the temporary nature of the license transfer to a fiduciary, we find that it is inappropriate to apply an unjust enrichment to an involuntary *pro forma* transaction. Rather, in involuntary situations, the unjust enrichment analysis will apply to the subsequent "long form" assignment or transfer to the person or entity legally qualified to succeed to the broadcast interests at issue. *See* 47 C.F.R. § 73.3541(b).

[175] *See Broadcast Auction MO&O*, 14 FCC Rcd at 8767-68.

57. *Background*. As described in the *Rural NPRM*, applicants to participate in broadcast auctions are required to establish their qualifications for the NEBC on their short-form applications (FCC Form 175), "Application to Participate in an FCC Auction."[176] Applicants meeting the eligibility criteria set forth in Section 73.5007 of the Rules qualify for a bidding credit representing the amount by which a winning bidder's gross bid is discounted.[177] The size of a NEBC depends on the number of ownership interests in other media of mass communications that are attributable to the bidder-entity and its attributable interest-holders.[178] In accordance with Section 73.5008(c) of the Rules, when determining an applicant's eligibility for the NEBC, the interests of the applicant, and of any individuals or entities with an attributable interest in the applicant, in other media of mass communications are considered.[179]

58. The Form 175 is the applicant's sole opportunity to claim bidding credit eligibility. Accordingly, an auction applicant's attributable interests, and therefore its maximum NEBC eligibility, are determined as of the Form 175 filing deadline. Consequently, bidders cannot qualify for a bidding credit, nor increase the size of a previously claimed bidding credit, based upon ownership or positional changes occurring after the Form 175 filing deadline.[180]

59. In broadcast auctions, the Bureaus routinely announce by Public Notice that events occurring after the Form 175 filing deadline, such as the acquisition of additional attributable interests in media of mass communications, may cause diminishment or loss of the bidding credit as originally claimed on Form 175.[181] The *Rural NPRM* noted that, notwithstanding clear announcements of this policy in broadcast auction Public Notices, certain parties have, for example, acquired attributable interests after the Form 175 filing deadline and argued that their NEBC eligibility is maintained or "frozen" as of the Form 175 application filing.[182] Therefore, to prevent applicant confusion, in the *Rural*

[176] *See* 47 C.F.R. §§ 1.2105, 73.5007, 73.5008. All applicants, including those seeking a new entrant bidding credit, must provide certifications under penalty of perjury in FCC Form 175.

[177] *Id*. § 73.5007.

[178] *See id.* at 73.5007. In the *New Entrant Bidding Credit Reconsideration Order,* the Commission further refined the eligibility standards for the NEBC, judging it appropriate to attribute the media interests held by very substantial investors in, or creditors of, a bidder claiming new entrant status. Specifically, the attributable mass media interests held by an individual or entity with an equity and/or debt interest in a bidder shall be attributed to that bidder for purposes of determining its eligibility for the credit, if the equity and debt interests, in the aggregate, exceed 33 percent of the total asset value of the bidder, even if such an interest is non-voting. *New Entrant Bidding Credit Reconsideration Order*, 14 FCC Rcd at 12543.

[179] 47 C.F.R. § 73.5008(c).

[180] *See Liberty Productions, a Limited Partnership*, Memorandum Opinion and Order, 16 FCC Rcd 12061, 12079, *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*") (subsequent changes can reduce or eliminate the NEBC that the applicant originally claimed in its Form 175 application).

[181] *See, e.g., Auction of FM Broadcast Construction Permits Scheduled for September 1, 2009; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 79*, DA 09-810, Public Notice, 24 FCC Rcd 4448, 4463 (MB/WTB 2009) ("*Auction 79 Procedures Public Notice*"). Similarly, the broadcast auction Public Notices unambiguously state that an applicant cannot qualify for a bidding credit, nor upgrade a previously claimed bidding credit, based upon ownership or positional changes occurring after the Form 175 filing deadline.

[182] *See, e.g., Matinee Radio, LLC*, Letter, 20 FCC Rcd 13713 (MB 2005), *review pending*. In an attempt to preserve their maximum NEBC eligibility, and despite having acquired attributable interests that nullify their new entrant

NPRM the Commission proposed to amend Section 73.5007(a) of the Rules to codify the current policy, and state explicitly that the NEBC eligibility set forth in an applicant's Form 175 application is the maximum NEBC eligibility for that auction, and that such bidding credit may be reduced or lost upon post-filing changes.[183]

60. *Discussion*. Commenters addressing this issue supported the Commission's proposal to codify the current policy and clarify Section 73.5007(a).[184] We therefore modify Section 73.5007(a) of the Rules to state unequivocally that: (1) an applicant must specify its eligibility for the NEBC in its Form 175 application; (2) the NEBC specified in an applicant's Form 175 establishes that applicant's maximum NEBC eligibility for that auction; (3) any post-Form 175 filing ("post-filing") change in the applicant's circumstances underlying its NEBC eligibility claim, or that of any attributable interest-holder in the applicant, must be reported immediately to the Commission, and no later than five business days after the change occurs;[185] and (4) any such post-filing change may cause a reduction or elimination of the NEBC claimed in the applicant's Form 175 application, if the change would cause the applicant not to qualify for the originally claimed NEBC under the eligibility provisions of Section 73.5007 of the Rules, and the change occurred prior to grant of the construction permit to the applicant. Under no circumstances will a post-filing change increase an applicant's NEBC eligibility for that auction.

61. The rules governing NEBC eligibility state that attributable interests shall be determined in accordance with Section 73.3555 and Note 2 to that section.[186] Section 73.3555 and Note 2 set forth numerous means by which interests are attributed to individuals and entities.[187] We emphasize that all of these bases for attribution will be considered to affect NEBC eligibility when they occur after the Form 175 filing deadline. For example, for NEBC purposes, we do not distinguish between attribution triggered by the post-filing procuring of a creditor with attributable interests (as was the case in *Liberty*),[188] and attribution triggered by an applicant's attributable interest holders themselves acquiring additional media interests subsequent to the Form 175 filing. We therefore reiterate that *any* change occurring subsequent to the short form filing deadline could serve as the basis for reducing or eliminating the applicant's previously claimed NEBC eligibility.[189] This policy codification clearly notifies broadcast auction applicants of the NEBC eligibility consequences of their other business dealings.

status, these parties sought to factually distinguish precedent such as *Liberty Productions*.

[183] *Rural Radio NPRM*, 24 FCC Rcd 5257-58.

[184] H&D Comments at 14.

[185] *See Procedural Amendments to Commission Part 1 Competitive Bidding Rules*, Order, FCC 10-4, at 5 (rel. Jan. 7, 2010) ("*Procedural Amendments*") (under amended 47 C.F.R. § 1.2105(b)(4), amendments or modifications required to maintain the accuracy and completeness of information furnished in pending auction applications "shall be made as promptly as possible, and in no case more than five business days after applicants become aware of the need to make any amendment or modification, or five business days after the reportable event occurs, whichever is later.").

[186] *See* 47 C.F.R. §§ 73.5007-5008.

[187] *Id*., § 73.3555 and Note 2.

[188] *See supra* notes 180 and 182.

[189] It remains the case that an applicant may not qualify for a previously unclaimed NEBC, nor upgrade a previously claimed bidding credit, based on changes occurring after the short form filing deadline. *Liberty*, 16 FCC Rcd at 12077.

62. By auction Public Notices, bidders are also instructed that any change affecting eligibility for the NEBC, insofar as it results in the reduction or loss of the credit originally claimed on the Form 175 application, must be reported immediately, and no later than five business days after the change occurs.[190] Given the significance of this information in an auctions context, in the *Rural NPRM* we proposed to adjust the standard reporting timeframe and codify this immediate reporting requirement. Our experience shows that few bidders actually incur changes that result in adjustments to their bidding credit status. The vast majority of those that do have promptly reported the change. Bidders are advised through Public Notices that the Commission will post pertinent auction information throughout the entire auction event. The past practice has been to post such announcements for auction participants, including messages conveying a change in a bidder's bidding credit eligibility.[191] In such cases, the Commission then makes the appropriate adjustments concerning the NEBC status in the computation of down and final payment amounts due from any affected winning bidder. Therefore, and in keeping with the rule amendments we recently adopted in *Procedural Amendments*,[192] we codify the practice that any changes affecting NEBC eligibility must be reported immediately, and in any event no later than five business days after the change occurs, and we amend Section 73.5007(a) of the Rules accordingly. This codification, again, clearly notifies auction applicants of their reporting obligations, and provides clarity and transparency in the auction processes, both to the affected applicant itself and to those auction participants bidding against that applicant.

63. Finally, we restate that we will continue to make final determinations regarding an applicant's eligibility to hold a construction permit, including its 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 construction permit authorization.[193]

III. FURTHER NOTICE OF PROPOSED RULE MAKING

A. Implement a Tribal Bidding Credit.

64. *Background*. As noted above, some commenters have urged the Commission to adopt some form of tribal bidding credit. Specifically, H&D notes that tribal applicants applying the priority to add an allotment to the Table of FM Allotments might still lose at auction, suggesting for this reason that the Tribal Priority be limited to non-tabled services.[194] In response to this suggestion, NPM/NCAI

[190] *See, e.g., Auction 79 Procedures Public Notice*, 24 FCC Rcd at 4463; "*Auction of FM Broadcast Construction Permits- 77 Bidders Qualified to Participate in Auction 79*," Public Notice, 24 FCC Rcd 10782, 10791 (MB/WTB Aug. 19, 2009) ("*Auction 79 Qualified Bidders Public Notice*"). In Public Notices, the Bureaus also remind bidders of their responsibility to maintain the accuracy and completeness of information furnished in their pending Form 175 applications. *See, e.g., Auction 79 Qualified Bidders Public Notice*, 24 FCC Rcd at 10791 (Applicants are responsible for maintaining the accuracy and completeness of information furnished in their Form 175 and exhibits).

[191] *See, e.g.*, http://auctionresults.fcc.gov/Auction_37/Announcements/37_007.005 (announcing a bidder's change of NEBC eligibility in Auction 37); http://auctionresults.fcc.gov/Auction_53/Announcements/53_005.004 (announcing a bidder's withdrawal of its small business bidding credit in Auction 53).

[192] *See supra* note 185.

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

[194] H&D Comments at 4.

countered that the remedy for the problem H&D posed was not to eliminate the priority for commercial FM auctions, but rather to implement a bidding credit for qualified tribal applicants.[195]

65. *Discussion*. In the *Rural NPRM*, the Commission noted that there are more than 4.1 million Native Americans and Alaska Natives living in the United States, with 563 federally recognized Tribes.[196] The Commission further noted that, at the present time, there are approximately 41 full-power NCE FM radio stations in the United States licensed to Tribes or affiliated groups, with another 31 construction permits for full-power NCE FM stations having been granted to such Tribes or affiliates.[197] Given the paucity of tribal-owned radio stations, it might be expected that the vast majority of tribal applicants for commercial facilities would qualify for new entrant bidding credits, negating the need for a special tribal bidding credit over and above the new entrant bidding credits. Moreover, the Commission has previously rejected the implementation of "finder's" or "pioneer's" bidding credits for applicants that add allotments to the FM Table of Allotments,[198] finding that such applicants were not among the categories specifically designated by Congress when it granted the Commission competitive bidding authority.[199]

66. We nevertheless believe it appropriate to consider various proposals for a special bidding credit for tribal applicants. While not forwarding any one such proposal as a rule at this time, we seek comment to assist our consideration as to whether to offer such a new bidding credit, either in lieu of or in addition to the existing NEBCs. In this regard, two of the commenters in this proceeding have already made suggestions along these lines. MEI suggests that tribal applicants be granted the "maximum permissible bidding credit provided they do not own any other commercial facility with overlapping principal community contours."[200] In other words, MEI appears to suggest that the Commission establish a 35 percent bidding credit for tribal applicants, as long as they own no commercial facilities in the "same area" as the proposed new facility.[201] BFIT, as noted above, also suggests "the equivalent of a new entrant credit," rather than a Section 307(b) priority.[202] We would also consider whether to give tribal applicants the option to claim either the appropriate 25 or 35 percent new entrant bidding credit or, as long as the conditions posed by MEI are met, a 25 or 35 percent tribal bidding credit. Still another

[195] NPM/NCAI Joint Reply Comments at 5-6.

[196] *Rural NPRM*, 24 FCC Rcd at 5247-48 and n.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).' [*Tribal Policy Statement*, 16 FCC Rcd at 4080]").

[197] *Rural NPRM*, 24 FCC Rcd at 5248.

[198] 47 C.F.R. § 73.202(b).

[199] *See Broadcast Auction First Report and Order*, 13 FCC Rcd at 15996-97.

[200] MEI Comments at 7.

[201] 47 C.F.R. § 73.5007(b) (defining "same area" for purposes of new entrant bidding credit).

[202] BFIT Comments at 8.

alternative to be considered would be to offer a choice of either the appropriate new entrant bidding credit or a lesser credit, perhaps 15 or 20 percent, to tribal applicants who are not new entrants. In all of the above cases, we would consider whether to limit the tribal bidding credit to allotments added using the Tribal Priority, and further, whether to limit the credit to the Tribe(s) or entity adding the allotment to the Table of Allotments.[203] Should a qualifying bidder be able to employ a tribal bidding credit in addition to a new entrant bidding credit (at least for qualifying tribal allotments) rather than in lieu of the new entrant credit? Additionally, applicants using new entrant bidding credits are subject to the unjust enrichment provisions of our Rules,[204] which require that all or a portion of the bidding credit be reimbursed if the authorization is assigned or transferred within five years of issuance to a party not qualifying for the credit. What impact would a tribal bidding credit have on the unjust enrichment rules, and what adjustments (if any) should the Commission make to those rules to accommodate a tribal bidding credit? We seek comment on these proposals, or any other proposals forwarded by commenters for a potential tribal bidding credit.

B. Extend the Tribal Priority to Non-Landed Tribes.

67. *Background*. NPM/NCAI point out in their Joint Reply Comments that, while there are 563 Tribes in the United States, there are only 312 reservations, with some Tribes occupying more than one reservation.[205] The Tribal Priority as adopted in the *First R&O* is by its terms limited to what NPM/NCAI term "landed" Tribes. They urge that we seek comment on ways in which "landless" Tribes may nonetheless avail themselves of the Tribal Priority.

68. *Discussion*. NPM/NCAI recognize that the Tribal Priority proposed in the *Rural NPRM* was principally designed to enable Tribes to fulfill their obligations, as inherently sovereign Nations, to aid the development, and perpetuate the language and culture of their members. It was not proposed merely to give Tribes a blanket priority over other applicants for facilities that may not provide service targeted at Tribal citizens or communities.[206] Thus, any application of the Tribal Priority to non-landed Tribes must take into account the policies underlying the Tribal Priority. NPM/NCAI, by way of example, state that federal agencies such as the Census Bureau and the Department of Housing and Urban Development utilize "service areas rather than strict definitions of Tribal Lands."[207] Service areas include such categories as American Indian reservations, Off-reservation trust lands, and Oklahoma tribal statistical areas, as well as tribal subdivisions and Census Designated Places on such lands.[208] They further suggest that provision could be made for tribal applicants to show that the proposed principal community contour serves the functional equivalent of tribal lands, using factors such as Native American

[203] In other words, should the bidding credit be available to otherwise qualifying applicants that did not participate in the Tribal allotment reservation process?

[204] 47 C.F.R. § 73.5007(c) (a licensee or permittee using a new entrant bidding credit, and assigning or transferring control of the authorization to an entity not meeting the eligibility criteria for the bidding credit, must reimburse the U.S. Government 100 percent of the bidding credit if the authorization is assigned or transferred in the first two years after issuance; 75 percent in the third year; 50 percent in the fourth year; and 25 percent in the fifth year).

[205] NPM/NCAI Joint Reply Comments at 10.

[206] *Rural NPRM*, 24 FCC Rcd at 5248-49; NPM/NCAI Joint Reply Comments at 11 n.33.

[207] *Id*. at 11 and n.32.

[208] *Id*.

population density, cultural links between the community of license and the Tribe or Tribes, or other factors.

69. We therefore consider, without proposing a specific rule, whether and how Tribes without tribal lands as defined herein and in the *Rural NPRM* can qualify for the Tribal Priority. For example, we consider whether a threshold tribal population, or tribal population density, could be taken into account in determining whether a tribal applicant meets the tribal coverage and community of license criteria of the Tribal Priority. We would also consider whether historical or contemporary cultural links could be taken into account in making the tribal coverage and community determinations. Should the fact that a currently landless Tribe or Tribes previously occupied the coverage area or proposed community of license be taken into account? Are there other factors that should be considered? We invite comment on these issues, and seek suggestions as to whether and how we might institute such a procedure.

IV. ADMINISTRATIVE MATTERS

A. First Report and Order.

1. Final Regulatory Flexibility Analysis.

70. As required by the Regulatory Flexibility Act of 1980 ("RFA"),[209] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *First R&O*. The FRFA is set forth in Appendix B.

2. Final Paperwork Reduction Act of 1995 Analysis.

71. This *First R&O* adopts new or revised information collection requirements, subject to the Paperwork Reduction Act of 1995 ("PRA").[210] These information collection requirements will be submitted to the Office of Management and Budget ("OMB") for review under Section 3507(d) of the PRA. The Commission will publish a separate notice in the Federal Register inviting comment on the new or revised information collection requirement(s) adopted in this document. The requirement(s) will not go into effect until OMB has approved it and the Commission has published a notice announcing the effective date of the information collection requirement(s). In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."[211]

72. *Further Information.* For additional information concerning the information collection requirements contained in this *First Report and Order*, contact Cathy Williams at 202-418-2918, or via the Internet to Cathy.Williams@fcc.gov.

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[209] *See* 5 U.S.C. § 604. The RFA, *see* 5 U.S.C. § 601 *et. seq*., has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

[210] The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in 44 U.S.C. §§ 3501-3520).

[211] *Rural NPRM*, 24 FCC Rcd at 5261; 74 Fed. Reg. 22498, 22505 (May 13, 2009).

3. Congressional Review Act.

73. The Commission will send a copy of this *First Report and Order* in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.[212]

B. Further Notice of Proposed Rule Making

1. Filing Requirements.

74. *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.[213] *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.[214] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

75. *Comments and Reply Comments*. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules,[215] 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.[216]

76. 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.

77. 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

[212] *See* 5 U.S.C. § 801(a)(1)(A).

[213] *Id*. § 1.1206(b), as revised.

[214] *See id.* at § 1.1206(b)(2).

[215] *Id*. §§ 1.415, 1.419.

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

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.

78. 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).

79. *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.

2. Initial Regulatory Flexibility Analysis.

80. 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).

81. With respect to this *Further Notice of Proposed Rule Making* ("*FNPRM*"), an Initial Regulatory Flexibility Analysis ("IRFA") under the Regulatory Flexibility Act[217] 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 *FNPRM*, with a distinct heading designating them as responses to the IRFA. The Commission will send a copy of this *FNPRM*, including the IRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, a copy of this *FNPRM* and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the *Federal Register*.

3. Paperwork Reduction Act Analysis.

82. The *FNPRM* contains potential information collection requirements subject to the Paperwork Reduction Act of 1995 ("PRA"), Public Law 104-13. OMB, the general public, and other Federal agencies are invited to comment on the potential new and modified information collection requirements contained in this *FNPRM*. If the information collection requirements are adopted, the Commission will submit the appropriate documents to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA and OMB, the general public, and other Federal agencies will

[217] *See* 5 U.S.C. § 603.

again be invited to comment on the new and modified information collection requirements adopted by the Commission. 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. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), the FCC seeks specific comment on how it might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

83. 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-C823, 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.

84. 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.

IV. ORDERING CLAUSES

85. 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 *First Report and Order* IS ADOPTED.

86. IT IS FURTHER 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 *Further Notice of Proposed Rulemaking* IS ADOPTED.

87. IT IS FURTHER ORDERED that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 548, the Commission's Rules ARE HEREBY AMENDED as set forth in Appendix E.

88. IT IS FURTHER ORDERED that the rules adopted herein WILL BECOME EFFECTIVE 30 days after the date of publication in the *Federal Register*, except for Sections 73.3571(k), 73.7000, 73.7002(b), and 73.7002(c), which contain new or modified information collection requirements that require approval by the Office of Management and Budget ("OMB") under the Paperwork Reduction Act (PRA), and which WILL BECOME EFFECTIVE after the Commission publishes a notice in the *Federal Register* announcing such approval and the relevant effective date.

89. IT IS FURTHER ORDERED that the Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Further 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")[218] 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 *Further Notice of Proposed Rulemaking* ("*FNPRM*"). 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 *FNPRM* provided in paragraph 75. The Commission will send a copy of this entire *FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[219] In addition, the *FNPRM* and the IRFA (or summaries thereof) will be published in the Federal Register.[220]

2. **Need For, and Objectives of, the Proposed Rules.** This further rulemaking proceeding is initiated to obtain comments concerning commenters' request that the Commission consider providing a bidding credit to Native American Indian Tribes and Alaska Native Villages ("Tribes") and entities owned by Tribes, and also to obtain comments concerning a commenter's proposal to provide a Tribal Priority, as adopted in the *First R&O* in this proceeding, to Tribes that do not possess their own tribal lands. The Commission has put out for consideration several proposals for a potential tribal bidding credit: to grant Tribes the maximum permissible 35 percent bidding credit provided they do not own any other facility in the "same area" as the proposed new facility;[221] to give Tribes the option to claim either the appropriate 25 or 35 percent new entrant bidding credit or, as long as the applicant owns no stations in the same area as the proposed new station, a 25 or 35 percent tribal bidding credit; or to offer Tribes a choice of either the appropriate new entrant bidding credit or a lesser credit, perhaps 15 or 20 percent, to tribal applicants who are not new entrants. In all of the above cases, the Commission also considers whether to limit the tribal bidding credit, in FM auctions, to allotments added using the Tribal Priority, and further, whether to limit the credit to the Tribe(s) or entity adding the allotment to the Table of Allotments.[222] The Commission also considers herein whether a tribal bidding credit should be available in addition to a new entrant bidding credit (at least for qualifying tribal FM allotments) or in lieu of the new entrant bidding credit. The Commission believes these proposals, if adopted, will provide opportunities for Tribes and tribal entities proposing new FM allotments better to compete at auction for those allotments.

3. The Commission is also considering, without proposing a specific rule, whether and how Tribes without tribal lands can qualify for the Tribal Priority. The proposals offered for consideration by commenters are (1) whether an applicant or proponent is deemed to provide tribal area coverage if it covers a certain threshold tribal population or population density, (2) whether historical or contemporary cultural links between a Tribe and land or population covered should be taken into account in making the

[218] *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).

[219] *See* 5 U.S.C. § 603(a).

[220] *See id*. § 603(a).

[221] 47 C.F.R. § 73.5007(b) (defining "same area" for purposes of new entrant bidding credit).

[222] In other words, should the bidding credit be available to otherwise qualifying applicants that did not participate in the Tribal allotment reservation process?

tribal coverage and community of license determinations, and (3) whether the fact that a currently landless Tribe or Tribes previously occupied the coverage area or proposed community of license should be taken into account. The Commission considers these proposals, and seeks comment and suggestions as to other ways to extend the benefits of the Tribal Priority to those Tribes that do not have reservations or other tribal lands, allowing such "landless" Tribes to acquire radio stations to achieve the goals of aiding tribal development, and perpetuating tribal language and culture.

4. **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).

5. **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.[223] The RFA generally defines the term "small entity" as encompassing the terms "small business," "small organization," and "small governmental entity."[224] In addition, the term "small Business" has the same meaning as the term "small business concern" under the Small Business Act.[225] 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").[226]

6. **Radio Stations.** The proposed rules and policies potentially will apply to all AM and FM radio broadcasting applicants, and proponents for new FM allotments, who qualify for the Tribal Priority adopted in the *First R&O* in this proceeding. 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."[227] The SBA has established a small business size standard for this category, which is: such firms having $7 million or less in annual receipts.[228] **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.[229] In addition, to be determined to be a "small business," the entity may not

[223] *Id*. § 603(b)(3).

[224] *Id*. § 601(6).

[225] *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."

[226] 15 U.S.C. § 632.

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

[228] 13 C.F.R. § 121.201, NAICS code 515112 (updated for inflation in 2008).

[229] "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).

be dominant in its field of operation.[230] 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.

7. **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 on or after filing the short form application (FCC 175) or in the noncommercial educational long form application (FCC 340). 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.

8. To the extent that other applicants would be disadvantaged by Tribes qualifying for the Tribal Priority, the Commission believes that such burdens would be offset by the fact that the Tribal Priority is designed to redress inequities in the number of tribal radio licensees, compared to the population of tribal citizens in the United States and the fact that some of these citizens were deprived of their original tribal lands. The Tribal Priority, then, not only helps the Commission to meet its goals of ownership and program diversity, but also furthers the federal government's obligations toward Tribes to assist them in promulgating tribal languages and cultures, and to support tribal self-government.

9. **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.[231]

10. In the *Further Notice of Proposed Rulemaking*, the Commission seeks to provide additional opportunities for participation by Tribes in broadcast auctions, especially FM auctions, and to open up the Tribal Priority to those Tribes who do not currently have tribal lands, and who therefore cannot qualify under the Tribal Priority's tribal coverage criterion. The Commission is open to consideration of alternatives to the proposals under consideration, as set forth herein, including but not limited to alternatives that will minimize the burden on broadcasters, most of whom are small businesses. There may be unique circumstances these entities may face, and we will consider appropriate action for small broadcasters when preparing a *Report and Order* in this matter.

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

APPENDIX B

Final Regulatory Flexibility Analysis

[230] 13 C.F.R. § 121.102(b) (an SBA regulation).

[231] 5 U.S.C. § 603(b).

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[232] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rule Making* ("*Rural NPRM*") to this proceeding.[233] The Commission sought written public comment on the proposals in the *Rural NPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[234]

A. Need for, and Objectives of, the Report and Order

2. This *First Report and Order* ("*First R&O*") adopts rule changes and procedures to codify or clarify certain allotment, assignment, auction, and technical procedures. The rules adopted by this *First R&O* also create a new Tribal Priority to assist Native American Tribes and Alaska Native Villages ("Tribes") or tribal consortia, or entities controlled by Tribes, in obtaining radio broadcast stations designed to serve their tribal communities.

3. We turn first to the Tribal Priority. The Commission noted the marked disparity in the Native American and Alaskan Native population of the United States, compared to the number of radio stations licensed to, or providing significant signal coverage to, lands occupied by members of Tribes. Tribal lands comprise 55.7 million acres, or 2.3 percent of the area of the United States (exclusive of the State of Alaska).[235] Roughly one-third of the 4.1 million American Indian and Alaska Native population of the United States lives in tribal lands, yet only 41 radio stations currently are licensed to Tribes or affiliated groups, representing less than one-third of one percent of the more than 14,000 radio stations in the United States. This service disparity belies the goal of fair distribution of radio service mandated by Section 307(b) of the Communications Act of 1934, as amended, as well as the Commission's commitment to promoting diversity of station ownership and programming. The Commission also noted its historic trust relationship with Tribes, and the federal policy goals of assisting Tribes in promoting tribal culture and self-government.

4. To remedy these problems, the Commission concluded that Tribes seeking new radio stations to serve their citizens should receive a priority in the award of allotments and construction permits. To qualify for the Tribal Priority, an applicant must demonstrate that it meets all of the following eligibility criteria: (1) the applicant is either a federally recognized Tribe or tribal consortium, or an entity 51 percent or more of which is owned or controlled by a Tribe or Tribes, at least part of whose tribal lands (as defined in note 30 of the *Rural NPRM*)[236] are covered by the principal community contour of the proposed facility. Although the 51 or greater percent need not consist of a single Tribe, the qualifying entity must be 51 percent or more owned or controlled by Tribes at least a portion of whose tribal lands lie within the facility's principal community contour; (2) at least 50 percent of the daytime principal community contour[237] of the proposed facilities covers tribal lands; (3) the proposed community

[232] *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. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

[233] 24 FCC Rcd 5239 (2009).

[234] *See* 5 U.S.C. § 604.

[235] NPM/NCAI Joint Reply Comments at 4.

[236] *Rural NPRM*, 24 FCC Rcd at 5248 n.30.

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

of license must be located on tribal lands; and (4) the applicant proposes first aural, second aural, or first local tribal-owned transmission service at the proposed community of license, in the case of proposed commercial facilities, or at least first local tribal-owned noncommercial educational transmission service, in the case of proposed NCE facilities. In the event that two or more applicants claiming the Tribal Priority are mutually exclusive, the one providing the highest level of service to the greatest population will prevail. The Tribal Priority ranks between the current Priority (1) and co-equal Priorities (2) and (3) in the case of commercial applicants.[238] Thus, the Tribal Priority will not take precedence over a proposal to provide first reception service to a greater than *de minimis* population, but will take precedence over the provision of second local reception service, or over a proposal for first local non-tribal owned transmission service. Likewise, an NCE applicant qualifying for the Tribal Priority will take precedence over all mutually exclusive applications, except those that propose *bona fide* first reception service to a greater than *de minimis* population.

5. The Tribal Priority will be applied only at the allotment stage of the commercial FM licensing procedures, to commercial AM applications filed during an AM filing window, as part of the threshold Section 307(b) analysis, and to applications filed in an NCE FM filing window as the first part of the fair distribution analysis. NCE applicants must also meet all NCE eligibility and licensing requirements.[239] Holding period restrictions, commencing with the award of a construction permit until the completion of four years of on-air operation, will apply to any authorization or allotment awarded pursuant to the Tribal Priority. In the case of an AM or NCE FM authorization awarded to a tribal applicant, the permittee/licensee will be prohibited during this period from making any change that would lower tribal ownership below the 51 percent threshold, a change of community of license, or a technical change that would cause less than 50 percent of the principal community contour to cover tribal lands. However, gradual changes in the composition of an NCE board that do not change the nature of the organization or break continuity of control will not violate the four-year holding period restrictions. In the case of a commercial FM allotment, the restrictions will apply only to any proposed change of community of license or technical change as described above. The winner at auction of an FM allotment added to the Table of Allotments[240] under a Tribal Priority, whether Tribal or non-Tribal, must still provide broadcast service primarily to tribal lands for the entire four-year holding period.

6. Additionally, in the *First R&O* the Commission requires that applicants receiving dispositive preferences for AM facilities under Section 307(b) of the Communications Act of 1934, as amended ("Section 307(b)") be prohibited from substantially downgrading the facilities on which the Section 307(b) award was based. This prohibition was designed to provide basic fairness in the award of a dispositive preference to one proposal in a group of several mutually exclusive proposals. That is, it would be unfair to allow one member of a mutually exclusive group to be awarded a construction permit without auction, based on the superior population coverage in its proposal, only then to allow it to downgrade its proposal to the point where it would no longer be significantly different from the other mutually exclusive proposals.

7. The *First R&O* also establishes procedures by which applicants in AM auction filing windows must submit technical proposals that meet minimum technical eligibility criteria. The Commission noted the number of incomplete or technically defective proposals filed in AM auction filing windows. Such proposals undermine the accuracy and reliability of our mutual exclusivity and Section

[238] *See FM Assignment Policies*, 90 FCC2d at 91-93.

[239] *See id*. §§ 73.503, 73.561.

[240] *Id*. § 73.202.

307(b) determinations, and frustrate 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. In short, allowing the filing of technically defective proposals places a strain on the Commission's resources and, consequently, delays consideration of meritorious proposals and provision of new service to the public.

8. Likewise, the *First R&O* contains two other proposals designed to streamline the AM auction process and speed new service to the public: the grant of delegated authority to the Media Bureau to allow AM auction filing window applicants to submit settlements or technical resolutions that do not resolve all the mutual exclusivities in a mutually exclusive group, as long as the proposal results in one "singleton" application from the group; and the grant of delegated authority to the Media Bureau and Wireless Telecommunications Bureau to cap the number of AM applications that may be filed during a filing window. The Commission also grants the Media and Wireless Telecommunications Bureaus delegated authority to extend the deadline for filing post-auction long-form applications, as appropriate, thus providing successful auction applicants with greater flexibility in preparing such applications.

9. Finally, in the *First R&O* the Commission clarifies certain aspects of the rules governing the new entrant bidding credit ("NEBC"): that for purposes of determining whether an auctioned allotment is in the "same area" as an applicant's other media properties, we will use the maximum class facilities at the allotment site, rather than applicant specified preferred coordinates; that unjust enrichment payments by assignors who used the NEBC in paying for their permit apply even to *pro forma* assignments or transfers filed on FCC Form 316; and that an applicant's maximum NEBC eligibility is established as of the deadline for filing short-form applications, but that the eligibility may be lost or diminished based on post-filing changes in the applicant's situation. In clarifying these rules and policies, the Commission will provide greater certainty to applicants, reducing any confusion and, therefore, burden when preparing and filing auction applications.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

10. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

11. 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 rules adopted herein.[241] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," small organization," and "small government jurisdiction."[242] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[243] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of

[241] 5 U.S.C. § 603(b)(3).

[242] *Id*. § 601(6).

[243] *Id*. § 601(3) (incorporating by reference the definition of "small business concern" in 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." 5 U.S.C. § 601(3).

operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[244]

12. The subject rules and policies potentially will apply to all AM and FM radio broadcasting licensees and potential licensees. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[245] Included in this industry are commercial, religious, educational, and other radio stations.[246] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[247] However, radio stations that are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number.[248] The SBA has established a small business size standard for this category, which is: firms having $7 million or less in annual receipts.[249] 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 many radio stations are affiliated with much larger corporations having much higher revenue. Our estimate, therefore, likely overstates the number of small entities that might be affected by any ultimate changes to the rules and forms.

D. Description of Projected Reporting, Record Keeping and other Compliance Requirements

13. As described, certain rules and procedures will change, although the changes will not result in substantial increases in burdens on applicants. Questions will be added to FCC Forms 340, 314, and 315 to establish Section 307(b) eligibility for the Tribal Priority or compliance with holding period restrictions in the event of an assignment or transfer. Questions will also be added to FCC Form 316 based on the Commission's conclusion that the new entrant bidding credit unjust enrichment rules apply to *pro forma* assignment and transfer applications. These are largely self-identification questions or questions regarding the duration of on-air operation, requiring minimal calculation. In certain cases (AM auction filing window applications and FM allotment proceedings), Section 307(b) information is already required, thus the information needed to be collected from applicants claiming the Tribal Priority is of the same character as that already collected, resulting in little or no increase in burden on such applicants. The remaining procedural changes in the *First R&O* are either changes in Commission procedures, requiring no input from applicants, or more stringent regulation of existing requirements. For example, AM auction filing window applicants need not submit more technical information than is already collected; the procedural change merely adds consequences when that information does not meet certain already extant technical standards.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

14. 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

[244] 15 U.S.C. § 632.

[245] *Id*.

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] 13 C.F.R. § 121.201, NAICS code 515112 (updated for inflation in 2008).

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.[250]

15. The Tribal Priority adopted in the *First R&O* was modified from the original proposal specified in the *Rural NPRM*, based on comments in the record and on the Commission's evaluation of the legal ramifications of the priority, especially with regard to the Commission's government-to-government relationship with Tribes. As adopted, the Tribal Priority can disadvantage certain applicants whose applications or proposals are mutually exclusive with those of applicants qualifying for the Tribal Priority. However, after due consideration, the Commission believes that the priority is necessary to redress an imbalance in the number of Native American broadcasters vis-à-vis native populations and lands, and to further the Commission's interests in promoting diversity of ownership and programming, in assisting Tribes to promulgate tribal language and culture, and in helping to promote self-government by Tribes. Thus, the Commission has determined that the Tribal Priority as adopted is the least burdensome method to achieve its policy goals, consonant with constitutional and other legal requirements.

16. With regard to the adopted rule limiting the downgrade of AM facilities awarded based on service proposals, initially the Commission proposed a standard allowing no reduction in population served, much as is done with NCE selectees. However, after consideration, and recognizing the technical complexity of the AM service and the burden such a rigid standard would impose on applicants, most of whom are small businesses, the Commission instead adopted the more flexible "equivalency" standard, which allows a variance of up to 20 percent of the population initially proposed to be served.

17. Likewise, in adopting the rule requiring that AM technical proposals be technically eligible for auction processing at time of filing, the Commission considered seeking further technical information from applicants. Moreover, as proposed the rule would not have allowed curative amendments. However, upon consideration of the record, the Commission opted not to require additional technical information from applicants, declining to increase the burden on such parties, and also mitigated the firm requirements of the proposed rule by allowing one opportunity for curative amendments.

18. The remaining proposals adopted in the *First R&O* fall into one of two categories: grant of delegated authority to modify certain rules on an as-needed basis, or codification or clarification of existing policies and rules. In the first category, the new authority granted the Commission to place a "cap" on AM filing window applications may deprive certain applicants of the ability to file all the applications they wish. However, application caps will deter speculation, eliminating superfluous applications and enabling faster processing of applications overall. Caps will cause applicants to focus on those facilities that they value most, and in conjunction with the requirement of technically eligible applications will encourage the filing of better and more quickly grantable applications, streamlining the AM auction and award process. Given that, in the most recent AM auction filing window, less than six percent of the applicants filed ten or more applications (accounting for approximately 40 percent of all technical proposals filed), a reasonable application cap will burden only that small percentage of potential applicants whose multiple applications take up disproportionate amounts of Commission time and resources, slowing down the auction process and impeding the authorization of new AM service to the public. The grant of delegated authority to the Media and Wireless Telecommunications Bureaus to extend post-auction filing deadlines will only benefit applicants: it gives the Bureaus the flexibility to provide additional time for parties that need it, while those who wish their applications to be considered sooner may file when they like. In these cases, because of the significant benefits to regulated parties and minimal to no burdens, it was not deemed necessary to consider other options.

[250] 5 U.S.C. § 603(c)(1)-(c)(4)

19. With regard to the adopted codifications and clarifications of existing rules, these also present no burden on applicants requiring consideration of less burdensome alternatives. The codification of the policy, used in prior auctions, allowing non-universal settlements that result in at least one singleton application from an MX Group, speeds auctions by simplifying MX groups, and expedites provision of new service by the singleton applicants. Similarly, the clarification of policies regarding new entrant bidding credit eligibility and the new entrant bidding credit unjust enrichment rule does not place any additional burdens on applicants or other parties. Rather, clarifying these policies will benefit applicants, permittees, and licensees by adding certainty to auction and post-auction procedures. As such, consideration of less burdensome alternatives was unnecessary.

F. Report to Congress

20. The Commission will send a copy of the *First R&O*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[251] In addition, the Commission will send a copy of the *First R&O*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *First R&O* and FRFA (or summaries thereof) will also be published in the Federal Register.[252]

[251] *See id*. § 801(a)(1)(A).

[252] *See id*. § 604(b).

APPENDIX C

Comments Filed in Response to Rural NPRM

Cameron University
Positive Alternative Radio, Inc.
Calvary Chapel of Twin Falls, Inc.
Booth, Freret, Imlay & Tepper, P.C.
Creative Educational Media Corp., Inc.
Amador S. Bustos and Bustos Media Holdings, L.L.C.
Priority Radio, Inc.
Vir James, P.C.
Hatfield & Dawson Consulting Engineers
Sacred Heart University, Inc.
American Media Services, LLC
Miller Communications, Inc., Kaskaskia Broadcasting, Inc., Virden Broadcasting Corp., Delta Radio LLC, Contemporary Communications LLC, South Seas Broadcasting Inc., the Georgia-Carolina Radiocasting Companies, WTUZ Radio Inc., Charisma Radio Corp., K95.5, Inc., Payne 5 Communications, LLC, Best Broadcasting, Inc., FM 105, Inc., Chirillo Electronics, Inc., Eastern Shore Radio, Inc., Guadalupe Media, Ltd.
Communications Technologies, Inc.
National Association of Broadcasters
Educational Media Foundation
du Treil, Lundin & Rackley, Inc.
Glades Media Company, LLP
Native Public Media and National Congress of American Indians
Frank G. McCoy
William B. Clay
Brantley Broadcast Associates
Mullaney Engineering, Inc.
Munbilla Broadcasting Services, LLC
Cox Radio, Inc.
Prometheus Radio Project and National Federation of Community Broadcasters
Media Technology Ventures, LLC
Radio One, Inc., Minority Media and Telecommunications Council, Ace Radio Corporation, Auburn Network, Inc., Cherry Creek Radio LLC, Chisholm Trail Broadcasting Co., Communications Technologies, Inc., Radio K-T, Inc., Great South Wireless, LLC, Brantley Broadcast Associates, LLC, RAMS, Broadcast One, Inc., Skytower Communications-E'town, Inc., Heritage Communications, Inc., Anderson Associates, Holladay Broadcasting of Louisiana, Alatron Corp., Inc., Scott Communications, Inc., Alexander Broadcasting Company, LLC, Jackson Radio, LLC, Main Line Broadcasting, LLC, Radiotechniques Engineering LLC, Signal Ventures LLC, SMAHH Communications, Inc., Wagon Wheel Broadcasting, LLC, WRNJ, Inc., Dot Com Plus LLC, Independence Broadcast Services, Provident Broadcasting Company, Inc., Radio Training Network, Inc., Sacred Heart University, Inc., Hancock Broadcasting Corporation
Cherokee Nation
Carl T. Jones Corporation
Robert A. Lynch and Romar Communications, Inc.
Jorgenson Broadcast Brokerage, Inc.
Donald Manro
Charles Sumner

Craig Kuehn
Thomas D. Bentley
Allen VanPliet
Jeff W. Bressler
Robert Feuer
Katie Finnigan
Christian McLaughlin
Don A. Sevilla
Craig Blomberg
Noel Yates
Nancy Bodily
Nancy Fullmer
Michael Niemann
Mark Woodward
David Kunian
Timothy Stone
Joe Shedlock
Bexley Public Radio Foundation
Scott Sanders
Jeff Shaw
Leigh Robartes
Jesse Drew
Jim Buchanan
Catholic Radio Association
Erubiel Valladares Carranza
Polnet Communications, Ltd. and Johnson Communications, Inc.

APPENDIX D

Reply Comments Filed in Response to Rural NPRM

du Treil, Lundin & Rackley, Inc.
Booth, Freret, Imlay & Tepper, P.C.
Brantley Broadcast Associates
Media Technology Ventures, LLC
Educational Media Foundation
Cherokee Nation
William B. Clay
Radio One, Inc., Minority Media and Telecommunications Council, Ace Radio Corporation, Auburn Network, Inc., Cherry Creek Radio LLC, Chisholm Trail Broadcasting Co., Communications Technologies, Inc., Radio K-T, Inc., Great South Wireless, LLC, Brantley Broadcast Associates, LLC, RAMS, Broadcast One, Inc., Skytower Communications-E'town, Inc., Heritage Communications, Inc., Anderson Associates, Holladay Broadcasting of Louisiana, Alatron Corp., Inc., Scott Communications, Inc., Alexander Broadcasting Company, LLC, Jackson Radio, LLC, Main Line Broadcasting, LLC, Radiotechniques Engineering LLC, Signal Ventures LLC, SMAHH Communications, Inc., Wagon Wheel Broadcasting, LLC, WRNJ, Inc., Dot Com Plus LLC, Independence Broadcast Services, Provident Broadcasting Company, Inc., Radio Training Network, Inc., Sacred Heart University, Inc., Hancock Broadcasting Corporation
Native Public Media and National Congress of American Indians
National Association of Broadcasters

APPENDIX E

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 73.3571 is amended by revising paragraphs (h)(1)(ii) and (h)(4)(iii), and adding new paragraph (k), to read as follows:

§ 73.3571 Processing of AM broadcast station applications.

* * * * *

(h) *Processing new and major AM broadcast station applications*.

* * *

(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. Applications must include the following engineering data: (1) community of license; (2) frequency; (3) class; (4) hours of operations (day, night, critical hours); (5) power (day, night, critical hours); (6) antenna location (day, night, critical hours); and (7) all other antenna data. Applications lacking data (including any form of placeholder, such as inapposite use of "0" or "not applicable" or an abbreviation thereof) in any of these categories will be immediately dismissed as incomplete without an opportunity for amendment. The staff will review the remaining applications to determine whether they meet the following basic eligibility criteria: (1) community of license coverage (day and night) as set forth in § 73.24(i), and (2) protection of co- and adjacent-channel station licenses, construction permits and prior-filed applications (day and night) as set forth in §§ 73.37 and 73.182. If the staff review shows that an application does not meet one or more of the basic eligibility criteria listed above, it will be deemed "technically ineligible for filing" and will be included on a Public Notice listing defective applications and setting a deadline for the submission of curative amendments. An application listed on that Public Notice may be amended only to the extent directly related to an identified deficiency in the application. The amendment may modify the proposed power, class (within the limits set forth in Section 73.21 of the Rules), antenna location or antenna data, but not the proposed community of license or frequency. Except as set forth in the preceding two sentences, amendments to short-form (FCC Form 175) applications will not be accepted at any time. Applications that remain technically ineligible after the close of this amendment period will be dismissed, and the staff will determine which remaining applications are mutually exclusive.

* * *

(4)(iii) All long-form applications will be cutoff as of the date of filing with the FCC and will be protected from subsequently filed long-form applications. Applications will be required to protect all previously filed commercial and noncommercial applications. Subject to the restrictions set forth in subsection (k) below, winning bidders filing long-form applications may change the technical proposals specified in their previously submitted short-form applications, but such change may not constitute a major change. If the submitted long-form application would

constitute a major change from the proposal submitted in the short-form application, the long-form application will be returned pursuant to paragraph (h)(1)(i) of this section.

* * * * *

(k)(i) An AM applicant receiving a dispositive Section 307(b) preference is required to construct and operate technical facilities substantially as proposed in its FCC Form 175. An AM applicant, licensee, or permittee receiving a dispositive Section 307(b) preference based on its proposed service to underserved populations (under Priority (1), Priority (2), and Priority (4)) or service totals (under Priority (4)) may modify its facilities so long as it continues to provide the same priority service to substantially the same number of persons who would have received service under the initial proposal, even if the population is not the same population that would have received such service under the initial proposal. For purposes of this provision, "substantially" means that any proposed modification must not result in a decrease of more than 20 percent of any population figure that was a material factor in obtaining the dispositive Section 307(b) preference.

(ii) An AM applicant, licensee, or permittee that has received a dispositive preference under Priority (3) will be prohibited from changing its community of license.

(iii) The restrictions set forth in subsections (k)(i) and (k)(ii) will be applied for a period of four years of on-air operations. This holding period does not apply to construction permits that are awarded on a non-comparative basis, such as those awarded to non-mutually exclusive applicants or through settlement.

2. Section 73.5002 is amended by adding new paragraph (e), 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) Applicants seeking to resolve their mutual exclusivities by means of engineering solution or settlement during a limited period as specified by public notice, pursuant to paragraph (d) of this section, may 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.

3. Section 73.5005 is amended by revising paragraph (a), 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 a longer period is specified by public notice, each winning bidder must submit an appropriate long-form application (FCC Form 301, FCC Form 346, or FCC Form 349) for each construction permit or license for which it was the high bidder. * * *

* * * * *

4. Section 73.5007 is amended by revising paragraph (a) and adding Note 1, 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 the new entrant bidding credit must be specified in an applicant's FCC Form 175 application, and the new entrant bidding credit specified in an applicant's FCC Form 175 application establishes that applicant's maximum bidding credit eligibility for that auction. Any post-FCC Form 175 filing change in the applicant's circumstances underlying its new entrant bidding credit eligibility claim, or that of any attributable interest-holder in the applicant, must be reported to the Commission immediately, and no later than five business days after the change occurs. Any such post-FCC Form 175 filing change may cause a reduction or elimination of the new entrant bidding credit claimed in the applicant's FCC Form 175 application, if the change would cause the applicant not to qualify for the originally claimed new entrant bidding credit under the eligibility provisions of § 73.5007, and the change occurred prior to grant of the construction permit to the applicant. Final determinations regarding new entrant status will be made at the time of long form construction permit application grant. Applicants whose eligibility is lost or reduced subsequent to the FCC Form 175 filing must, before a construction 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 based on the maximum class facilities at the FM allotment site, which is defined as the perfectly circular standard 70 dBu contour distance for the class of station.

5. Section 73.7000 is amended by adding six additional definitions, to read as follows:

§ 73.7000 Definition of terms (as used in subpart K only).

* * * * *

Near Reservation Lands. Those areas or communities adjacent or contiguous to reservation or other Trust lands 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.

Reservations. 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, for which a Tribe exercises regulatory jurisdiction.

Tribe. 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).

Tribal Applicant. (1) a Tribe or consortium of Tribes, or (b) an entity that is 51 percent or more owned or controlled by a Tribe or Tribes that occupy Tribal Lands that receive Tribal Coverage

Tribal Coverage. Coverage of Tribal Lands by at least 50 percent of a facility's 60 dBu (1 mV/m) contour. To the extent that Tribal Lands include fee lands not owned by Tribes or members of Tribes, the outer boundaries of such lands shall delineate the coverage area, with no deduction of area for fee lands not owned by Tribes or members of Tribes.

Tribal Lands. Both Reservations and Near reservation lands. This definition 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.

6. Section 73.7002 is amended by revising paragraphs (b) and (c), to read as follows:

§ 73.7002 Fair distribution of service on reserved band FM channels.

* * * * *

(b) In an analysis performed pursuant to paragraph (a) of this section, a full-service FM applicant that identifies itself as a Tribal Applicant, that proposes Tribal Coverage, and that proposes the first reserved channel NCE service owned by any Tribal Applicant at a community of license located on Tribal Lands, will be awarded a construction permit. If two or more full-service FM applicants identify themselves as Tribal Applicants and meet the above criteria, the applicant providing the most people with reserved channel NCE service to Tribal Lands will be awarded a construction permit, regardless of the magnitude of the superior service or the populations of the communities of license proposed, if different. If two or more full-service FM applicants identifying themselves as Tribal Applicants each meet the above criteria and propose identical levels of NCE aural service to Tribal Lands, only those applicants shall proceed to be considered together in a point system analysis. In an analysis performed pursuant to paragraph (a) of this section that does not include a Tribal Applicant, a full service FM applicant that will provide the first or second reserved channel noncommercial educational (NCE) aural signal received by at least 10% of the population within the station's 60dBu (1mV/m) service contours will be considered to substantially further fair distribution of service goals and to be superior to mutually exclusive applicants not proposing that level of service, provided that such service to fewer than 2,000 people will be considered insignificant. First service to 2,000 or more people will be considered superior to second service to a population of any size. If only one applicant will provide such first or second service, that applicant will be selected as a threshold matter. If more than one applicant will provide an equivalent level (first or second) of NCE aural service, the size of the population to receive such service from the mutually exclusive applicants will be compared. The applicant providing the most people with the highest level of service will be awarded a construction permit, if it will provide such service to 5,000 or more people than the next best applicant. If none of the applicants in a mutually exclusive group would substantially further fair distribution goals, all applicants will proceed to examination under a point system. If two or more applicants will provide the same level of service to an equivalent number of people (differing by less than 5,000), only those equivalent applicants will be considered together in a point system.

(c) For a period of four years of on-air operations, an applicant receiving a decisive preference pursuant to this section is required to construct and operate technical facilities substantially as proposed and shall not downgrade service to the area on which the preference was based. Additionally, for a period beginning from the award of a construction permit through four years of on-air operations, a Tribal Applicant receiving a decisive preference pursuant to this section may not (1) assign or transfer the authorization except to another party that qualifies as a Tribal Applicant, (2) change the facility’s community of license, or (3) effect a technical change that would cause the facility to provide less than full Tribal Coverage.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, MB Docket 09-52

I am delighted to add my vote of approval to this *Order* that sets us on a path to foster increased ownership of radio broadcast stations by federally recognized American Indian Tribes and Alaska Native Villages. I was pleased the Commission launched this proceeding during my Acting Chairmanship, and I couldn't be more pleased with the prompt action taken by the Commission to implement this priority for Tribes and tribal consortia. The *Order* starts from our assessment that the current allocation priorities – which are designed to provide a fair, efficient and equitable distribution of radio service among all States and communities – have not worked as intended for tribal lands. Only 41 radio stations out of the approximately 14,000 radio stations licensed in the United States – or less than one-third of one percent – are currently licensed to federally recognized Indian tribes. This sad statistic testifies to a course much in need of correcting. Thus, we adopt today a new Section 307 (b) priority that will apply to federally recognized Native American Tribes that propose new radio services to serve tribal lands.

Increased tribal ownership of radio stations furthers the Commission's core goals of competition, localism and diversity. More tribally-owned stations will mean new opportunities for these rural communities: economic advancement from construction activity to erect broadcast facilities; advertisements for goods and services geared especially to tribal audiences and markets; career and employment opportunities in media-related fields; outlets for the distribution of diverse cultural programming and viewpoints, as well as public safety information for tribal lands. This initiative goes to the heart of localism. There can be no doubt that radio stations owned by Tribes, for the benefit of those residing on tribal lands, advance the FCC's localism objective.

In addition, we seek further comment on whether the Commission should implement a special bidding credit to tribal applicants in addition to or in lieu of our existing new entrant bidding credits, and how Tribes without tribal lands can qualify for the Tribal priority we adopt today. The *Order* also adopts additional measures to streamline auction application processing, including a procedure to cap the number of applications a single applicant may file in an AM short-form window. These much needed reforms will protect the integrity of the auctions process and promote opportunities for new entrants to bid for radio broadcast construction permits.

I fully support today's *Order*, and look forward to continuing to work on ways to enhance broadcast ownership diversity among American Indian Tribes.

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

I am pleased to support this First Report and Order ("Order"), which affords a priority under Commission rules to Native American Tribes, Alaska Native Villages, and tribal consortia ("Tribes") to assist them in obtaining new radio stations designed to serve their tribal communities. As of today, Tribal lands and Alaska Native lands are some of the most under-served parts of America. Our rule change is designed to be a solid first step in fostering the development of new stations owned and controlled by Tribes to serve their communities on tribal lands.

By affording the Tribes an improved opportunity to provide news, information, entertainment and public safety alerts to their members, this initiative comports well with the Commission's charge under Section 307(b) of the Communications Act to provide a "fair, efficient and equitable distribution of radio service" across the nation. It also is consistent with the Commission's longstanding recognition of tribal sovereignty and the federal trust relationship between the U.S. government and federally recognized Native peoples. Moreover, the new rule is tailored to advance the interests of the Tribes in a manner that satisfies Supreme Court precedent concerning both tribal sovereignty and the Equal Protection Clause of the Constitution.

On a more practical note, I also hope that the new stations that result – whether AM or FM, commercial or noncommercial – help to promote tribal self-sufficiency and economic development. I thank the staffs of the Media Bureau and the Office of the General Counsel for their work on the Order.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

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

The Commission is taking a step in the right direction today by establishing a priority for American Indian Tribes and Alaska Native Villages proposing FM allotments, and submitting AM and noncommercial educational FM filing window applications. The Tribes and Villages have been woefully underrepresented among the radio ownership ranks, and for decades they have suffered a lack of radio programming addressing issues of importance to them. As a result, many Tribal members simply do not have access to a critical source of information that can contribute significantly to the economic and community development of Native peoples.

The importance of the Tribal Priority is further highlighted by the unique responsibility Tribal entities have as sovereign nations to govern, educate, and care for their members. The Commission recognized the significance of this charge in its 2000 *Tribal Policy Statement*. And as Native Public Media and the National Congress of American Indians have recently reminded us, a Tribal Priority would be – and now is – the Commission's first step in implementing our *Tribal Policy Statement* for broadcasting services. Thank you to the staffs of the Media Bureau and the Office of General Counsel for their hard work and attention to detail in producing this important item.