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	)	

SECOND REPORT AND ORDER, FIRST ORDER ON RECONSIDERATION, AND SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: March 3, 2011 **Released: March 3, 2011**

Comment Date: [30 days after date of publication in the Federal Register]
Reply Comment Date: [60 days after date of publication in the Federal Register]

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

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I. INTRODUCTION

1. In this *Second Report and Order* ("*Second R&O*"), we continue our efforts to enhance the ability of federally recognized Native American Tribes and Alaska Native Villages ("Tribes")[1] not only to receive radio service tailored to their specific needs and cultures, but to increase ownership of such radio stations by Tribes and Tribal-owned entities. The proposals we adopt today, and those on which we seek comment, are designed to build upon the Tribal Priority we adopted in the *First R&O* in this proceeding,[2] further enabling Tribes and Tribal entities to serve their communities through uniquely Tribal radio service. We announce our interest in entertaining requests by Tribes that do not possess "Tribal Lands,"

[1] In the Notice of Inquiry in *Improving Communications Services for Native Nations by Identifying and Removing Barriers to Entry and Deployment*, FCC 11-29 (rel. Mar. _, 2011) ("*Native Nations NOI*"), we use the term "Native Nations" to refer to federally recognized American Indian Tribes and Alaska Native Villages. *Native Nations NOI* at 1 n.1. Previously, in both the *Notice of Proposed Rule Making* and the *First Report and Order* in this proceeding, we used the term "Tribes" to refer to federally recognized American Indian Tribes and Alaska Native Villages, further noting that "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 Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Notice of Proposed Rule Making, 24 FCC Rcd 5239, 5247-48 and n.29 (2009) ("*Rural NPRM*"), citing *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080 (2000); *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order and Further Notice of Proposed Rule Making, 25 FCC Rcd 1583, 1584-85 (2010) ("*First R&O*"). In the interest of avoiding confusion regarding the already-adopted Tribal Priority in this proceeding, for purposes of this docket we will continue to use the previously used terminology of "Tribes" and "Tribal Lands." *See also* 47 C.F.R. § 73.7000.

[2] *First R&O*, 25 FCC Rcd at 1596-97.

as we defined that term in the *First R&O* in this proceeding,[3] for waiver of the tribal coverage requirement of the Tribal Priority adopted in the *First R&O*,[4] and establish specific guidance regarding how those waiver determinations will be made. This will expand the availability of the Tribal Priority to Tribes that wish to provide radio service to geographically identifiable Tribal population groupings located outside Tribal Lands. We also act on those proposals set forth in the *Notice of Proposed Rule Making* in this proceeding that were not addressed in the *First R&O*. Specifically, we adopt some of the proposed changes in our procedures for awarding new channel allotments and assignments under Section 307(b) of the Communications Act,[5] adopt a rule prohibiting FM translator applicants from proposing to change channels from the non-reserved to reserved bands and vice-versa, and codify our existing standards for determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window.

2. In the *First Order on Reconsideration*, we modify the Tribal Priority established in the *First R&O* to enable Tribes whose lands are small or irregularly shaped to claim the Tribal Priority under certain circumstances. In the *Second Further Notice of Proposed Rule Making*, we seek to develop a more comprehensive record on the need for a Tribal Bidding Credit that may be employed by Tribes in lieu of, or in addition to, our existing new entrant bidding credit, and also to solicit comment on alternatives to a Tribal Bidding Credit that would assist Tribes wishing to establish commercial service to their communities.

3. The actions we take today are intended to further the statutory goal of distributing radio service fairly, efficiently and equitably, and to increase the transparency and efficiency of our radio broadcast auction and licensing processes. In particular, our continued efforts to expand Tribal ownership of radio stations serving Tribal communities comports with our Section 307(b) mandate to distribute radio service fairly and equitably, especially among those communities that are currently least served by radio tailored to their needs and interests.

II. BACKGROUND

4. 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*.[6] The *Rural NPRM* 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"), their members, and entities owned or controlled by such Tribes and their members, when they propose new radio services that primarily would serve tribal lands (the "Tribal Priority"). The *Rural NPRM* also contained several proposals for changes to the Commission's allotment and assignment procedures, including proposals to adjust the manner in which it awards preferences to applicants under the provisions of Section 307(b), which directs us to provide a fair, efficient, and equitable distribution of radio service among the States and communities. Several other proposals were designed to codify or clarify certain allotment, assignment, auction, and technical procedures.[7]

[3] *Id*. at 1587 and n.15.

[4] *Id*.

[5] 47 U.S.C. § 307(b) ("Section 307(b)").

[6] *See supra* note 1.

[7] In the *Rural NPRM*, the Commission also proposed to codify guidelines for supplemental contour prediction showings under 47 C.F.R. § 73.313(e). *Rural NPRM*, 24 FCC Rcd at 5258-59. Upon consideration after review of the comments, we decline at this time to adopt this proposal.

5. On February 3, 2010, we released the *First R&O* in this proceeding. In the *First R&O*, we adopted the Tribal Priority proposal, with modifications, in order to promote the sovereign rights of Tribes by enabling them to provide vital radio services to their communities, and also to advance the policies and purposes of the Communications Act favoring diversity of media voices and fair and equitable distribution of radio service.[8] In addition to other actions not relevant to this *Second R&O*,[9] the *First R&O* included a *Further Notice of Proposed Rulemaking*, in which we sought comment on two further proposals related to the Tribal Priority: how to extend the Tribal Priority to Tribes without "Tribal Lands," as that term is defined in relation to the Tribal Priority,[10] and whether and how to implement a Tribal Bidding Credit.[11] We address those issues here.

III. DISCUSSION

A. Extend the Tribal Priority to Tribes Without "Tribal Lands."

6. *Background*. In the *Further Notice of Proposed Rule Making* ("*FNPRM*"),[12] we recounted the concern of joint commenters Native Public Media and the National Congress of American Indians ("NPM/NCAI") that the Tribal Priority, as originally proposed in the *Rural NPRM*, would benefit only those Tribes possessing Tribal Lands, as we defined that term in the *First R&O*.[13] The Tribal

[8] *First R&O*, 25 FCC Rcd at 1588-89, 1596-97. The original Tribal Priority proposal was modified to limit eligibility for the priority only to Tribes and entities owned 51 percent or more by Tribes. We also adopted certain modifications relating to assignments and transfers of stations obtained using the Tribal Priority among qualifying Tribes and entities, permitting gradual changes to the governing boards of qualifying tribal entities, allowing ownership of qualifying entities by multiple Tribes whose Tribal Lands are covered by the station's principal community contour, and requiring that an applicant must propose first or second reception service to, or first local commercial or noncommercial educational ("NCE") service at, the community of license in order to qualify for the Tribal Priority.

[9] In the *First R&O*, we modified our Rules to limit an applicant's ability to downgrade proposed AM facilities receiving dispositive Section 307(b) preferences (*id*. at 1597-99); established "technically eligible at time of filing" criteria for applications for new AM stations and major changes to AM facilities (*id*. at 1600-03); codified the permissibility of non-universal engineering solutions and settlement proposals (*id*. at 1604); delegated to the Media Bureau ("Bureau") the authority to cap the number of applications that may be filed in a short-form filing window for new AM facilities (*id*. at 1605-07); modified Section 73.5005 of the Rules to provide flexibility in the deadline for filing post-auction long-form applications (*id*. at 1607-08); clarified application of the new entrant bidding credit unjust enrichment rule (*id*. at 1612-14); and clarified maximum new entrant bidding credit eligibility (*id*. at 1616).

[10] *Id*. at 1616.

[11] *Id*. at 1615-16.

[12] *Id*. at 1614.

[13] As defined in the *First R&O*, "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

Priority we adopted includes a requirement that at least 50 percent of the proposed station's principal community contour covers Tribal Lands. This requirement is designed to ensure that a facility qualifying for the Tribal Priority is primarily used for its intended purpose, namely, to assist Tribes in their mission of promulgating Tribal language and culture, promoting self-governance, and serving the specific needs of Tribal communities. NPM/NCAI noted, however, that while there are 563 Tribes in the United States, there are only 312 reservations, with some Tribes occupying more than one reservation.[14] While NPM/NCAI dispute the use of the term "landless" to describe such Tribes (pointing out that "Tribes own and inhabit land in many different types of land tenure"),[15] they encourage us to develop a test that will enable Tribes lacking lands that fit our definition of "Tribal Lands" to take advantage of the Tribal Priority. Koahnic Broadcasting Corporation ("KBC"), pointing out the sizeable Native populations in cities such as Tulsa, Oakland, Los Angeles, Seattle, and Phoenix, also cites the need for such an accommodation, stating that it would help Tribes to "keep the dialogue and cultural ties alive with their communities that reside in urban areas."[16]

7. KBC, in its comments, proposes a standard by which a Tribe without defined Tribal Lands could claim the Tribal Priority upon a demonstration that at least ten percent of the members of a Tribe live within the principal community contour of the proposed station.[17] In their comments, NPM/NCAI recognize that there is a need for a means to identify communities linked specifically to a Tribe or Tribes, while not necessarily including "certain regions so non-Native in their character or location, such as urban areas, so as to defeat the shared purposes . . . of both the Commission and the Tribes."[18] NPM/NCAI propose a test similar to that which we use in determining whether a proposed community of license is a "licensable community," that is, whether it constitutes a "geographically identifiable population grouping."[19] They propose, first, that a claim of "community" and for the Tribal Priority must be formally requested by an official of a federally recognized Tribe who has proper

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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. *First R&O*, 25 FCC Rcd at 1587 n.15.

[14] *Id*. at 1616 and n.205.

[15] NPM/NCAI FNPRM Comments at 3 n.5.

[16] KBC Comments at 9.

[17] *Id*. at 11.

[18] NPM/NCAI FNPRM Comments at 10 n.20.

[19] *Id*. at 7 *et seq*. *See, e.g.*, *Hayden Christian Broadcasting Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 2466, 2471 (2008), citing *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 F.C.C.2d 88, 101 (1982) ("*FM Assignment Policies*"); *Beacon Broadcasting*, Decision, 104 F.C.C.2d 808 (Rev. Bd. 1986), *modified*, 2 FCC Rcd 3469 (2007), *aff'd sub nom. New South Broadcasting Corp. v. F.C.C.*, 879 F.2d 867 (D.C. Cir. 1989) (specified location must be an identifiable population grouping, separate and apart from all others, and the geographic boundaries of the location must not enclose or contain areas or populations more logically identified or associated with some other location). As an example of how the staff has applied such principles to tribal lands, *see Seminole Tribe of Florida*, Letter, 24 FCC Rcd 2845 (MB 2009) (noting the location of the Big Cypress Reservation's government offices, school, and all but one significant business within a defined geographic cluster).

jurisdiction. In addition, NPM/NCAI recommend a flexible standard, which may include any appropriate showing of a defined geographic area identified with the Tribe. Most probative among such showings, in their view, would be evidence of an area to which the Tribe delivers services to its citizens, but the Tribe could offer other evidence, including evidence of an area to which the federal government delivers services to Tribal members, for example federal service areas used by the Indian Health Service, Department of Energy, or Environmental Protection Agency. Probative evidence might also include evidence of Census Bureau-defined tribal service areas, used by agencies such as the Department of Housing and Urban Development.[20] The Catholic Radio Association ("CRA") opposed the extension of the Tribal Priority to tribes without Tribal Lands, arguing that the justification for the Tribal Priority revolved around the federal government's facilitation of Tribal self-government on reservations, and that Tribes without Tribal Lands do not govern themselves differently than other United States citizens. Therefore, they argue that the priority should not extend to such Tribes.[21]

8. *Discussion*. The record on this issue, consisting of two comments in favor and one against, is not as well-developed as we anticipated. Moreover, as NPM/NCAI point out, the situations of different Tribes are extremely varied and are likely to require different showings, necessitating flexible standards. The sparse record and need for flexibility to cover widely varying circumstances thus militate against our adopting a specific standard for defining a functional equivalent of Tribal Lands. We believe the better approach is not to modify the Tribal Priority at this time, but rather encourage Tribes lacking Tribal Lands, as we have defined them, to seek waiver in appropriate cases of the tribal coverage requirements of the Tribal Priority. Because, as we noted in the *First R&O*, approximately two-thirds of all Tribal citizens do not live on Tribal Lands,[22] we recognize the potential need for the availability of a Tribal Priority in such circumstances, and will accordingly be receptive to waiver requests that demonstrate grant would serve the goals of the Tribal Priority – to enable the Tribe to provide radio service uniquely devoted to the needs, language, and culture of the Tribal community – without undermining the Priority, because a majority of the proposed service would cover the functional equivalent of Tribal Lands.

9. We agree with NPM/NCAI that such a waiver should be formally requested by an official of a federally recognized Tribe who has proper jurisdiction.[23] This is consistent with our requirement that only Tribes or Tribal-owned entities may qualify for the Tribal Priority, based on the government-to-government relationship between Tribes and the federal government. Thus any waiver request regarding Tribal Lands should be made by an individual empowered to speak for the Tribe. Beyond that requirement, as is the case with any waiver request, an applicant seeking to establish eligibility for the Tribal Priority may submit any evidence probative of a connection between a defined community or area and the Tribe itself.[24] Such a waiver showing should explain that the communities or areas associated

[20] NPM/NCAI FNPRM Comments at 8-10.

[21] CRA Comments at 5-6. CRA's objections are based in large part on Constitutional arguments that we considered and rejected in the *First R&O*. *See First R&O*, 25 FCC Rcd at 1589-92. Given our decision below not to modify the Tribal Priority as proposed, we need not address CRA's objection to the proposed extension to Tribes without Tribal Lands. We note, however, that the relationship of the federal government to Tribes on which our constitutional analysis was founded in the *First R&O* is government-to-government, not government-to-land, and therefore does not appear to depend on the nature of a Tribe's territory. *First R&O*, 25 FCC Rcd at 1587-89.

[22] *Id*. at 1587 and n.17.

[23] NPM/NCAI FNPRM Comments at 8-9.

[24] On waiver standards generally, s*ee Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such

with the Tribe do not fit the definition of Tribal Lands set forth in the *First R&O*.[25] A waiver showing should also detail how a proposed service to the area would aid the Tribe in serving the needs and interests of its citizens in that community, and thus further the goals of the Tribal Priority. The factors listed by NPM/NCAI in their comments, and listed in paragraph 7 above, all would be probative of a geographically identifiable Tribal population grouping. Evidence that a Tribal government has a defined seat, such as a headquarters or office, in combination with evidence that Tribal citizens live and/or are served by the Tribal government in the immediate environs of such a governmental seat, would also be probative of a nexus between that community and the Tribe. Further, absent a physical seat of Tribal government, a Tribe might, for example, provide evidence that a majority of members of the Tribal council or board live within a certain radius of the proposed station.[26] An applicant might also provide a showing under the standard enunciated in Section 83.7(b)(2)(i) of Part 25 of the Code of Federal Regulations,[27] that more than 50 percent of Tribal members live in a geographical area exclusively or almost exclusively composed of members of the Tribe. Additionally, tribes might provide other indicia of community, such as Tribal institutions (e.g., hospitals or clinics, museums, businesses) or activities (e.g., conferences, festivals, fairs).

10. Regardless of the waiver showing provided, it is important that an applicant seeking to take advantage of the Tribal Priority set forth a defined area for the functional "tribal lands" to be covered, and the community on those lands that would be considered the community of license. This showing is necessary to duplicate, as closely as possible, the Tribal Land coverage provisions of the Tribal Priority, and also to make determinations such as community coverage.[28] Additionally, the showing should demonstrate the predominantly Tribal character of the coverage area sought, and that such area does not include "regions so non-Native in their character or location . . . so as to defeat the shared purposes . . . of both the Commission and the Tribes."[29] The need for such a demonstration is in line with the principal purposes of the Tribal Priority, namely, to enable Tribes to serve their citizens, to perpetuate Tribal culture, and to promote self-government.[30]

11. Based on our examination of the record before the Commission, we find that the use of waivers to establish the equivalent of Tribal Lands will serve the public interest by affording maximum flexibility to Tribes in non-landed situations, particularly given that the circumstances of such Tribes are so varied. We remind Tribes that, in evaluating such waiver requests, we will delineate the "Tribal Lands" equivalent as narrowly as possible. In other words, in considering the proposed facilities, we will view most favorably those proposals that seek facilities narrowly designed, to the extent feasible under

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deviation will serve the public interest," citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)).

[25] *See supra* note 13.

[26] *Cf.* 47 C.F.R. § 73.7000 (for purposes of earning a "local applicant" credit, a noncommercial educational applicant organization may show that it is physically headquartered, has a campus, or has 75 percent of its board members residing within 25 miles of the reference coordinates of the proposed community of license).

[27] 25 C.F.R. § 83.7(b)(2)(i).

[28] *See* 47 C.F.R. §§ 73.24, 73.315, 73.515.

[29] NPM/NCAI FNPRM Comments at 10 n.20. Thus, metropolitan markets, such as those identified by KBC, *see supra* at ¶ 4, would not be appropriate areas for a tribal land waiver.

[30] *First R&O*, 25 FCC Rcd at 1587-89.

technical and geographic constraints, to provide service to Tribal citizens rather than to non-Tribal members living in adjacent areas or communities.

B. Section 307(b) Proposals.

12. *Background*. In the *Rural NPRM*, the Commission observed that new allotments for FM channels and, especially, awards for new AM stations were being made based on either (a) dispositive Section 307(b) preferences under Priority (3) of the Commission's allotment priorities,[31] to proponents for first local transmission service, at communities located in or very near large Urbanized Areas, or (b) dispositive preferences under Priority (4), "other public interest matters,"[32] based solely upon the differential in raw population totals to be served under the proposal. This, the Commission tentatively concluded, led to a disproportionate number of new FM allotments and AM construction permits being awarded as additional services to already well-served urbanized areas, in some cases at the expense of smaller communities or rural areas that received fewer services.[33] Additionally, in the case of new AM applications, the Commission noted that the vast majority of mutually exclusive groups were being resolved under Section 307(b), rather than through competitive bidding.[34] The Commission expressed the same concerns with regard to moves of stations (*i.e.*, changes of community of license) from smaller communities and rural areas toward urbanized areas.[35] The Commission's concerns about community of license changes are similar to those that arise in the context of new FM allotments and new AM assignments, because the same Section 307(b) criteria are used to compare the applicant's former and new community and/or service areas.[36]

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[31] *See FM Assignment Policies*, 90 F.C.C.2d at 91-93. The four priorities are: (1) First fulltime aural (reception) service; (2) Second fulltime aural service; (3) First local (transmission) service; and (4) Other public interest matters. Priorities (2) and (3) are considered co-equal.

[32] As examples of the preference for raw population totals over other considerations, including service to less-than-abundantly served (i.e., five or fewer reception services) populations, *see, e.g., Rocky Mount, North Carolina*, Memorandum Opinion and Order, 8 FCC Rcd 6206, 6207 (MMB 1993) ("[T]he provision of additional reception service to 21,584 persons, including a third, fourth and fifth full-time reception service to a total of 3,673 persons does not present sufficiently compelling public interest benefits to outweigh the public interest benefit accruing from the provision of a new reception service to a total of 45,931 persons…."); *Okmulgee, Nowata, Pawhuska, Bartlesville, and Bixby, Oklahoma, and Rogers, Arkansas*, Report and Order, 10 FCC Rcd 12014, 12016 (MMB 1995) (merely stating that a proposal would provide a fourth, fifth, sixth, or seventh service to a certain number of people did not suffice to discount greater raw population service differential of over 100,000; party wishing to make such a challenge must use the methodology prescribed in *Greenup, Kentucky, and Athens, Ohio*, Report and Order, 2 FCC Rcd 4319 (MMB 1987) ("*Greenup*")).

[33] *Rural NPRM*, 24 FCC Rcd at 5242-44.

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

[35] *Rural NPRM*, 24 FCC Rcd at 5247.

[36] *See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212 (2006), *recon. pending* ("*Community of License R&O*"), in which the Commission amended the Rules to allow licensees and permittees to change their communities of license on a first come-first served basis by filing a minor modification application. Mutual exclusivity of the proposed and existing facilities is a prerequisite for using the new procedures. In addition, the applicant must submit a detailed exhibit demonstrating that the new community and facility represent a preferential arrangement of allotments under Section 307(b), compared to the existing community and facility. 21 FCC Rcd at 14218-19.

13. Accordingly, the Commission tentatively concluded that it should modify its policies to more equitably distribute radio service among urban and rural areas, and to promote the resolution of mutual exclusivity through competitive bidding where Section 307(b) principles do not dictate a preference among communities. First, the Commission tentatively concluded that it should establish a rebuttable presumption that an FM allotment or AM new station proponent seeking to locate at a community in an urbanized area, or that would cover or could be modified to cover more than 50 percent of an urbanized area, was in fact proposing a service to the entire urbanized area, and that accordingly it would not award such an applicant a preference for providing first local transmission service under Priority (3) of the FM allotment priorities to a small community within that area. Second, in the case of applicants for new AM stations, the Commission tentatively concluded that it should change its application of Priority (4) -- other public interest matters -- and sought comment on alternative proposals in this regard. The first was to cease treating Priority (4) as a dispositive Section 307(b) criterion: if an applicant did not qualify for Priorities (1), (2), or (3), it would proceed to competitive bidding. Alternatively, the Commission sought comment on a more narrowly defined application of Priority (4), under which no dispositive preference would be awarded if the population in 75 percent of the proposed station's principal community contour already receives five or more aural services, and the proposed community of license already has more than five transmission services, except where the applicant can make a successful *Greenup* showing as described below. An applicant whose proposed contour did not meet the five reception / five transmission service criteria would proceed to a modified Priority (4) analysis. The Commission suggested that, as part of this modified analysis, a showing as described in the *Greenup* case might prove useful.[37] A *Greenup* showing involves calculation of a Service Value Index ("SVI"), which takes into account both population and the number of reception services. The Commission tentatively concluded that, in such a situation, it would award a dispositive Section 307(b) preference under Priority (4) if the SVI difference was 50 percent or greater.[38] Otherwise, the application would proceed to competitive bidding. Third, the Commission proposed a possible "underserved listeners" preference, that would be co-equal with Priorities (2) and (3), under which it would grant a Section 307(b) preference to an applicant proposing to provide third, fourth, or fifth aural reception service to a substantial portion of its covered population.[39]

14. With regard to proposed community of license change applications, the Commission tentatively concluded that there should be an absolute bar on proposals that would create "white" or "gray" area (*i.e.*, would leave populations with no or only one reception service), in keeping with the first two allotment priorities (which favor the provision of first and second reception service).[40] The Commission also proposed to apply the same Priority (3) standards to community of license changes as it proposed for new FM allotment and AM applications, when determining whether a proposed community change represents a "preferential arrangement of allotments."[41] Finally, the Commission sought comment on a number of other proposals: whether to disallow community changes that would remove third, fourth, or fifth reception service to a significant population; whether to bar removal of a second local transmission service at a community; and whether provision of service to underserved listeners should

[37] *See supra* note 32.

[38] *Rural NPRM*, 24 FCC Rcd at 5245-46.

[39] *Id*. at 5246. The Commission also asked what the appropriate percentage would be, suggesting 15, 25, 35, or 50 percent. *Id*.

[40] *Id*. at 5247.

[41] *Id*.

outweigh a proposal of first local transmission service, in both the community change and new station/allotment contexts.[42]

15. The majority, though by no means all, of the commenters firmly endorse retention of the *status quo*,[43] in most cases citing the same reasons for doing so. Chief among these reasons was the flexibility the current policies afford to continue station moves – in some cases coordinated station moves – from less-populous areas toward urbanized areas and suburban communities, all in the name of "spectral efficiency." Specifically, these commenters define "efficiency" purely in terms of the ability to cover the largest possible population with a signal of a given strength – in essence, an ears-per-kilowatt standard.[44]

16. Some commenters insist that there is no imbalance between service to urbanized areas and to non-urbanized areas, and that Section 307(b) retains little or no relevance.[45] Others implicitly recognize an imbalance of service, but argue that radio service properly *should* be concentrated in urbanized areas, as 79 percent of the American population lives in urban areas.[46] This figure, it should be noted, combines the 68.3 percent of the population living in and around urbanized areas of over 50,000 with the 10.7 percent living in urban clusters of between 40,000 and 50,000 population. This still leaves 21 percent of the population – over 59 million Americans under the 2000 Census – living in rural areas or communities of less than 40,000. These 59 million people, in the opinion of some commenters, should be content with "basic service" – undefined by commenters but perhaps as little as the two reception services advanced by Priorities (1) and (2) – while broadcasters move to fill and, in some cases, divide up the spectrum remaining near the larger urbanized areas.[47]

17. Some commenters use analogies to support their contention that we need do no more to encourage rural radio. The Miller Parties state that "common sense" dictates that there should be more radio service in urban areas, much as there are more grocery stores, theaters, and shopping centers.[48]

[42] *Id*.

[43] Perhaps nowhere is this sentiment expressed more succinctly than in the Comments of Booth, Freret, Imlay & Tepper ("BFIT"): "Nothing is broken here." BFIT Comments at 4.

[44] *See, e.g*., Comments of Miller Communications, Inc., et al. ("Miller Parties") at 3; Comments of American Media Services, LLC ("AMS") at 3.

[45] *See, e.g.*, Comments of Media Technology Ventures LLC ("MTV") at 9-10; Comments of Radio One, Inc., et al. ("Radio One Parties") at 19 ("The Commission should recognize that when it decided the FM spectrum no longer needed to be preserved in 1983, it had substantially completed its responsibilities under Section 307(b)."). *But see The Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, Report and Order, 93 F.C.C.2d 436, 437 (1983) ("*Suburban Community Policy*") ("We emphasize, however, that elimination of these policies will not eliminate or modify § 307(b) of the Communications Act. Our obligation to implement that statutory responsibility continues and will be faithfully carried out.").

[46] In some cases, this is phrased as 80.3 percent of Americans living in metropolitan areas. Due to varying Census Bureau definitions, metropolitan areas are slightly larger than urbanized areas and urban clusters. Because we use urbanized areas in determining when *Tuck* showings are needed, and with regard to the proposals in the *Rural NPRM*, when possible we will refer to the populations in urban areas (*i.e*., urbanized areas and urban clusters) rather than metropolitan areas.

[47] *See* Comments of Educational Media Foundation ("EMF") at 7. *See also* MTV Comments at 20.

[48] Miller Parties Comments at 3.

American Media Services ("AMS") goes a step further, invoking the election concept of "one person, one vote," suggesting further that for us to use any metric other than the number of people to be served by a proposal "would and should raise Constitutional eyebrows."[49] Such comments appear to be premised on an assumption that a listener in a small town needs only a few reception services from which to choose, while his or her urban counterpart should have many times more services. Additionally, many commenters suggest that, in fact, many smaller markets and communities are better served by radio than urban areas, when viewed on a *per capita* basis.[50] Other commenters contend that the proposals in the *Rural NPRM* will disproportionately affect minority populations, which they say are concentrated in urbanized areas.[51]

18. The comments show a somewhat broader range of opinion as to whether we should retain our current policies regarding the award of Section 307(b) priorities to applicants proposing first local transmission service, especially when such applicants' proposed service areas encompass the majority of an urbanized area or where the community of license comprises a small percentage of the total service area. For example, Munbilla Broadcasting Services, LLC ("Munbilla") asserts that the concept of first local transmission service is vital and must not be abandoned, even for stations located in or on the fringes of urbanized areas, especially in the case of growing communities just developing a need for a local outlet.[52] On the other hand, commenters such as the Miller Parties, while still arguing for spectrum efficiency as the primary focus of Section 307(b), and population coverage as the primary metric for awarding Section 307(b) preferences, contend that the concept of a single community of license is largely outdated and has been given disproportionate importance in our allotment and assignment policies.[53] Arguing in favor of reforming the standards for award of Priority (3) preferences, although not endorsing the Commission's specific proposal for presumption of urbanized area coverage, William Clay ("Clay") produces detailed analyses of community of license change applications demonstrating that, in the majority of cases, the population of the proposed community of license was a small fraction of the total service population, and that in most cases the community of license was not even the largest community being completely served.[54] Countering Clay's contentions, many commenters point out the realities of radio service: that a station's contour invariably extends beyond the boundaries of its community of license, and that as a matter of both economics and public service a station is bound to serve the interests

[49] AMS Comments at 3.

[50] *See*, *e.g*., EMF Comments at 7; BFIT Comments at 3; Jorgenson Comments at 2; CTJ Comments at 7, 9-10, and Exhibits 1 and 2.

[51] *See* MTV Comments at 7; Comments of Amador S. Bustos and Bustos Media Holdings, LLC ("Bustos") at 3; Radio One Parties Comments at 12.

[52] Munbilla Comments at 7-9.

[53] Miller Parties Comments at 2-3, 4-5.

[54] Clay Comments at 3-11 and *passim*, and Exhibits A-D. Clay believes the Commission's proposed presumption of urbanized area coverage would still allow "specious" claims of service to communities constituting a small fraction of the entire service area population. Clay instead proposes that the Commission designate the community of license based on the highest "ranked" community, based on his proposed formula that includes factors such as population relative to other covered communities and signal strength. *Id*. at 22-27. Clay's analyses formed the factual basis for the Prometheus Radio Project / National Federation of Community Broadcasters' ("Prometheus/NFCB") endorsement of the *Rural NPRM*'s proposals to reform Priority (3), although Prometheus/NFCB urge us to go further, designating the largest community covered by a given proposal to be the community of license, rather than the community selected by the applicant. Prometheus/NFCB Comments at 9-11.

of all listeners, not just the residents of the community of license.[55] This situation is most pronounced, understandably, when the community of license is located in or near an urbanized area.

19. *Discussion*. We find that the procedures we have employed for the award of Section 307(b) preferences, and for determining whether community of license change applications represent preferential arrangements of allotments or assignments under Section 307(b), require some adjustment in order to provide opportunities to those existing broadcasters and new entrants who seek to serve smaller communities and rural areas, to protect listeners in such areas who might lose needed transmission and reception services from broadcasters seeking to move to abundantly served areas, and to reflect more realistically the economic incentives of broadcasters. In this regard, we reject the suggestion of some commenters that our statutory mandate to distribute radio licenses in a fair, efficient and equitable manner is either obsolete or outdated. Section 307(b) remains a vital provision of the Communications Act guiding our allotment policies, and "[o]ur obligation to implement that statutory responsibility continues and will be faithfully carried out."[56]

20. Based on our examination of the record in this proceeding, we modify our assignment and allotment policies to de-emphasize differences in population coverage as a principal metric in awarding Section 307(b) preferences, and to adopt a more realistic evaluation of the totality of a proposed station's service in lieu of the current narrow focus on the specified community of license. We therefore adopt certain of the proposals in the *Rural NPRM*, modify some, and reject others. Generally, however, we adopt the tentative conclusion to institute a rebuttable presumption that, when the community proposed is located in an urbanized area or could, through a minor modification application, cover more than 50 percent of an urbanized area, we will treat the application, for Section 307(b) purposes, as proposing service to the entire urbanized area rather than the named community of license. We believe that this treatment is in line with broadcasters' economic incentives. We also adopt the proposed "underserved listeners" priority in modified form: service to "underserved listeners" will not be subject to a co-equal priority alongside Priorities (2) and (3), but will be taken into account before other Priority (4) considerations. We further adopt procedures designed to de-emphasize raw population totals as the sole metric of whether an arrangement of allotments or assignments is preferred under Section 307(b), and to require more detail and transparency in the showings provided by licensees and permittees seeking to locate in new communities of license.

21. It is a truism that broadcasters may, in most cases, find greater economic opportunity in large metropolitan areas than they can in smaller cities and rural areas.[57] Many commenters have stated as much, especially with regard to AM service.[58] What most commenters fail to acknowledge, however, is that this statement was as true in 1936, when the current version of Section 307(b) was enacted,[59] as it

[55] *See* EMF Comments at 3; Miller Parties Comments at 2.

[56] *Suburban Community Policy*, 93 F.C.C.2d at 437.

[57] At least one commenter notes, however, that there are situations in which broadcasters find it economically advantageous to move from a large urbanized area to a smaller one. *See* Comments of Cox Radio, Inc. ("Cox") at 5.

[58] *See*, *e.g.*, Cox Comments at 3; BFIT Comments at 1-2; Comments of Jorgenson Broadcast Brokerage, Inc. ("Jorgenson") at 1.

[59] *See Pasadena Broadcasting Company v. F.C.C.*, 555 F.2d 1046, 1050 (D.C. Cir. 1977) ("*Pasadena Broadcasting*") (reviewing history of Section 307(b); the court first noted that "[c]oncentration of radio service in the big city was a problem at the time Section 307(b) was first enacted as part of the Radio Act of 1927," and that the statute was briefly modified to provide quotas of service in defined regions of the country, which led only to the concentration of frequency use in population centers and restriction of frequencies in sparsely populated states,

is today, and moreover that Congress has not amended that statutory provision in almost 75 years. The courts have long recognized that the principal goals of Section 307(b) are to "forestall" the excessive concentration of radio service in larger cities, and to check the predictable interest of broadcasters to congregate in major markets.[60] Accordingly, Section 307(b) is essentially an early listener-centric consumer statute, rather than a broadcaster-centric mandate designed to promote "spectral efficiency." Viewed from this perspective, it is difficult to credit commenters' arguments that Section 307(b)'s objectives are best served merely by ensuring service to urbanized areas, where populations are most concentrated. We thus find that these commenters place an undue, if not exclusive, emphasis on the term "efficient" in Section 307(b)'s mandate that we "make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."[61]

22. We further find that these arguments fail to take into account fully the importance of ubiquitous and diverse radio service, as expressed by Congress in Section 307(b). Such arguments also disregard the fact that Section 307(b) only applies "when and insofar as there is demand for" radio service.[62] Just as limited spectrum availability serves to restrict the number of radio services in available large markets, demand ultimately restrains the number of services in smaller and rural areas. The Commission in the *Rural NPRM* did not seek to manufacture demand where none exists. The limited goal of the *Rural NPRM* was to provide greater opportunities for those applicants who propose such service with the expectation that it would be viable, to the extent that they are mutually exclusive with applicants proposing yet more service to urbanized areas whose residents already have an abundance of radio listening choices.[63]

23. With regard to those commenters contending that smaller communities are as well or better served than urbanized areas on a *per capita* basis, we find that such analyses similarly misconstrue the Commission's responsibilities to promote the fair and equitable distribution of radio facilities. A *per*

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whereupon the quota system was lifted to reinstate the statute, in its prior and now-current form, to enable wide dispersion of radio service, including to sparsely populated areas especially in the West and Middle West).

[60] *See Communications Investment Corp. v. F.C.C.*, 641 F.2d 954, 963-64 (D.C. Cir. 1981) ("The Commission's duty thus becomes clear. It must forestall excessive concentration of FM assignments in larger cities and ensure adequate service to smaller communities and 'sparsely populated' regions."); *see also Pasadena Broadcasting*, 555 F.2d at 1049-50 ("Congress was, of course, concerned that radio service extend to as large an audience as possible, but that is not to say that the license is to be awarded to the applicant who would encompass the most listeners within the range of his signal. If that were so, all frequencies likely would be assigned sooner or later to powerful stations in major population centers – precisely the result Congress meant to forestall by means of Section 307(b) as even cursory examination of its ancestry indicates.").

[61] From the perspective of some commenters, on the other hand, it is the Commission that ignored the term "efficient" in Section 307(b). *See*, *e.g.*, Comments of Carl T. Jones Corporation ("CTJ") at 4.

[62] 47 U.S.C. § 307(b).

[63] *See*, *e.g.*, BFIT Comments at 1-2; Jorgenson Comments at 1; Bustos Comments at 2-3. These commenters argue that AM facilities are too expensive to be economically viable in all but urbanized areas. Again, however, 307(b) comparisons are made only when demand is shown for new service. If AM facilities are not economically viable in rural areas, they should not be proposed; if there are only mutually exclusive AM proposals to serve all or part of a more populous area, then the preferred method of award should be through competitive bidding, which should result in the construction permit going to the party valuing the spectrum most. *See generally Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2360-61 (1994).

capita metric is unresponsive to our concern with the current Section 307(b) priorities which can favor, for example, adding a thirtieth reception service in an urbanized area over a proposal that would serve an area enjoying far fewer services.

24. We also disagree with commenters who believe that station moves by broadcasters, in some cases coordinated, multi-station moves, invariably represent the best way to effectuate our Section 307(b) mandate.[64] We emphasize that Section 307(b) states that "the Commission shall make such distribution of licenses . . . ." We cannot cede that statutory responsibility to broadcasters, no matter how well-intentioned or "thoughtful" their proposed moves.[65]

25. Moreover, there is simply no evidence to support the claim by some commenters that allowing new service in, or community of license changes to relocate to, urbanized areas will necessarily result in greater levels of service to minority populations.[66] Apart from blanket assertions, not a single party making this assertion submitted data demonstrating that the current priorities have resulted in enhanced levels of service to minority and niche communities. We thus reject as merely speculative the claim that the current Section 307(b) priorities have resulted in, or will result in, material gains in service to minority populations.[67] As for commenters' arguments that the proposed policy modifications will disproportionately affect minority populations because they are concentrated in urbanized areas, we note that *all* populations are primarily concentrated in urbanized areas, and in roughly the same proportions.[68] The same considerations apply in rural and smaller communities – they, too, have minority populations that are equally deserving of radio service. Thus, we are not convinced that the speculative benefit of additional service in urban areas outweighs our concern that the current priorities fail to promote new service, or the retention of existing service, at less well-served communities and that the current allocation priorities do not realistically reflect broadcasters' actual economic incentives.

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[64] *See* MTV Comments at 3-4, 13-15; CTJ Comments at 5; Radio One Parties Comments at 16-17. The Radio One Parties, in particular, contend that community of license changes since 2007 have resulted in "new entrants" to Arbitron Radio Metros. However, the Radio One Parties appear to define "new entrants" as incumbent broadcasters who are merely entering these large markets for the first time.

[65] *See* MTV Comments at 3-4.

[66] *See*, *e.g.*, Bustos Comments at 3; Radio One Parties Comments at 12.

[67] Given that the percentages of minority owners among current broadcast licensees is already disproportionately low (estimated at 7.7 percent in 2007), there is little support for commenters' claims that current policies optimally provide opportunities for such broadcasters and minority audiences. *See* Turner, D., "Off the Dial: Female and Minority Radio Station Ownership in the United States," available at http://www.freepress.net/files/off_the_dial_summary.pdf (Free Press, June 2007). *See also* Sandoval, C., "Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity, and Service in the Public Interest," available at http://mmtconline.org/lp-pdf/Minority_Commercial_Radio_Broadcasters_Sandoval%20_MMTC_2009_final_report.pdf (Minority Media and Telecommunications Council, 2009), finding that the number of commercial radio stations owned by minorities subsequent to the 2007 Turner study remained essentially the same, but that the total number of stations rose, leading to a percentage decrease of minority ownership to 7.24 percent in 2009.

[68] According to the Radio One Parties, approximately 78 percent of African Americans and 83 percent of Hispanics live in "urban centers." Radio One Parties Comments at 12. According to the 2000 Census, 79 percent of all Americans lived in urbanized areas or urban clusters, and 80.3 percent lived in metropolitan areas. *See supra* note 46 and accompanying text.

26. We do agree with commenters that it does not serve the public interest to limit broadcasters to service geared toward their communities of license to the exclusion of the rest of their service areas. At the same time, as Clay argues, we recognize that as a matter of economics and responsiveness to the audience, the incentive to emphasize service to the community of license is severely diluted when the population of that community comprises, in some cases, less than five percent of the total covered population, and when the community of license is perhaps only the fifth-largest community covered by the station's principal community contour.[69]

27. Thus, we believe it is unrealistic to limit our Section 307(b) evaluation of an applicant's proposal to that service provided to its proposed community of license and ignore its incentives to serve the larger coverage area.[70] Moreover, we do not believe that an expanded Section 307(b) evaluation will prevent applicants from proposing new service in or near urbanized areas. We likewise do not intend to erect an insurmountable wall around urbanized areas to prevent all entry by broadcasters seeking to improve service or to serve specific audience segments that may be located in those areas. Our intent is merely to match our Section 307(b) priorities and policies more closely to the actual service proposed by applicants, in an effort to provide all parties, especially those seeking to serve underserved communities, with an opportunity for meaningful participation in the allotment, assignment, and auction processes.

28. We reject the suggestion by the Radio One Parties, among others, that this recognition of the scope of proposed service represents an unwarranted return to the policies overturned in *Suburban Community Policy*.[71] Under the former suburban community policy it was presumed that, if an AM station's proposed 5 mV/m contour would penetrate the geographic boundaries of any community of over 50,000 population, having at least twice the population of the specified community of license, the applicant in reality proposed to serve the larger community rather than the specified community.[72] The urbanized area service presumption we adopt here involves a fundamentally different standard. First, the presumption will apply to all proposals in which the community of license is located within the urbanized area. Second, it applies to all proposals that could or would *provide service* to fifty percent of more of an urbanized area, as opposed to proposals that merely "penetrate" a larger adjacent community as under the former suburban community policy. Third, one of the primary rationales for the Commission's rejection in 1983 of the former suburban community policy was the check of a potential comparative hearing between an incumbent licensee and a new station challenger. The Commission stated that "the risk of a renewal challenge for failure actually to serve the designated community constitutes a more effective regulatory tool than utilization in advance of guidelines and factors that are inexact in divining intent."[73] The Act, however, was subsequently amended and now bars the filing of a competing application as part of the license renewal process.[74] Moreover, we are no longer convinced that the Commission's ability to enforce a broadcaster's public interest obligations after licensing justifies limiting evaluation of a proposed broadcast service at the authorization stage. While some commenters have suggested increasing

[69] Clay Comments at 6-8 and Exhibit C.

[70] *See, e.g., Winter Park Comm'ns, Inc. v. F.C.C.*, 873 F.2d 347, 352 (D.C. Cir. 1989) (affirming Commission's decision to treat metropolitan areas as communities, rather than looking to "artificial political boundaries.").

[71] *See, e.g.*, Radio One Parties Comments at 6-9; Cox Comments at 8.

[72] *Suburban Community Policy*, 93 F.C.C.2d at 439. The Berwick doctrine applied the same public interest considerations to FM radio and television, without benefit of the presumption. *Id*., citing *Berwick Broadcasting Corp*., 12 F.C.C.2d 8 (Rev. Bd. 1968) (subsequent history omitted).

[73] *Suburban Community Policy*, 93 F.C.C.2d at 456.

[74] *See* 47 U.S.C. § 309(k)(4).

the renewal reporting burden for stations in order to confirm the *bona fides* of their local transmission service,[75] we believe the better course is not to impose such burdens, but rather to evaluate the totality of the proposed service when determining whether to award a Section 307(b) preference, absent a showing that the proposed community is both independent of the urbanized area and has a palpable need for a local service apart from those stations already located at communities in the urbanized area. This will place our Section 307(b) preferences on a firm factual foundation.

29. In the *Rural NPRM* the Commission went into considerable detail in distinguishing among proposals for new AM facilities, FM allotments, and community of license changes, all of which involve Section 307(b) comparisons of communities. The first two involve proposals for new radio service put forward by competing applicants or allotment proponents. These are distinguishable from each other in that, in the case of AM filing window applications, mutually exclusive application groups in which one (or more) proposals do not receive a Section 307(b) preference proceed to competitive bidding per Congressional mandate,[76] whereas in the case of competing FM allotment proposals, the Section 307(b) analysis continues until one proposal prevails. These scenarios are also distinguishable from community of license change applications filed by existing stations, in which a Section 307(b) comparison is made between the proposed new community and the existing one, with the applicant required to propose a preferential arrangement of allotments (FM) or assignments (AM) if its application is to be granted. While each of these situations involves a Section 307(b) comparison, each is distinct and, therefore, we set forth below separate procedures for the Section 307(b) analysis in each such situation.[77]

1. Proposals for New AM Facilities

30. Mindful of our Congressional mandate to use competitive bidding as the primary means of awarding new service, as a threshold matter we will restrict the award of dispositive Section 307(b) preferences among mutually exclusive AM applications to those situations where there is a significant difference between the proposals. First, with regard to proposals for first local transmission service under Priority (3), we adopt the Commission's tentative conclusion that any new AM station proposal for a community located within an urbanized area, that would place a daytime principal community signal over 50 percent or more of an urbanized area, or that could be modified to provide such coverage, will be presumed to be a proposal to serve the urbanized area rather than the proposed community.[78] This is the

[75] *See, e.g.*, Munbilla Comments at 9-10.

[76] A few commenters suggested that the paucity of AM auctions noted in the *Rural NPRM* is, in fact, a good thing, based on the expense attendant in constructing AM facilities. *See, e.g.*, Comments of Romar Communications, Inc. ("Romar") at 4; Comments of Hatfield & Dawson ("H&D") at 1 ("By prevailing under a Section 307(b) analysis, applicants have been able to avoid the unnecessary expense of participating in an auction."). We take issue with the characterization of auction expense as "unnecessary." Congress specifically exempted three services from competitive bidding. 47 U.S.C. § 309(j)(2). Had it felt that auctioning spectrum for new AM service was "unnecessary," it would have exempted that service as well.

[77] Two dozen parties filed brief comments urging us to evaluate community of license change applications only after "an evaluation of the effect of the move on [low-power FM] stations." *See, e.g.*, Comments of Katie Finnigan at 1. To the extent that such commenters request that we re-evaluate the secondary status of low-power FM ("LPFM") stations, such action is beyond the scope of the proceeding initiated in the *Rural NPRM*. In any event, Congress resolved this issue in Section 5 of the Local Community Radio Act of 2010, Pub. L. No. 111-371, 124 Stat. 4072 (to be codified in 47 U.S.C. § 303), by directing us to ensure that FM translator and booster stations, and LPFM stations, remain secondary to existing and modified full-service FM stations.

[78] We recognize that it is possible that the majority of a proposed station's contour can cover part of an urbanized area without necessarily triggering the urbanized area service presumption. For example, the contour proposed for a

standard we have used to this point in determining whether an applicant for a new AM station must provide a showing under *Faye and Richard Tuck*.[79] The determination of whether a proposed facility "could be modified" to cover 50 percent or more of an urbanized area will be limited to a consideration of rule-compliant minor modifications to the proposal, without changing the proposed antenna configuration or site, and spectrum availability as of the close of the filing window. The urbanized area service presumption may be rebutted by a compelling showing (1) that the proposed community is truly independent of the urbanized area, (2) of the community's specific need for an outlet for local expression separate from the urbanized area and (3) the ability of the proposed station to provide that outlet.[80] The required compelling showing may be based on the existing three-pronged *Tuck* test. That three-pronged test is: (1) the degree to which the proposed station will provide coverage to the urbanized area; (2) the size and proximity of the proposed community of license relative to the central city of the urbanized area; and (3) the interdependence of the proposed community of license and the urbanized area, utilizing the eight *Tuck* factors.[81] However, the *Tuck* factors, especially the eight-part test of independence, will be more rigorously scrutinized than has sometimes been the case in the past. For example, an applicant should submit actual evidence of the number of local residents who work in the community, not merely extrapolations from commute times or observations that there are businesses where local residents *could* work if they so chose.[82] Similarly, the record should include actual evidence that the community's

community adjacent to a large urbanized area might cover 45 percent of the urbanized area, yet urbanized area coverage might constitute well over half of the proposed station's daytime principal community contour. In such situations, we would entertain challenges, at the appropriate stage of the particular application or allotment proceeding, detailing the reasons that the proposal should nonetheless be treated as one to serve the urbanized area rather than the named community of license.

[79] Memorandum Opinion and Order, 3 FCC Rcd 5374, 5376 (1988) ("*Tuck*"). *See Powell Meredith Communications Co., et al.*, Memorandum Opinion and Order, 19 FCC Rcd 12672, 12673 n.9 (2004) (citing *Darien, Rincon, and Statesboro, Georgia, etc.*, Report and Order, 17 FCC Rcd 20485, 20486 (MMB 2002) (showing under *Tuck* required when station located outside of an Urbanized Area proposes to place a principal community signal over 50 percent or more of the Urbanized Area)). *See also Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352, 10354 (1995) (proponents seeking to relocate to a community adjacent to an Urbanized Area that would place a city grade signal over 50 percent or more of the Urbanized Area must submit *Tuck* analysis); *Chillicothe and Ashville, Ohio*, Request for Supplemental Information, 18 FCC Rcd 11230 (MB 2003) (*Tuck* showing required based on potential transmitter relocation site that would serve more than 50 percent of an Urbanized Area).

[80] This, in other words, will enable the applicant to make a case for its proposed community as a "community on the upswing," in the words of commenter MTV. MTV Comments at 17.

[81] The eight-factor test of independence of a community from the urbanized area, as set forth in *Tuck*, is: (1) the extent to which the community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own local telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services. *Tuck*, 3 FCC Rcd at 5378.

[82] *See Lincoln and Sherman, Illinois*, Memorandum Opinion and Order, 23 FCC Rcd 15835, 15842-43 (2008) (Commissioners Copps and Adelstein, jointly dissenting); *Evergreen, Alabama and Shalimar, Florida*, Memorandum Opinion and Order, 23 FCC Rcd 15846, 15852-53 (2008) (Commissioners Copps and Adelstein jointly dissenting).

residents perceive themselves as separate and distinct from the urbanized area, rather than merely self-serving statements to that effect from town officials or business leaders.[83] Moreover, certain of the *Tuck* independence factors have become increasingly anachronistic, and accordingly will not be given as much weight. For example, as local telephone companies have started to discontinue routine distribution of telephone directories, factor five is less meaningful than it once was.[84] Similarly, with the closing of even major city newspapers, the lack of a local newspaper should not necessarily be fatal to a finding of independence, though it is still a relevant factor.[85] In addition to demonstrating independence, a compelling showing sufficient to rebut the urbanized area service presumption must also include evidence of the community's need for an outlet for local expression. For example, an applicant may rely on factors such as the community's rate of growth; the existence of substantial local government necessitating coverage;[86] and/or physical, geographical, or cultural barriers separating the community from the remainder of the urbanized area. An applicant will be afforded wide latitude in attempting to overcome the presumption, but a compelling showing will be required.

31. The Commission also proposed to eliminate completely the Section 307(b) analysis under Priority (4), other public interest matters, for new AM applicants.[87] Based on our examination of the record, however, we do not believe it necessary or desirable to eliminate completely an applicant's ability to make its public interest case for additional service at a community under Priority (4). At the same time, we adhere to our tentative conclusion that large service population differentials between competing proposals should not suffice, in and of themselves, for a dispositive Section 307(b) preference under Priority (4), especially when the proposed new population is already abundantly served. Such a preference, as the Commission observed, often unfairly disadvantages those who would provide additional media voices to those needing them most. Instead we adopt, in modified form, the proposal to emphasize underserved populations, that is, those receiving fewer than five aural services. As we are imposing a more rigorous standard on those applicants seeking a dispositive Section 307(b) preference under Priority (3), we think it unfair to subject an applicant successfully clearing this hurdle to a new, co-equal priority. Thus, we will consider this new, underserved populations factor under Priority (4).[88] Accordingly, a new AM applicant proposing third, fourth, and/or fifth reception service to at least 25 percent of the population in the proposed primary service area,[89] as defined in Section 73.182(d) of our

[83] *Id*.

[84] *See*, *e.g*., *Verizon Seeking Permission to Stop Delivering White Pages in Maryland, Virginia*, Wash. Post, Nov. 17, 2010 (http://www.washingtonpost.com/wp-dyn/content/article/2010/11/16/AR2010111605653_pf.html).

[85] However, we find that the mere existence of a city- or town-posted site on the World Wide Web is not a substitute for evidence of independent media also covering a community, as a means of demonstrating a community's independence from an urbanized area.

[86] *See* EMF Comments at 5.

[87] *Rural NPRM*, 24 FCC Rcd at 5245.

[88] Additionally, as pointed out by the Radio One Parties, making third, fourth, and fifth reception service co-equal with second reception service (Priority (2)) makes little sense. Radio One Parties Comments at 20.

[89] While in the *Rural NPRM* the Commission tentatively concluded that the relevant contour was the principal community contour (24 FCC Rcd at 5245), upon further consideration we conclude that for purposes of evaluating reception service, the primary service area is more appropriate.

Rules,[90] where the proposed community of license has two or fewer local transmission services,[91] may receive a dispositive Section 307(b) preference under Priority (4). We find that 25 percent of the covered population is a high enough standard to warrant awarding a dispositive Section 307(b) preference, while not so high that no applicant will be able to meet it. For purposes of this analysis, "community of license" will be considered to be the entire urbanized area if the proposed community of license is subject to the presumption set forth in the preceding paragraph.

32. We further adopt the Commission's proposal to allow, but not require, new AM applicants not meeting the above-stated 25 percent / two transmission service standard to submit an SVI showing as set forth in *Greenup* in order to receive a dispositive preference under Priority (4).[92] As discussed above, we disfavor a basic *per capita* analysis as the sole basis for distribution of radio service. We recognize that at its core a *Greenup* study is a *per capita* analysis, albeit in much more granular form than those employed by commenters. Nevertheless, we believe this methodology has value when used to identify substantial differences in radio service levels. Accordingly, we adopt the Commission's proposal that an applicant opting to present a *Greenup* analysis must demonstrate a 30 percent differential in SVI between its proposal and the next-highest ranking proposal before we will award a dispositive Section 307(b) preference under Priority (4). As explained in the *Rural NPRM*, the Commission in *Greenup* found an 18.8 percent SVI differential to be dispositive in an FM allotment case.[93] Unlike in FM allotment proceedings, in which all cases are decided under Section 307(b), an applicant for a new AM station that does not receive a Section 307(b) preference may proceed to auction. We therefore find that a higher SVI differential should be required in this context. Although the Commission in the *Rural NPRM* proposed a 50 percent differential,[94] we believe that a 30 percent SVI differential is sufficiently high to demonstrate that a proposed community merits a dispositive Section 307(b) preference, but is not so low as to undermine the statute's general preference for awarding new commercial stations primarily through competitive bidding. An applicant receiving a dispositive Section 307(b) preference under Priority (4) will, of course, be subject to the prohibition on reducing service set forth in the *First R&O* and codified in Section 73.3571(k)(i) of the Rules.[95]

33. Except under the circumstances outlined above, dispositive Section 307(b) preferences will not be granted under Priority (4). Thus, as is currently the practice, mutually exclusive application groups in which no applicant receives a Section 307(b) preference will proceed to competitive bidding. We will not, however, apply these new procedures to pending applications for new AM stations and major modifications to AM facilities filed in the 2004 AM Auction 84 filing window. These applications have been pending for many years, and in most cases the applicants have invested considerable resources

[90] 47 C.F.R. § 73.182(d). Pursuant to this rule section, the signal strength required for primary groundwave service is 0.5 mV/m for communities under 2,500 population, and 2.0 mV/m for communities of 2,500 or more. Consequently, communities with populations of 2,500 or more, situated between the 2.0 mV/m and 0.5 mV/m groundwave contours, are not considered to receive service from the AM station or proposal in question.

[91] We likewise, on our own consideration, conclude that the threshold of five transmission services to receive a dispositive Section 307(b) preference set forth in the *Rural NPRM* (24 FCC Rcd at 5245) is too high, and set the level at two.

[92] *Greenup*, 6 FCC Rcd at 1495. *See Rural NPRM*, 24 FCC Rcd at 5245.

[93] *Id*., citing *Greenup*, 6 FCC Rcd at 1495.

[94] *Rural NPRM*, 24 FCC Rcd at 5245-46.

[95] *First R&O*, 25 FCC Rcd at 1598-99; 47 C.F.R. § 73.3571(k)(i).

in technical studies, settlements and technical resolutions, and Section 307(b) showings. Recognizing the hardship that new procedures would place on these applicants, then, we will apply our new procedures only to those applications filed after the release date of this *Second R&O*.

2. Proposals for FM Allotments.

34. As noted in the *Rural NPRM*, the considerations underlying fair, efficient, and equitable distribution of new radio service in the non-reserved FM band are much the same as they are in the AM band. The mechanism for evaluating the respective Section 307(b) merits of competing allotment proposals, however, is quite different, insofar as competing proposals for new FM allotments cannot simply be sent to auction if no dispositive Section 307(b) difference can be found. As the Commission stated in the *Rural NPRM*, when dealing with mutually exclusive FM allotment proposals, the process must end with a decision as to which one of the competing proposals and counterproposals merits a dispositive Section 307(b) preference, so that the FM Table of Allotments can be amended and the new vacant allotment thereafter set for auction.[96] Accordingly, the standards for awarding Section 307(b) preferences cannot be as strict or as limited as those set forth above with regard to dispositive Section 307(b) preferences for new AM applications.

35. With regard to Priority (3) preferences, we adopt the same urbanized area service presumption as proposed in the *Rural NPRM* and set forth in paragraph 30 above. The determination of whether a proposed facility "could be modified" to cover 50 percent or more of an urbanized area will be made based on an applicant's certification that there are no existing towers in the area to which, at the time of filing, the applicant's antenna could be relocated pursuant to a minor modification application to serve 50 percent or more of an Urbanized Area.[97] Upon consideration of the comments and for the reasons set forth above, we decline to add an "underserved listeners" priority co-equal with Priorities (2) and (3). Rather, if a proposal does not qualify for a first local transmission service preference, we will consider proposals to provide third, fourth, and/or fifth reception service to more than a *de minimis* population under Priority (4), as we do now. However, we direct the staff to accord greater weight to service to underserved populations than to the differences in raw population totals. In keeping with the Commission's observations in the *Rural NPRM*, we conclude that raw population total differentials should be considered only after other Priority (4) factors that a proponent might present, including the number of reception services available to the proposed communities and reception areas, population trends in the proposed communities of license/reception areas, and/or number of transmission services at the respective communities. Because it is impossible to anticipate every possible competing allotment proposal, we are reluctant to eliminate outright any factor, including reception population, for determining dispositive Section 307(b) preferences in the FM allotment context. For now, we limit our direction to a determination that, of all considerations in making new FM allotments, raw reception population totals – of whatever magnitude – should receive less weight than other legitimate service-

[96] *Rural NPRM*, 24 FCC Rcd at 5242.

[97] Specifically, a proponent would need to certify that there could be no rule-compliant minor modification on the proposed channel to provide a principal community signal over 50 percent or more of an Urbanized Area, in addition to covering the proposed community of license. In doing so, proponents will be required to consider all existing registered towers in the Commission's Antenna Structure Registration database, in addition to any unregistered towers currently used by licensed radio stations. Furthermore, we expect all applicants and allotment proponents to consider widely-used techniques, such as directional antennas and contour protection, when certifying that the proposal could not be modified to provide a principal community signal over the community of license and 50 percent or more of an Urbanized Area. While this is not a conclusive test, it is one that the Commission will treat as establishing a rebuttable presumption of an allotment that could not be modified to serve both the majority of an Urbanized Area and the community of license.

based considerations. These procedures shall not apply to any non-final FM allotment proceeding, including "hybrid" coordinated application/allotment proceedings, in which the Commission has modified a radio station license or granted a construction permit. Although it is well settled that the Commission may apply modified rules to applications that are pending at the time of rule modification,[98] substantial equitable considerations apply to these categories of proceedings. Affected licensees and permittees may have expended considerable sums or entered into agreements following such actions. Moreover, filings and licensing actions subsequent to a license modification could impose significant burdens on parties forced to take steps to protect formerly licensed facilities. The revised procedures will apply, however, to all pending petitions to amend the FM Table of Allotments, and to all other open FM allotment proceedings and non-final FM allotment orders.

3. Proposals to Change Community of License.

36. Licensees and permittees seeking to change community of license differ from applicants in the above two categories insofar as, for Section 307(b) purposes, they do not face comparative analysis with respect to communities proposed by competing applicants. Rather, the comparison, for Section 307(b) purposes, is between the applicant's present community and the community to which it seeks to relocate.[99] Specifically, the applicant must demonstrate that the facility at the new community represents a preferential arrangement of allotments (FM) or assignments (AM) over the current facility. Because the applicant has some choice (subject to technical constraints) as to the destination community, it has a greater ability to select a community most likely to provide a favorable Section 307(b) outcome. Thus, any procedural changes we implement would impose less of a constraint on these applicants than they would on applicants for new service, who do not control the mutual exclusivity their proposals may face.

37. Many of the commenters who support retaining the current Section 307(b) policies also endorse the idea of a presumption that a simple showing of a net gain in population coverage in a community of license / facility move demonstrates a preferential arrangement of allotments or assignments.[100] In cases where a station proposes to move to a community that already has local transmission service, in fact, net population gain is ordinarily the only metric that applicants provide to demonstrate that the move represents a preferential arrangement of allotments or assignments. As discussed above, while this may represent an "efficient" use of spectrum insofar as the station provides service to the most people, it does not necessarily represent a fair or equitable arrangement of allotments among the several States and communities within the meaning of our Section 307(b) mandate.

38. Based on our examination of the record, in the case of community of license changes, we will adopt certain changes designed to require more specificity on the part of licensees and permittees regarding the actual effects of the proposed moves, while still affording flexibility to propose truly favorable arrangements of radio allotments and assignments.[101] Specifically, first we adopt the urbanized area service presumption outlined above. The presumption may be rebutted in the same manner as set forth at paragraph 30, above, and will be subject to the same determinations, described in paragraphs 30 and 35 above, as to whether the proposed facility could be modified to cover over 50 percent of an urbanized area. This will, we believe, more effectively safeguard the interests of listeners in less well-served areas. Additionally, applicants not qualifying for Priority (3) preferences under this standard will

[98] *See, e.g., Review of the Pioneer's Preference Rules*, First Report and Order, 9 FCC Rcd 605, 610 n.24 (1994).

[99] 47 C.F.R. §§ 73.3571(j)(2), 73.3573(g)(2).

[100] *See, e.g.*, Miller Parties Comments at 8.

[101] *See, e.g.*, MTV Comments at 22.

still be able to make a Priority (4) showing that will require them to provide a more detailed explanation of the claimed public interest benefits of the proposed move.

39. With regard to Priority (4) claims, we seek to limit the presumption that raw net population gains, in and of themselves, represent a preferential arrangement of allotments or assignments under Section 307(b). As the Commission proposed in the *Rural NPRM*, we will impose an absolute bar to any facility modification that would create white or gray area.[102] We will also strongly disfavor any change that would result in the net loss of third, fourth, or fifth reception service to more than 15 percent of the population in the station's current protected contour.[103] We will also require applicants not only to set forth the size of the populations gaining and losing service under the proposal, but also the numbers of services those populations will receive if the application is granted, and an explanation as to how the proposal advances the revised Section 307(b) priorities. For example, an applicant will not only be required to detail that it is providing 500,000 listeners with a 21st reception service, and removing the sixth reception service from 50,000 listeners, but also to provide a rationale to explain how this service change represents a preferential arrangement of allotments or assignments.[104] Additionally, pursuant to the proposal in the *Rural NPRM*,[105] we will strongly disfavor any proposed removal of a second local transmission service from a community of substantial size (with a population of 7,500 or greater) when determining whether a proposed community of license change represents a preferential arrangement of allotments or assignments.[106] Finally, as is and has always been the case, under Priority (4) applicants may offer any other information they believe to be pertinent to a public interest showing, including the need for further transmission service at the new community, a drop in population justifying the removal of transmission service at the old community,[107] population growth in areas surrounding the proposed new community that can best be met by a centrally located service, or any other changes in circumstance believed relevant to our consideration. These procedures shall apply to any applications to change community of license that are pending as of the release date of this *Second R&O*.

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[102] Opposition to this proposal was not as strong as to other proposals, and was supported by one commenter that otherwise generally disagreed with changing our 307(b) standards. *See* BFIT Comments at 7.

[103] Loss of service to underserved listeners that is offset by proposed new service to a greater number of underserved listeners would not constitute a "net loss of service" to such listeners, and would be viewed more favorably.

[104] Such explanation need not be a granular accounting of the reception service provided each individual or population pocket in the proposed contour. A detailed summary should suffice, for example, to point out that 50,000 people would receive 20 or more services, 10,000 would receive between 15 and 20 services, 7,000 would receive between 10 and 15 services, etc. The showing should, however, state what service the modified facility would represent to the majority of the population gaining new service, e.g., the 16th service to 58 percent of the population, and the corresponding service that the majority of the population losing service would lose, e.g., 60 percent of the current coverage population would lose the ninth reception service. New service or service losses to underserved listeners should be detailed.

[105] *Rural NPRM*, 24 FCC Rcd at 5247.

[106] While we recognize the value of additional media voices, especially competing media voices, in a community, we also recognize, as pointed out by one commenter, that there are many small communities that, realistically, may only be able to support one transmission service. EMF Reply Comments at 6. We retain our presumption against removal of sole local transmission service, regardless of the size of the community. *Community of License R&O*, 21 FCC Rcd at 14228-30.

[107] *Cf. id.*, 21 FCC Rcd at 14230 (stating that presumption against removal of sole local transmission service from a community may be rebutted by a showing that the community is no longer a licensable community, owing perhaps to a "precipitous decline in population or significant loss of industry").

40. It is our intent that the changes we introduce here will, first, cause applicants to give more consideration to the effects of proposed station moves on listeners, both those they would serve at a new community and those from whom they would remove existing service. Second, we anticipate that a fuller explanation of the claimed benefits of a station move will introduce greater transparency into the community change procedure, both to aid in decision-making and for the benefit of affected listeners. Contrary to the fears expressed by many commenters, it is neither our belief nor our intent that these changes will erect an insurmountable wall around urbanized areas. Rather, we expect that these procedures will help to achieve a balance between distribution of radio service to the largest populations, on the one hand, and distribution of new service to those most in need of it on the other. Ultimately, based on examination of the record and our experience administering the Commission's allotment and assignment policies, we believe the changes we adopt will enable us to more effectively further Congress's mandate to distribute radio service in a fair, efficient and equitable manner.

C. Prohibit FM Translator "Band-Hopping" Applications.

41. *Background*. In the *Rural NPRM*, the Commission noted that the current rules permit FM translator stations originally authorized in the non-reserved band (channels 221-300) to modify their authorizations to "hop" into the reserved band (channels 201-220).[108] As an example, we indicated that numerous FM translators originally authorized as a result of the Auction No. 83 non-reserved band filing window in 2003 have completed such changes to operate in the reserved band.[109] By making these modifications, translator stations are able to operate under the less restrictive NCE rules, which permit the use of alternative methods of signal delivery, such as satellite and terrestrial microwave facilities. Likewise, FM translators authorized in the reserved band are currently able to file modifications to hop into the non-reserved band.

42. The Commission stated in the *Rural NPRM* that the filing of band-hopping applications by FM translator stations prior to construction of their facilities wastes staff resources, and potentially precludes the use of those frequencies in future reserved band filing windows for FM translators. The integrity of the window filing process is critical to provide equal opportunity to frequencies for translator applicants across the country. The Commission therefore tentatively concluded that Section 74.1233 of the Commission's rules should be modified to prohibit this practice. Specifically, the Commission proposed to require that applications to move into the reserved band from the non-reserved band, or to move into the non-reserved band from the reserved band, may only be filed by FM translator stations that have filed license applications or are licensed, and that have been operating for at least two years. In addition to seeking comment on the proposal, the Commission sought comment on the duration of the proposed holding period.

43. *Discussion*. Based on our examination of the record, we adopt the prohibition on band-hopping proposed in the *Rural NPRM*, along with the two-year holding period. Few commenters addressed this issue. Six parties (the "Joint Translator Commenters") submitted similar comments in response to the Commission's tentative conclusions.[110] Rather than codifying a prohibition, the Joint

[108] 47 C.F.R. § 74.1233.

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

[110] *See* Comments of Calvary Chapel of Twin Falls, Inc., Cameron University, Positive Alternative Radio, Inc., Creative Educational Media Corp., Inc., Priority Radio, Inc. ("Priority"), and Sacred Heart University, Inc.

Translator Commenters propose that the Commission grant all new FM translator construction permits with individual conditions prohibiting band-hopping absent a waiver, and to require direct off-air reception by all such waiver recipients.[111] The Joint Translator Commenters argue that this approach will provide needed flexibility without jeopardizing the policy considerations set forth in the *Rural NPRM*, in addition to enabling operating translators to provide continuous service in certain areas. Finally, they suggest that the Commission should impose strict filing limits on future translator windows, and impose a holding period on the assignment or transfer of authorizations resulting from filing windows. Mullaney Engineering, Inc. ("MEI") does not oppose a general prohibition on band hopping, but suggests the Commission provide an exception to the prohibition when a translator can demonstrate that it has been displaced and the only available channels are on the other band.[112] H&D opposes the proposal, arguing that if the problem amounts to just a handful of translators, it does not warrant an across-the-board prohibition as set forth in the *Rural NPRM*.[113] H&D further notes that should the Commission decide to impose a prohibition, an exception should be made for reserved band translators that are displaced and forced to move to the non-reserved band.

44. Our review of the operating licensed translators that were originally proposed in the 2003 non-reserved band window reveals that 160 of those FM translator stations are currently operating in the reserved band. Of those, at least 110 never operated in the non-reserved band, more than 30 operated for less than 8 months in the non-reserved band, and another 10 operated for less than 24 months in the non-reserved band before requesting a reserved band channel.[114] The number of FM translators that never operated in the non-reserved band, or that only operated there for a very short time, indicates that band-hopping has become a convenient tool to circumvent the need to file in an appropriate reserved band window. We believe that codifying a prohibition on band-hopping will have an effect similar to the conditional grants suggested by the Joint Translator Commenters, but without the concern regarding inconsistent treatment that could arise from a case-by-case application of the prohibition. Furthermore, as with any rule, waivers are available when unique circumstances warrant deviation from the rule.

45. We conclude that adoption of the prohibition proposed in the *Rural NPRM*, in conjunction with the holding period, will best preserve the fairness of the window filing process while providing flexibility for translators that have operated long enough to have an established listener base. Having received no comments suggesting any alternative holding period, we will impose this prohibition for a period of two years. To the extent that the commenters propose general codified displacement procedures, filing limits, or additional holding periods for new FM translators, we conclude that such requests are beyond the scope of this rulemaking proceeding. Even though we are not codifying a rule that would permit the filing of non-minor-change displacement proposals, we direct the staff to continue to consider such waiver requests on a case-by-case basis.

D. Codify Technical Standards for Determining AM Nighttime Mutual Exclusivity Among Window-Filed AM Applications.

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[111] *See, e.g.* Priority Comments at 2.

[112] MEI Comments at 13.

[113] H&D Comments at 9.

[114] These figures do not include any band-hopping FM translators that were never constructed, or that have had their licenses cancelled.

46. *Background*. As we observed in the *Rural NPRM*, the first and most fundamental step in the AM auction process is the staff determination as to which applications filed during the relevant filing window are mutually exclusive with one another.[115] As described in the *Rural NPRM*, in the context of an AM auction, mutual exclusivity is determined by an evaluation of engineering data provided in conjunction with the FCC Form 175.[116] Applicants must specify a frequency on which they seek to operate in accordance with the Commission's existing interference standards. While neither the interference standards nor the method used to determine mutual exclusivity was altered by the implementation of competitive bidding procedures in the *Broadcast First Report and Order*[117] and the transition to an auction licensing scheme, the Commission did replace the two-step, sequential "A" and "B" cut-off list AM application filing system with a uniform application window filing approach.[118]

47. It is well established that mutual exclusivity arises when grant of one application would preclude grant of a second.[119] Our interference rules and protection requirements are the technical standards used to determine mutual exclusivity. In addition to discussion in the *Broadcast First Report and Order*, public notices released prior to an AM auction specifically note that the staff applies Sections 73.37, 73.182, and 73.183(b)(1) of the Commission's technical rules to make mutual exclusivity determinations.[120] As additionally noted in the *AM Auction 32 MX Public Notice* and the *AM Auction 84 MX Public Notice*, the staff also employs technical standards adopted in the 1991 *AM Improvement Report and Order* to determine mutual exclusivity among AM applications.[121] In the AM service, mutual

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[115] *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, 15975 (1998) ("*Broadcast First Report and Order*") (prior to conducting an auction for the AM service, the "Commission must determine which applications are mutually exclusive."), *on recon.*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), *on further recon.*, Memorandum Opinion and Order, 14 FCC Rcd 14521 (1999).

[116] Since any mutually exclusive application filed during the window would be subject to the Commission's auction procedures, applicants are required to file electronically FCC Form 175. To permit the staff to determine mutual exclusivities among applicants, AM applicants are also required to file Section I and the Section III-A Tech Box of FCC Form 301, Application for Construction Permit.

[117] *Broadcast First Report and Order*, 13 FCC Rcd at 15975, citing AM interference rules found in 47 C.F.R. §§ 73.37, 73.182 and 73.187.

[118] *Broadcast First Report and Order*, 13 FCC Rcd at 15972-15974.

[119] *See, e.g., Ashbacker v. FCC*, 326 U.S. 327, 328-30 (1945) (applicants sought to use the same spectrum to operate their respective broadcast stations, the simultaneous operation of which would result in intolerable interference. Grant of one mutually exclusive application for broadcast license without affording a hearing on the other deprives the loser of opportunity for hearing provided by the Act); *see also* 47 C.F.R. § 101.45(a) (establishing that two applications are mutually exclusive in the Fixed Microwave Services when the grant of one "would effectively preclude by reason of harmful electrical interference . . . the grant of one or more applications" as determined by § 101.105 standards).

[120] *See* 47 C.F.R. §§ 73.37, 73.182, 73.183(b)(1). *See also AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction; Settlement Period for Groups Which Include a Major Modification Applicant; Filing Period for Section 307(b) Submissions*, Public Notice, 15 FCC Rcd 20449, 20449-50, (2000) ("*AM Auction 32 MX Public Notice*"); *AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction; Settlement Period for Groups Which Include a Major Modification Applicant; Filing Period for Section 307(b) Submissions*, Public Notice, 20 FCC Rcd 10563 (2005) ("*AM Auction 84 MX Public Notice*").

[121] *See AM Auction 32 MX Public Notice*, 15 FCC Rcd at 20449 n.3, *citing Review of the Technical Assignment Criteria for the AM Broadcast Service*, 6 FCC Rcd 6273 (1991) ("*AM Improvement Report and Order*"), *recon. granted in part and denied in part*, 8 FCC Rcd 3250 (1993) ("*AM Improvement Reconsideration Order*")

exclusivity may occur during three operational timeframes: daytime, critical hours,[122] and nighttime.[123] Prohibited daytime contour overlap is determined by Section 73.37, and critical hours mutual exclusivity by Sections 73.37 and 73.187. The *AM Improvement Report and Order* establishes three classes of nighttime interference contributors: (a) a high-level interferer is defined as a station that contributes to the fifty percent exclusion root-sum-square ("RSS") nighttime limit of another station; (b) a mid-level interferer is defined as a station that enters the twenty-five but not fifty percent RSS of another station; and (c) a low-level interferer is defined as a station that does not enter into the twenty-five percent RSS of another station.[124] Concluding that extreme levels of interference have led to a deterioration of the AM service, the Commission established a strict new standard, stating "a new station may be authorized only if it qualifies as a low interferer with respect to any other station on the same or first adjacent channel."[125] The nighttime protection requirements are codified in Section 73.182.[126] For AM auction window applications, the staff analyzes the daytime, critical hours, and nighttime[127] facilities specified in each application against every other application filed in the window. Two AM applications filed during the same filing window are considered mutually exclusive if either fails to fully protect the other as required by the Commission's technical rules.

48. The Commission tentatively concluded, in the *Rural NPRM*, to codify its decision in *Nelson Enterprises, Inc*.[128] At issue in that case was whether the staff properly applied Section 73.182(k) interference standards to establish mutual exclusivity between window-filed applications, *i.e.*, whether the rule limits the interference a new station application may cause to another application filed in the same AM window.[129] Because Section 73.182(k)(2) establishes that the RSS methodology should be applied

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(collectively "*AM Improvement Proceeding*"); *AM Auction 84 MX Public Notice*, 20 FCC Rcd at 10563 n.2.

[122] 47 C.F.R. § 73.14 defines "critical hours" as the two-hour period immediately following local sunrise and the two hour period immediately preceding local sunset.

[123] *See generally* 47 C.F.R. § 73.14 for AM broadcast definitions.

[124] The 50 percent RSS limit defines the nighttime interference free service contour. The 25 percent RSS limit, based on a running total of interferers, defines a level of protection from other stations or applications. *See infra* note 126.

[125] *AM Improvement Report and Order*, 6 FCC Rcd at 6296. The Commission specifically adopted the twenty-five percent RSS nighttime limit to "prevent continually increasing interference in the existing AM band [and] also reduce, in some cases, existing levels of interference." *Id*. at 6294.

[126] This method of calculating nighttime interference assesses the cumulative effects of skywave interference to other stations and considers an individual signal in conjunction with other interfering signals. Nighttime interfering signals from all co-channel and first-adjacent channel stations are considered in decreasing order, and the square-root of the sum of the squares of interfering signals is calculated. When the next contributor is less than 25 percent of the running RSS, it and all lesser interferers are excluded from the sum and the calculation process stops. By this method, the staff is able to determine which applications will cause unacceptable nighttime interference to other stations. *See id.* at 6293 n.32.

[127] This calculation must be completed separately for each technical proposal. It is possible for one proposed facility to cause interference to, but not receive interference from, another proposed facility under this methodology.

[128] Memorandum Opinion and Order, 18 FCC Rcd 3414 (2003) ("*Nelson*").

[129] The rule permits a new station or modification applicant to accept the existing level of interference but generally prohibits any such applicant from entering into, *i.e.*, raising, the 25 percent limit of any other station. In *Nelson*, petitioners incorrectly claimed that the rules protect only existing "stations." The Commission noted that petitioners

for the "calculation of nighttime interference for non-coverage purposes,"[130] the Commission concluded that the staff properly relied on the rule for making mutual exclusivity determinations. In *Nelson*, the Commission found it proper to apply Section 73.182 in considering the effect of nighttime interference caused and received by simultaneously filed AM auction filing window proposals. The Commission held that the staff correctly calculated predicted nighttime interference levels, pursuant to Section 73.182(k) of the rules, by considering interference caused to or received from other window-filed applications, as well as to existing stations.

49. In the *Rural NPRM*, the Commission also tentatively concluded that it should modify Section 73.3571 of the Rules, by explicitly providing that Section 73.182(k) interference standards apply when determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window. That is, two applications would be deemed to be mutually exclusive if either application would be subject to dismissal because it would enter the twenty-five percent exclusion RSS nighttime limit of the other. We anticipated that the rule change would promote the strict interference standard that the Commission determined necessary to revitalize the AM service.[131]

50. *Discussion*. Based on our examination of the record, we codify the Commission's decision in *Nelson*, by explicitly providing that Section 73.182(k) interference standards are applicable in determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window. Very few commenters addressed this specific issue. Commenters addressing the topic generally expressed reservations with the *Nelson* decision itself. Notwithstanding the misgivings of the two commenters who briefly addressed this matter, we find it appropriate to consider the effect of nighttime interference caused and received by simultaneously filed AM auction filing window proposals.

51. H&D observes that the *Nelson* decision holds "that two (or more) applications filed in the same window, one or more of which enters into the 25% RSS limitation of one or more of the others, are considered mutually exclusive even if the applications would otherwise be fully grantable and meet the nighttime principal community coverage requirement."[132] H&D objects that "[t]he effect of this policy and the proposed rule is to limit the number of grantable applications in a single filing window, and therefore to act directly against one of the stated objectives of the NPRM, policies to promote rural radio service."[133] To maintain the policy, cautions H&D, thwarts the objective of improving rural radio service "by unnecessarily limiting the number of grantable applications and adding to the administrative burden of processing mutually exclusive ("MX") application groups."[134] MEI asserts that dismissing "an

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assumed without argument that window-filed applications must satisfy the daytime protection requirements of Section 73.37. It observed, however, that both Sections 73.37 and 73.182 define objectionable interference in terms of specified strength signals from "stations." The Commission asserted that petitioners failed to explain the basis for distinguishing between daytime and nighttime interference rules for the purpose of making mutual exclusivity determinations among window-filed applications. *Nelson*, 18 FCC Rcd at 3419 n.28.

[130] 47 C.F.R. § 73.182(k)(2).

[131] *Rural NPRM*, 24 FCC Rcd at 5256. The Commission specifically adopted the 25 percent exclusion RSS limit to prevent continually increasing interference in the AM band and also reduce, in some cases, existing levels of interference. *AM Improvement Report and Order*, 6 FCC Rcd at 6294.

[132] H&D Comments at 10.

[133] *Id.*

[134] H&D Comments at 13-14.

otherwise grantable application" on the basis of possible nighttime interference does not promote the goals of diversity and those of Section 307(b).[135] MEI proposes that simultaneously filed AM window applications should never be considered mutually exclusive because of potential interference at nighttime unless the interference is so severe that it raises the nighttime interference free ("NIF") contour of one of the stations such that it is no longer able to provide compliant coverage of its community of license.

52. We disagree. As the Commission previously observed, Section 73.182 is not designed merely to protect service within a station's community of license.[136] Noting that mutual exclusivity and community coverage are important but distinct licensing standards, the Commission highlighted that our interference rules and protection requirements are the technical standards used for establishing mutual exclusivity, and found the criteria applied by the staff were "fully consistent with . . . the strict interference limitations established in the *AM Improvement Report and Order* . . . ."[137]

53. Moreover, contrary to MEI's inference, in the AM context it does not necessarily follow that, because window-filed applications are determined to be mutually exclusive, only one may be granted and the others must be dismissed. In certain circumstances, the Commission provides an opportunity for settlement, or to otherwise resolve mutual exclusivities by means of technical amendments, following filing of the window applications.[138] As a consequence, multiple grants may be realized from one MX application group. As the Commission concluded in the *First R&O*, because the process of accepting non-universal technical amendments and settlement proposals could break large MX groups into smaller groups and result in a greater number of grants, it has proven to be "an effective means for facilitating the introduction of new service."[139] We thus conclude that codifying the applicability of Section 73.182(k) AM nighttime interference standards to mutually exclusive AM auction applications promotes the integrity of the AM service, and is thus in the public interest.[140]

IV. FIRST ORDER ON RECONSIDERATION

[135] MEI Comments at 14.

[136] *Nelson*, 18 FCC Rcd at 3419.

[137] *Id*. at 3418.

[138] *See* 47 C.F.R. § 73.5002(c) and (d). *See also AM Auction 84 MX Public Notice*, 20 FCC Rcd at 10564-65 (setting forth procedures for submitting settlement agreements and engineering solutions that resolve technical conflicts with other applications in the specified MX group).

[139] *First R&O*, 25 FCC Rcd at 1604. *See also AM Auction No. 84, MX Group 84-39 Reconfigured Due to Settlements and Technical Resolutions; Subgroups Listed*, Public Notice, 24 FCC Rcd 12099 (MB 2009) (AM MX Group 84-39 consisting of 116 applications reconfigured into seven subgroups after evaluation and processing of multiple settlement and technical amendment submissions).

[140] In the *First R&O*, we also amended 47 C.F.R. § 73.3571(h)(1)(ii), to provide that AM auction filing window applications must meet certain basic technical eligibility criteria when filed. *First R&O*, 25 FCC Rcd at 1599-1603. In the revised version of that rule section implementing the technical criteria, we inadvertently omitted language from the then-existing version of that rule section protecting engineering proposals in AM auction filing window applications from subsequently filed applications, and providing that determinations as to acceptability and grantability of such applicants' proposals would not be made prior to auction. These core principles are fundamental to our AM auction processing policies. On our own motion, then, we restore these rule provisions to 47 C.F.R. § 73.3571(h)(1)(ii).

54. *Background*. In the *First R&O*, we adopted a Tribal Priority, giving federally recognized Native American Tribes and Alaska Native Villages ("Tribes"), and majority Tribal-owned entities, a Section 307(b) priority for proposing service, 50 percent or more of which would cover "Tribal Lands," as defined in the *First R&O*, as long as the proposals met certain conditions.[141] Two parties called attention to perceived difficulties with the implementation of the Tribal Priority that might inadvertently limit the ability of qualifying entities to receive the Tribal Priority. While these matters were captioned as comments or parts of comments, it is clear that they are petitions for partial reconsideration of the *First R&O*, and we shall treat them as such.

55. KBC points out that Alaska Native Regional Corporations ("ANCSA Corporations"), established pursuant to the Alaska Native Claims Settlement Act of 1971 ("ANCSA"),[142] were excluded from our definition of "Tribes." Under ANCSA, Alaskan Native lands were transferred to the ANCSA Corporations,[143] the shares of which are owned by individual Alaska Natives who are barred from transferring those shares to non-Natives. However, the ANCSA Corporations are not, themselves, listed as "federally recognized tribes."[144] KBC thus fears that under the definitions set forth in the Tribal Priority, in Alaska "the only entities the FCC would recognize as 'Tribes' may not own *land* and the Native entities that own land will not be recognized as '*Tribes*.'"[145]

56. Additionally, NPM/NCAI point out that our requirement that at least 50 percent of a proposed facility's principal community contour cover Tribal Lands would disqualify Tribes whose lands are very small or irregularly shaped. As an example, NPM/NCAI point to the situation in San Diego County, California, where a number of Tribes have small parcels of Tribal Lands, none of which (and, quite possibly, all of which combined) would not comprise 50 percent or more of a radio station's principal community contour.[146] NPM/NCAI also give the example of the Yurok Reservation in northern California, which consists of a 44-mile-long strip of land along the Klamath River.[147] In NPM/NCAI's view, Tribes should not be disqualified from claiming the Tribal Priority merely because their Tribal Lands might not comprise more than 50 percent of a typical radio station's signal contour.

57. *Discussion*. At the outset, we find that KBC's concern that, in Alaska, "Tribes" as defined in the *First R&O* may not own land, is addressed by the fact that the definition of "Tribal Lands" encompasses "Alaska Native regions established pursuant to the Alaska Native Claims Settlements Act (85 Stat. 688)."[148] We see no need to change this definition. Thus, Alaska Tribes and Alaska Native

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[141] *See generally First R&O*, 25 FCC Rcd at 1586, 1596-97.

[142] 43 U.S.C. § 1601 *et seq*.

[143] *Id*. § 1606.

[144] KBC points out that, in the Indian Self-Determination and Education Assistance Act, Congress specifically defined the term "Indian tribe" to include "any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA]." 25 U.S.C. § 450b(e).

[145] KBC Comments at 7 (emphasis in original).

[146] Joint Comments of Native Public Media and the National Congress of American Indians to Further Notice of Proposed Rulemaking ("NPM/NCAI FNPRM Comments") at 4-5.

[147] *Id*.

[148] *First R&O*, 25 FCC Rcd at 1587 n.15. *See also* 47 C.F.R. § 73.7000.

Villages will be eligible to claim the Tribal Priority for qualifying proposals. We cannot accommodate, however, KBC's request that we include ANCSA Corporations in the definition of "Tribes" for purposes of claiming the Tribal Priority. As we stated in the *First R&O*, the basis of the Tribal Priority is the government-to-government relationship between the federal government and the various federally recognized American Indian Tribal and Alaska Native Village government entities.[149] ANCSA Corporations, on the other hand, are federally established corporations incorporated under Alaska law, not sovereign or quasi-sovereign entities. Further, the shareholders of ANCSA Corporations are individual citizens of Alaska Native Villages, rather than the Alaska Native Villages themselves.[150] In the *First R&O* we concluded that only federally recognized American Indian Tribes and Alaska Native Villages, as sovereign entities, could avail themselves of the Tribal Priority, rather than individual members or corporations owned by individual members of those Tribes and Villages, as originally proposed.[151] Finally, the existence of ANCSA Corporations did not extinguish the independent existence of federally recognized Alaska Native Villages. Thus, we conclude that, because of the constitutional underpinnings of the Tribal Priority, the Tribal Priority cannot be claimed by ANCSA Corporations.[152]

58. The situation involving Tribes with small or irregularly-shaped Tribal Lands presents a somewhat more difficult problem. NPM/NCAI suggest modifying the coverage standard to one in which either at least 50 percent of the proposed facility's principal community contour comprises Tribal Lands, or the facility's principal community contour covers 50 percent or more of a Tribe's Tribal Lands. We agree that in most situations this would address NPM/NCAI's concern, but in some areas it could also lead to unintended consequences. With regard to NPM/NCAI's San Diego County example, in particular, where there are many Tribes with small lands in a relatively small geographic area, one can imagine that numerous Tribes could claim the Tribal Priority under the "covers 50 percent or more of Tribal Lands" standard put forth by NPM/NCAI, to the point where virtually all remaining spectrum in that area would be subject to Tribal Priority claims even before all Tribes had an opportunity to apply for such spectrum. Additionally, coverage to small Tribal Lands situated in very populous areas could result, as NPM/NCAI stated in the non-landed Tribes context, in the bulk of service being provided to "regions so non-Native in their character or location, such as urban areas, so as to defeat the shared purposes . . . of both the Commission and the Tribes" in establishing the Tribal Priority.[153]

59. We therefore adopt NPM/NCAI's proposed modification of the Tribal Priority with several qualifications: a Tribe may claim the Tribal Priority if (a) at least 50 percent of the area within the proposed station's principal community contour is over that Tribe's Tribal Lands, as set forth in the *First R&O*, or (b) the proposed principal community contour (i) encompasses 50 percent or more of that Tribe's Tribal Lands, (ii) serves at least 2,000 people living on Tribal Lands,[154] and (iii) the total

[149] *First R&O*, 25 FCC Rcd at 1588, 1595.

[150] *See generally* 43 U.S.C. § 1606(g).

[151] *Id*. at 1595.

[152] This does not, however, exclude ANCSA Corporations from minority ownership in a Tribal-owned entity that applies for a radio station and claims the Tribal Priority, as long as the entity is 51 or more percent owned by a Tribe or Alaska Native Village or consortium. Also, the Tribal Priority, as already established, remains available to village corporations that are 51 or more percent owned by federally recognized Alaska Native Villages or consortia of such villages or other Tribes that meet the qualifying criteria.

[153] NPM/NCAI FNPRM Comments at 10 n.20.

[154] *Cf*. 47 C.F.R. § 73.7002(b) (restricting the award of NCE "fair distribution" preference to applications that would provide a first or second NCE service to at least 2,000 persons).

population on Tribal Lands residing within the station's service contour constitutes at least 50 percent of the total covered population. In neither (a) nor (b) may the applicant claim the priority if the proposed principal community contour would cover more than 50 percent of the Tribal Lands of a non-applicant Tribe. We believe that these conditions are necessary for several reasons. The first and second requirements of the alternative test ensure that the proposed station will serve substantial Tribal Lands and populations.[155] However, a situation could arise where a proposal meets these requirements but the population of the applicant's Tribal Lands represents a relatively small percentage of the total population residing in the coverage area, and in this circumstance a Tribal Priority might potentially deprive the majority, non-tribal population of needed local service. To address this concern, we provide in the third requirement that, as a rule, the Tribal Priority cannot be claimed if the combined population on Tribal Lands within the proposed station's service contour constitutes less than 50 percent of the total covered population. As with the waiver standard for Tribes without Tribal Lands, this requirement is designed to avoid applying the Tribal Priority to regions and populations that are largely non-Native in character or location, in keeping with the priority's goals. We will, however, entertain waiver requests from applicants proposing Tribal service to service areas in which the population on Tribal Lands is less than 50 percent of the covered population, in appropriate situations.[156] In addition, we delegate to the Bureau authority to propose engineering solutions, including the use of alternative channels and facility modifications, and to waive our rules to accept implementing application amendments to eliminate conflicts between non-Tribal proposals and Tribal proposals that do not meet the above standards. This delegation is limited to circumstances in which the acceptance of such amendments would promote the goals of the Tribal Priority. Finally, the limitation that the applicant will not cover more than 50 percent of the Tribal Lands of a non-applicant Tribe will avoid exhausting the remaining spectrum in areas such as San Diego County before all qualifying Tribes have an opportunity to apply. We also believe this limitation will have the salutary effect of encouraging different Tribes whose lands are in close proximity to each other to form consortia to establish radio service serving the various Tribes' needs, as well as share the expense of starting new radio service.

V. SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

60. *Background*. Recognizing "the risks inherent in applying a Section 307(b) preference at the allotment stage for auctionable non-reserved band spectrum,"[157] we sought comment in the *FNPRM* on whether to establish a bidding credit for Tribes seeking to provide commercial FM radio service to their Tribal Lands and members.[158] As we explained, NPM/NCAI suggested the Tribal bidding credit to mitigate concerns that, due to the two-step nature of the commercial FM licensing process, Tribes or

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[155] A tribal proposal that covers 50 percent of Tribal Lands but does not meet the 2,000 population threshold may be able to make a persuasive waiver showing if it can demonstrate that it would provide needed service to Tribal Lands and populations that are isolated and sparse.

[156] For example, if all the tribes in a densely populated area were to form a consortium to provide service covering all of their Tribal Lands, and the collective population still does not constitute 50 percent of the total covered population, we would be receptive to a showing that the proposed facility is designed to minimize non-Tribal coverage while still providing needed service to Tribal Lands. We would also consider other factors, such as: the abundance of non-Tribal radio service in the area; the absence of Tribal radio service in the area; and the absence of other Tribal-owned or Tribal-oriented media of mass communications in the area, or a showing that other such Tribal-directed media are inadequate to serve the needs of Tribal communities.

[157] *First R&O*, 25 FCC Rcd at 1592-93.

[158] *See id.* at 1614-16 .

Tribal entities that employ the Tribal Priority to obtain allotments might be outbid by competing, non-Tribal applicants.[159] NPM/NCAI proposed, in the only filing on this issue, a 35 percent bidding credit that would be available to Tribes or Tribal entities that participated in the allotment proceeding for the channel being auctioned, regardless of new entrant status. Under their proposal, a Tribe or Tribal entity without a Commission license also would be entitled to an additional 25 percent new entrant bidding credit, for a total maximum bidding credit of 60 percent.[160]

61. *Discussion*. The present record is inconclusive as to the ultimate effectiveness of tribal bidding credits. Notwithstanding the useful input we received from NPM/NCAI, it is unclear to us whether and how we could craft such credits so as to meaningfully advance our goals here consistent with the competitive bidding mandate of Section 309(j).[161] In this regard, there is a necessary balance between Congress's directive to design competitive bidding systems to recover for the public a portion of the value of spectrum,[162] which militates in favor of setting the credit as low as possible, and the need to ensure that Tribes and Tribal entities uniquely qualified to serve their communities receive licenses to do so, which militates in the other direction. As we observed in the *FNPRM*, most Tribal applicants likely will qualify for new entrant bidding credits of up to 35 percent under our current rules (given the small number of Tribal-owned stations),[163] and the present record does not reflect whether and, if so, how much more of an additional credit would be necessary to address the particular bidding disadvantages that Tribes face.[164] To the extent that such disadvantages are substantial, we also are concerned that even a 60 percent credit might not be sufficient to ensure realization of our policy goals in establishing the Tribal Priority.

62. On further consideration, therefore, we believe an alternative approach may be more effective to achieve our policy goals and more consistent with our statutory mandate to license spectrum in the public interest. Specifically, we seek comment on whether to require, as a threshold qualification to apply for a commercial FM channel allotted pursuant to the Tribal Priority, that applicants qualify for a Tribal Priority for the channel.[165] This proposed requirement would be similar to procedures used for

[159] *Id.* at 1614. *See also id.* at 1592 ("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. Thus, H&D proposes that we limit the Tribal Priority to non-tabled services such as AM, NCE FM, and low-power FM.").

[160] NPM/NCAI FNPRM Comments at 12. NPM/NCAI also suggest substituting the four-year holding period connected to the Tribal Priority for the five-year unjust enrichment period generally applicable to bidders that use new entrant bidding credits. *Id*. at 13-14. *See First R&O*, 25 FCC Rcd at 1593.

[161] 47 U.S.C. § 309(j).

[162] *See* 47 U.S.C. at § 309(j)(3)(C).

[163] 25 FCC Rcd. at 1615. *See also* 47 C.F.R. § 73.5007.

[164] Our judgment on this issue is necessarily predictive, as we have received no commercial FM allotment petitions invoking the Tribal Priority adopted at the beginning of 2010. We note that NPM/NCAI are unaware of successful use of new entrant bidding credits by Tribes or Tribal entities. NPM/NCAI FNPRM Comments at 11. The record does not reveal whether Tribes or Tribal entities have participated in any broadcast auctions or utilized the new entrant bidding credit in such auctions.

[165] *See First R&O*, 25 FCC Rcd at 1596 ("[W]e 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… [Q]ualifying 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 other applicable requirements that we established in the *First R&O* also would have to be satisfied.

certain vacant FM allotments reserved for noncommercial educational ("NCE") use.[166] Under those procedures, which are intended to safeguard the policy objectives of the channel reservation process (namely, to add new NCE stations where listeners receive limited or no NCE service), applicants for a reserved channel must make a showing at the application stage similar to that required of channel reservation proponents at the allotment stage. Likewise, under the proposed approach here, a Tribe or Tribal entity applying for an FM channel allotted based on the Tribal Priority would be required to establish at the application stage its qualifications to provide the service for which the channel was specifically allotted.

63. We believe the proposed threshold qualifications would be more effective than tribal bidding credits in advancing the Tribal Priority's goals. As set forth in the *First R&O*, the Priority is premised on the unique ability of Tribes and Tribal entities to serve their Tribal communities "[b]ecause of their status as sovereign nations responsible for, among other things, 'maintaining and sustaining their sacred histories, languages, and traditions.'"[167] As we have previously established, the identity of the service provider to Tribal areas is critical to Tribal Priority-based allocations. Whereas in AM and NCE radio services the Tribal Priority generally operates as a dispositive preference in the application process, guaranteeing that a qualified applicant will obtain the license, commercial FM licensing is a two-step process in which a dispositive preference at the initial, allotment stage does not guarantee the grant of a license in the second, application step.[168] An unavoidable consequence of the auctions process is that Tribes and Tribal entities uniquely qualified to serve their communities may be outbid in the commercial FM application process by non-Tribal applicants that file mutually exclusive applications.[169] At best, Tribal bidding credits can mitigate this concern by boosting the competitive position of Tribal applicants. They cannot, however, eliminate the risk of qualified Tribal applicants being outbid, thereby frustrating the Commission's goals in allocating the channel pursuant to the Tribal Priority. In contrast, the proposed threshold qualification requirement would ensure that only a Tribe or Tribal entity qualified to provide the unique service contemplated by the allocation is eligible for the license to provide that service. Such an approach would set the commercial FM service on the same footing as other radio services with regard to the Tribal Priority and, we believe, avoid undermining the Commission's policy goals in establishing the Tribal Priority.

64. We also believe the proposed threshold qualifications would be consistent with our statutory mandate under Section 309(j). Section 309(j)(6)(E) provides, in pertinent part, that "[n]othing in this subsection, or in the use of competitive bidding, shall . . . be construed to relieve the Commission of the obligation in the public interest to continue to use . . . threshold qualifications . . . in order to avoid mutual exclusivity in application and licensing proceedings."[170] We believe the use of threshold qualifications would serve the public interest here because, as discussed above, the premise of the Tribal Priority is a Tribe's or Tribal entity's unique ability to serve the needs and interests of its local

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[166] *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691, 6705 (2003).

[167] *First R&O*, 25 FCC Rcd at 1587-88. *See also id.* at 1596 (in declining to extend the Tribal Priority to individual Tribal members, observing that individual Tribal members are not necessarily bound to develop and broadcast culturally related content in the same manner as Tribes and Tribal entities).

[168] *See id.* at 1592-93.

[169] *See id.*

[170] 47 U.S.C. § 309(j)(6)(E).

community. That premise distinguishes the proposal here from the grant of bidding credits to an FM applicant who successfully petitions for the allotment of a channel being auctioned, a proposal that the Commission rejected in 1998 as "analogous to the pioneer preferences that Congress has specifically eliminated."[171] The threshold qualification would be based on the Tribe's or Tribal entity's ability to fulfill the purpose for which the channel was allotted under the Tribal Priority, rather than on its participation in the allotment proceeding. Thus, eligible Tribes or Tribal entities may be eligible to apply for a channel allotted pursuant to the Tribal Priority even if they did not petition for the allotment. We recognize that mutually exclusive applications may still be filed under our proposed threshold qualifications approach, thus requiring competitive bidding. But in such circumstances, the bidders would be limited to qualified Tribes and Tribal entities, so the Commission's policy goals would not be frustrated. Should the Commission adopt an exception to the general prohibition of collusion set forth in Section 1.2105(c) applicable to mutually exclusive applications in the commercial FM broadcast service so that Tribes or Tribal entities that file mutually exclusive applications for a channel allotted pursuant to the Tribal Priority have an opportunity to resolve any mutual exclusivities through engineering solutions or settlement?[172]

65. We seek comment on the foregoing threshold qualifications proposal, the issues related to it that are discussed above, and on any and all additional issues that commenters believe it may raise. In particular, we invite comment from the Tribal community on its potential utility in ensuring realization of the goals underlying the Tribal Priority. In the event no applicant meets the threshold qualifications for the Tribal allotment in a filing window, we seek comment on whether the Commission should routinely include such allotments in subsequent windows. We also seek comment on when the Commission should permit non-Tribal applicants to seek construction permits through the auctions process for allotments for which potential Tribal applicants have not expressed an interest. We also invite further comment on Tribal bidding credits. Although the present record on the appropriate amount of the Tribal Bidding Credit is inconclusive on this issue, we would welcome additional input from commenters addressing the record deficiencies discussed above, such as evidence as to the particular bidding disadvantages that Tribes may face vis-à-vis non-Tribal bidders for broadcast radio licenses, as well as the capital requirements of Tribes and Tribal-owned entities to provide commercial FM service to Tribal lands. We strongly encourage qualified Tribes and Tribal entities to take advantage of the Tribal Priority by filing rulemaking petitions for commercial FM allotments. With regard to the commercial FM service, our goals in establishing the Tribal Priority can be realized only through the filing of such petitions. Finally, we seek comment on ways that the Commission could promote a commercial Tribal radio service, including comment on potential barriers that may discourage Tribal participation in the auctions and licensing processes.

VI. ADMINISTRATIVE MATTERS

A. Second Report and Order

1. Final Regulatory Flexibility Analysis.

[171] *See Implementation of Section 309(j) of the Communications Act*, First Report and Order, 13 FCC Rcd 15920, 15996-97 (1998), cited in *First R&O*, 25 FCC Rcd at 1615 n.199.

[172] *See* 47 C.F.R. § 73.5002(d).

66. As required by the Regulatory Flexibility Act of 1980 ("RFA"),[173] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *Second R&O*. The FRFA is set forth in Appendix B.

2. Final Paperwork Reduction Act of 1995 Analysis.

67. This *Second R&O* adopts new or revised information collection requirements, subject to the Paperwork Reduction Act of 1995 ("PRA").[174] 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."[175]

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

3. Congressional Review Act.

69. The Commission will send a copy of this *Second Report and Order* in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.[176]

B. Second Further Notice of Proposed Rule Making

1. Filing Requirements.

70. *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.[177] *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.[178] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

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[173] *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").

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

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

[176] *See* 5 U.S.C. § 801(a)(1)(A).

[177] *Id*. § 1.1206(b), as revised.

71. *Comments and Reply Comments*. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules,[179] 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.[180]

72. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/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.

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

74. 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 202-418-0530 (voice), 202-418-0432 (TTY).

75. *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.

2. Initial Regulatory Flexibility Analysis.

76. 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

[178] *See id.* at § 1.1206(b)(2).

[179] *Id*. §§ 1.415, 1.419.

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

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).

77. With respect to this *Second Further Notice of Proposed Rule Making* ("*SFNPRM*"), an Initial Regulatory Flexibility Analysis ("IRFA") under the Regulatory Flexibility Act[181] 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 *SFNPRM*, with a distinct heading designating them as responses to the IRFA. The Commission will send a copy of this *SFNPRM*, including the IRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, a copy of this *SFNPRM* 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.

78. The *SFNPRM* 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 *SFNPRM*. 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 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."

79. 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.

[181] *See* 5 U.S.C. § 603.

80. 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.

VII. ORDERING CLAUSES

81. 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 *Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making* IS ADOPTED.

82. 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 F.

83. 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 Section 73.7000, which contains 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.

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")[182] 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 proposed in the *Second Further Notice of Proposed Rulemaking* ("*SFNPRM*"). 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 *SFNPRM* provided in paragraph 75. The Commission will send a copy of this entire *SFNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[183] In addition, the *SFNPRM* and the IRFA (or summaries thereof) will be published in the Federal Register.[184]

2. **Need For, and Objectives of, the Proposed Rules.** This further rulemaking proceeding is initiated to obtain further comments concerning an alternate proposal to assist Native American Tribes and Alaska Native Villages ("Tribes") seeking to establish new commercial FM service to Tribal communities. In the *Further Notice of Proposed Rulemaking*, the Commission proposed an auction bidding credit to Tribes and entities owned by Tribes. The Commission received only one proposal for a potential tribal bidding credit: to grant Tribes a 35 percent Tribal Bidding Credit ("TBC"), to be added to any new entrant bidding credit for which they may qualify, to a maximum of 60 percent. The Commission believes this record is inconclusive to adopt a TBC, and believes it is unclear whether and how a TBC could be crafted to advance the dual goals of increasing Tribal ownership of radio facilities and maximizing the value of spectrum through competitive bidding, as mandated by Section 309(j) of the Communications Act.[185] On further consideration, the Commission determined that an alternative approach would more effectively achieve the policy goals underlying the Tribal Priority adopted in the *First Report and Order* in this proceeding,[186] and be more consistent with its statutory mandate.[187]

3. Specifically, the Commission seeks comment on whether to require, as a threshold qualification to apply for a commercial FM channel allotted pursuant to the Tribal Priority, that applicants qualify for a Tribal Priority for that channel. Such an approach is consistent with other procedures used by the Commission, such as those used to reserve vacant FM allotments for noncommercial educational ("NCE") use. Additionally, while the Tribal Priority operates as a dispositive preference in the AM commercial and FM NCE application contexts, as currently formulated the priority is not dispositive for FM commercial stations, because a Tribe that adds an FM allotment using the Tribal Priority may still be outbid at auction by a non-Tribal applicant. The alternative approach proposed by the Commission would correct this asymmetry, and would also more effectively ensure that FM allotments added using the Tribal

[182] *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).

[183] *See* 5 U.S.C. § 603(a).

[184] *See id*. § 603(a).

[185] 47 U.S.C. § 309(j).

[186] 25 FCC Rcd 1583, 1596-97 (2010).

[187] *See* 47 U.S.C. § 309(j)(6)(E) ("Nothing in this subsection, or in the use of competitive bidding, shall . . . be construed to relieve the Commission of the obligation in the public interest to continue to use . . . threshold qualifications . . . in order to avoid mutual exclusivity in application and licensing proceedings.").

Priority are ultimately licensed to Tribes, who would use such FM channels for their intended purposes of promoting Tribal language, culture, and self-government. The Commission therefore seeks comment on this alternative approach and its potential ramifications, including whether non-Tribal applicants should be allowed to apply for FM allotments added using the Tribal Priority, but for which no Tribe expresses interest. The Commission also seeks additional input from commenters on the TBC, and on other ways in which the Commission could promote commercial Tribal radio service, including comment on potential barriers that may discourage Tribal participation in the broadcast auction and licensing processes.

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.[188] The RFA generally defines the term "small entity" as encompassing the terms "small business," "small organization," and "small governmental entity."[189] In addition, the term “small Business” has the same meaning as the term “small business concern” under the Small Business Act.[190] 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").[191]

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 Report and Order* 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.”[192] The SBA has established a small business size standard for this category, which is: such firms having $7 million or less in annual receipts.[193] According to BIA/Kelsey, MEDIA Access Pro Database on January 13, 2011, 10,820 (97%) of 11,127 commercial radio stations have revenue of $7 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.[194] In addition, to be determined to be a “small business,” the entity may not

[188] 5 U.S.C. § 603(b)(3).

[189] *Id*. § 601(6).

[190] *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.”

[191] 15 U.S.C. § 632.

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

[193] 13 C.F.R. § 121.201, NAICS code 515112 (updated for inflation in 2008).

[194] “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.[195] 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 potential radio licensees and permittees, insofar as they would require or allow certain applicants to demonstrate their qualifications to apply for an FM channel allotted using the Tribal Priority. 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 and the proposed alternative "threshold qualifications" approach, 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. The approach proposed by the Commission would also apply only to FM allotments added to the Table of Allotments using the Tribal Priority, and thus would apply only to proposed facilities serving primarily Tribal communities. Adoption of the threshold qualifications approach would thus assist Tribes in pursuing commercial radio licensing opportunities and would enable ownership of facilities added to the FM Table of Allotments by Tribes or Tribal-owned entities that are charged with promoting Tribal self-governance.

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.[196]

10. In the *Second Further Notice of Proposed Rulemaking*, the Commission seeks to provide additional opportunities for participation by Tribes seeking commercial radio facilities, especially FM commercial stations. The Commission seeks comment as to whether its goals could be more effectively accomplished through the use of a "threshold qualifications" approach, limiting applications for Tribal-priority-added FM allotments to those filed by Tribes or Tribal-owned entities. 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 *Third Report and Order* in this matter.

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

[195] 13 C.F.R. § 121.102(b) (an SBA regulation).

[196] 5 U.S.C. § 603(b).

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[197] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rule Making* ("*Rural NPRM*") to this proceeding.[198] 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.[199]

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

2. This *Second Report and Order* ("*Second R&O*") adopts rule and procedural changes to codify or clarify certain allotment, assignment, auction, and technical procedures. In the Second R&O, the Commission also codifies a prohibition against "band hopping" FM translator station applications, and codifies standards determining nighttime AM mutual exclusivity among window-filed applications for new AM broadcast stations.

3. In the *Second R&O*, the Commission addressed issues raised in the *Further Notice of Proposed Rule Making* released with the *First R&O*. In the *First R&O*, the Commission adopted a Tribal Priority, as a means of rectifying the disparity in the Native American and Alaska Native populations of the United States versus the number of radio stations owned by, or providing service geared toward, members of Native American Tribes or Alaska Native Villages ("Tribes"). The Tribal Priority, as adopted in the *First R&O*, was available to applicants meeting 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*)[200] are covered by the principal community contour of the proposed facility; (2) at least 50 percent of the daytime principal community contour of the proposed facilities covers tribal lands; (3) the proposed community 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. Although "tribal lands" was given an expansive definition in the *First R&O*, commenters noted that not all Tribes had reservations or other tribal lands as the Commission defined that term. Thus, in the *Further Notice of Proposed Rule Making* ("*FNPRM*"), the Commission sought comment on how the Tribal Priority could be applied to Tribes that lacked tribal lands as defined in the *First R&O*. Additionally, commenters noted that Tribes successfully adding FM allotments in the non-reserved band to the Table of Allotments might still not acquire those facilities at auction. They suggested that the Commission adopt a bidding credit for Tribes, and the Commission sought comment on whether, and how, to establish such a bidding credit.

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[197] *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").

[198] 24 FCC Rcd 5239 (2009).

[199] *See* 5 U.S.C. § 604.

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

4. After considering the few comments filed in response to the *FNPRM*, the Commission determined that the record did not support the establishment of a specific standard for tribal coverage, under the Tribal Priority, for Tribes without defined Tribal Lands. Instead, such Tribes may, through a Tribal official with proper jurisdiction, request waiver of the tribal coverage criterion of the Tribal Priority, by making an appropriate showing of a defined geographic area identified with the Tribe. Among the probative factors in such a showing would be evidence of an area to which the Tribe delivers services to its citizens, or evidence of an area to which the federal government delivers services to Tribal members, for example federal service areas used by the Indian Health Service, Department of Energy, or Environmental Protection Agency. Probative evidence might also include evidence of Census Bureau-defined tribal service areas, used by agencies such as the Department of Housing and Urban Development. Additionally, if a Tribe were able to provide evidence that its Tribal government had a defined seat, such as a headquarters or office, this in combination with evidence that Tribal citizens lived and/or were served by the Tribal government in the immediate environs of such a governmental seat would provide strong evidence of a nexus between that community and the Tribe. Absent a physical location for Tribal government, a Tribe might also, for example, provide evidence that a majority of members of the Tribal council or board lived within a certain radius of a community. The Commission would also accept a showing under the standard enunciated in Section 83.7(b)(2)(i) of Part 25 of the Code of Federal Regulations, that more than 50 percent of Tribal members live in a geographical area exclusively or almost exclusively composed of members of the Tribe. Other evidence, such as evidence of the existence of Tribal institutions or events in a defined area, would also be considered probative of a geographically identifiable Tribal population grouping. Regardless of the evidence provided, the Tribe must define a reasonable boundary for the "tribal lands" to be covered, and the community on those lands that would be considered the community of license, with an eye toward duplicating as closely as possible the Tribal Land coverage provisions of the Tribal Priority.

5. In the *Rural NPRM*, the Commission also stated that the procedures and priorities it had been using to allocate radio service had not been completely successful in effecting the fair, efficient, and equitable distribution of radio service mandated by Section 307(b) of the Communications Act. Specifically, the Commission noted that current policies had resulted in an inordinate number of new services in large, already well-served urban areas, as well as moves of existing stations from smaller and rural communities into or near to urbanized areas. The Commission further observed that in many cases, the sole determinant in assigning new service was the number of people receiving new service, and that reliance on the differences in populations receiving new service in already abundantly served areas may have an adverse impact on the fair distribution of service in new AM and FM station licensing, and may be inconsistent with statutory and policy goals.

6. In order to address these concerns, the Commission concluded in the *Second R&O* that it should rectify the policies that it perceived as overwhelmingly favoring proposals in and near urbanized areas at the expense of smaller communities and rural areas. First, the Commission established a rebuttable presumption that an FM allotment or AM new station proponent seeking to locate at a community in an urbanized area, or that would cover or could be modified to cover more than 50 percent of an urbanized area, in fact proposes service to the entire urbanized area, and accordingly will not receive a Section 307(b) preference for providing first local transmission service. This urbanized area service presumption may be rebutted by a compelling showing, not only that the proposed community is truly independent of the urbanized area, but also of the community's specific need for an outlet for local expression separate from the urbanized area and the ability of the proposed service to provide that outlet. Additionally, in the case of applicants for new AM stations, the Commission stated that an applicant proposing third, fourth, and/or fifth reception service to at least 25 percent of the population in the proposed primary service area, where the proposed community of license has two or fewer local transmission services, may receive a dispositive Section 307(b) preference under Priority (4). An applicant whose proposed contour does not meet the 25 percent / two transmission service criteria may,

but is not required to, provide a Service Value Index showing as set forth in the case of *Greenup, Kentucky and Athens, Ohio*.[201] Such a showing, however, must yield a difference in SVI of at least 30 percent over the next-highest ranking proposal in order to receive a dispositive Section 307(b) preference under Priority (4) of the assignment priorities. Absent such a showing, no dispositive Section 307(b) preference will be awarded, and the competing applications for new AM stations will proceed to competitive bidding.

7. In the case of new FM allotments, before awarding a dispositive Section 307(b) preference to an applicant proposing first local service at a community, the Commission will apply the rebuttable urbanized area service presumption as described in the preceding paragraph. If a proposal does not qualify for a first local transmission service preference, the Commission will consider proposals to provide third, fourth, and/or fifth reception service to more than a *de minimis* population under Priority (4), but directs the staff to accord greater weight to service to underserved populations than to the differences in raw population totals. The Commission concluded that raw population total differentials should be considered only after other Priority (4) factors that a proponent might present, including the number of reception services available to the proposed communities and reception areas, population trends in the proposed communities of license/reception areas, and/or number of transmission services at the respective communities.

8. As noted above, in the *Rural NPRM* the Commission expressed concern over the movement of radio stations away from smaller and rural communities and toward urbanized areas. In order to change its community of license, a radio station must show that service at the new community constitutes a preferential arrangement of allotments or assignments compared to service at the current community. Currently, a substantial number of such applicants justify the benefits of such moves by setting forth the greater number of listeners who would receive a new service at the new community of license. The Commission sought to limit the presumption that such raw net population gains, in and of themselves, represent a preferential arrangement of allotments or assignments under Section 307(b). The Commission adopted its proposal to prohibit any community of license change that would create white or gray area, that is, leave any area with no reception services or only one reception service. As with proposals for new AM stations and FM allotments, the Commission will apply the rebuttable urbanized area service presumption as described above to an applicant for a change of community of license that proposed to provide the new community with its first local transmission service. An applicant not qualifying for a first local transmission service preference may then make a showing under Priority (4), other public interest matters. Such a showing, however, will require the applicant to provide a more detailed explanation of the claimed public interest benefits of the proposed move than is currently the case. A Priority (4) showing that reveals a net loss of third, fourth, or fifth reception service to more than 15 percent of the population in the station's current protected contour will be strongly disfavored. The Commission will now require applicants not only to set forth the size of the populations gaining and losing service under the proposal, but also to summarize the numbers of services those populations will receive if the application is granted, and an explanation as to how the proposal advances the revised Section 307(b) priorities. For example, an applicant will not only detail that it is providing 500,000 listeners with a 21st reception service, and removing the sixth reception service from 50,000 listeners, but also provide a rationale to explain how this service change represents a preferential arrangement of allotments or assignments. Additionally, pursuant to the Commission's proposal in the *Rural NPRM*, it will accord significant weight against any proposed removal of a second local transmission service from a community of substantial size (with a population of 7,500 or greater) when determining whether a proposed community of license change represents a preferential arrangement of allotments or assignments. Applicants may also offer, as part of a Priority (4) showing, any other information they

[201] Report and Order, 2 FCC Rcd 4319 (MMB 1987) ("*Greenup*").

believe to be pertinent to a public interest showing, including the need for further transmission service at the new community, a drop in population justifying the removal of transmission service at the old community, population growth in areas surrounding the proposed new community that can best be met by a centrally located service, or any other changes in circumstance believed relevant to Commission consideration.

9. In the *Rural NPRM*, the Commission also noted that the current rules permit FM translator stations originally authorized in the non-reserved band (channels 221-300) to modify their authorizations to "hop" into the reserved band (channels 201-220). Such modifications enable translator stations to operate under the less restrictive NCE rules, permitting the use of alternative methods of signal delivery, such as satellite and terrestrial microwave facilities. Likewise, FM translators authorized in the reserved band are currently able to file modifications to hop into the non-reserved band. The Commission stated in the *Rural NPRM* that the filing of band-hopping applications by FM translator stations prior to construction of their facilities wastes staff resources, potentially precludes the use of those frequencies in future reserved band filing windows for FM translators, and diminishes the integrity of the window filing process. The Commission therefore tentatively concluded that Section 74.1233 of the Commission's Rules should be modified to prohibit this practice. In the *Second R&O*, the Commission adopted its tentative conclusion, and codified this prohibition.

10. The Commission also tentatively concluded, in the *Rural NPRM*, that it should modify Section 73.3571 of the Rules to codify the Commission's decision in *Nelson Enterprises, Inc.*,[202] by explicitly providing that the AM nighttime interference standards found in Section 73.182(k) of the Rules should apply in determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window. That is, two applications would be deemed to be mutually exclusive if either application would be subject to dismissal because it would enter the 25 percent limit of the other.[203] The Commission believed this rule change was needed to promote the strict interference standard that the Commission has determined is necessary to revitalize the AM service. In the *Second R&O*, the Commission adopted its tentative conclusion, and codified these procedures.

11. Along with the *Second R&O*, the Commission released a *First Order on Reconsideration*, dealing with two issues raised by commenters in the nature of petitions for reconsideration of aspects of the Tribal Priority adopted in the *First R&O*. One of these issues concerned whether to extend the Tribal Priority to corporations established pursuant to the Alaska Native Claims Settlement Act of 1971 ("ANCSA").[204] Such regional corporations are established in the ANCSA statutes and are incorporated under Alaska law. These corporations, however, are not themselves Tribes, and their shares are owned by individual Natives rather than the Tribes themselves. The Commission determined that, because the basis for the Tribal Priority was the government-to-government relationship between the Tribes and the federal government, and because the regional corporations established pursuant to ANCSA are not sovereign or quasi-sovereign entities, the Tribal Priority could not be extended to such corporations.

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[202] Memorandum Opinion and Order, 18 FCC Rcd 3414 (2003).

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

[204] 43 U.S.C. § 1601 *et seq*.

12. The second issue on reconsideration concerned Tribes with small or irregularly shaped tribal lands. As originally established, the Tribal Priority requires that at least 50 percent of the principal community contour of a proposed station cover tribal lands. A commenter noted that some Tribes had tribal lands that, in total, would not comprise 50 percent of even a small radio station's contour, and moreover that some tribal lands were, for example, strips of land following rivers, that would not fit into the generally circular contours of non-directional radio stations. The Commission adopted a modification of the Tribal Priority: a Tribe may claim the Tribal Priority if (a) at least 50 percent of the proposed facility's principal community contour covers that Tribe's Tribal Lands, as set forth in the *First R&O*, or (b) the proposed principal community contour (i) covers 50 percent or more of that Tribe's Tribal Lands, (ii) serves at least 2,000 people living on Tribal Lands, and (iii) the total population on Tribal Lands residing within the station's service contour constitutes at least 50 percent of the total covered population. In neither (a) nor (b) may the applicant claim the priority if the proposed principal community contour would cover more than 50 percent of the Tribal Lands of a non-applicant Tribe. This is intended to facilitate use of the Tribal Priority by Tribes with small or irregularly shaped lands, while avoiding the problem of certain Tribes claiming the remaining spectrum in certain areas where many Tribes have smaller tribal lands in close proximity before all qualifying Tribes have an opportunity to apply. In such situations, different Tribes, whose lands are in close proximity to each other, might be encouraged to form consortia to establish radio service serving the various Tribes' needs, as well as sharing the expense of starting new radio service. The Commission also determined that Tribes complying with these new criteria might still provide service to very small Tribal populations situated among much larger non-Tribal populations. This is also designed to ensure that the Tribal Priority is used primarily to establish service to Tribal populations and communities, rather than proportionally minimal Tribal populations. The limitations on claiming the Tribal Priority in these situations is subject to waiver requests in appropriate situations (such as proposals covering a number of Tribes, narrowly tailored to minimize non-Tribal coverage, in areas where there is abundant non-Tribal service and no Tribal service).

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

13. 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

14. 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.[205] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," small organization," and "small government jurisdiction."[206] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[207] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of

[205] 5 U.S.C. § 603(b)(3).

[206] *Id*. § 601(6).

[207] *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).[208]

15. 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.[209] Included in this industry are commercial, religious, educational, and other radio stations.[210] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[211] However, radio stations that are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number.[212] The SBA has established a small business size standard for this category, which is: firms having $7 million or less in annual receipts.[213] According to BIA/Kelsey, MEDIA Access Pro Database on January 13, 2011, 10,820 (97%) of 11,127 commercial radio stations have revenue of $7 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

16. As described, certain rules and procedures will change, although the changes will not result in substantial increases in burdens on applicants. A question will be modified in FCC Form 340, to reflect the changed tribal coverage provisions for claiming eligibility for the Tribal Priority. These are largely self-identification questions reflecting the applicant's status, although in the case of tribal coverage some geographic analysis may be required, and/or a showing may be needed to establish eligibility for the Tribal Priority in the absence of tribal lands as defined in the *First R&O*. In certain cases (AM auction filing window applications, FM allotment proceedings, and applications to change community of license), Section 307(b) information is already required. In some cases, the procedures set forth in the *Second R&O* require more stringent analysis of information already requested of such applicants, resulting in little or no increase in burden on those applicants. In other cases, especially with regard to applications to change community of license, applicants may need to perform more analysis than is currently the case, increasing the reporting burden. Also, new showings may be required of certain applicants claiming the Tribal Priority, in order to demonstrate their eligibility for the priority. However, these burdens should be moderate to minimal, and are needed in order to achieve the Commission's statutory mandate of fair, efficient, and equitable distribution of radio service (and, in the case of Tribal Priority claimants, are necessary in order to open up the Tribal Priority to greater numbers of Tribes seeking to establish new radio service). The remaining procedural changes in the *Second 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 will continue to be evaluated for mutual exclusivity based on the nighttime interference standards set forth in the *Nelson Enterprises, Inc.* case,[214] and any burden will not be increased merely because those standards are now codified. Likewise, codifying a limitation on FM translator "band hopping" applications may require

[208] 15 U.S.C. § 632.

[209] *Id*.

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] 13 C.F.R. § 121.201, NAICS code 515112 (updated for inflation in 2008).

potential applicants to evaluate whether they are eligible to file, but will not require greater reporting burdens.

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

17. 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.[215]

18. With regard to the proposals in the *FNPRM*, the Commission did receive and consider two alternative proposals for Tribes without tribal lands wishing to claim the Tribal Priority. The Commission did not adopt either proposal, instead opting to consider requests for waiver of the tribal coverage criterion of the Tribal Priority. The waiver standard allows requesting parties the flexibility to determine how much or how little information is necessary to overcome the criterion, and thus can be less burdensome than a more rigid standard.

19. In the *Rural NPRM*, the Commission put forth several alternative proposals for modifications to its Section 307(b) evaluation procedures, in an effort to encourage the establishment of new service at smaller and rural communities and prevent stations already serving such communities from moving out. Many of these were ultimately rejected in favor of less burdensome alternatives. For example, the Commission considered not awarding dispositive Section 307(b) preferences to AM filing window applicants unless they proposed *bona fide* first transmission service or better; in other words, the Commission proposed to eliminate a Priority (4) "other public interest matters" analysis entirely, sending such applicants to auction. After considering comments, the Commission decided that applicants should be afforded the opportunity to demonstrate that they would provide service to underserved populations, and thus that new service at the proposed community fulfilled the objectives underlying Section 307(b). The Commission also proposed to require a *Greenup* Service Value Index showing but, due to the expense of such showings, determined that such a showing should be optional but not required. Certain other alternatives, proposed as high priorities or mandatory showings in the *Rural NPRM*, were instead included in Priority (4), other public interest matters or were otherwise downgraded in the *Second R&O*. For example, the Commission did not, as proposed, establish a priority for underserved listeners (those who would receive third, fourth, and fifth service), but rather indicated that it would strongly favor such showings under Priority (4); moreover, the Commission did not adopt the proposal to bar absolutely community of license changes that would remove service to underserved listeners, although it indicated it would strongly disfavor such moves. Similarly, the Commission did not adopt a proposal to bar removal of second local transmission service at a community, stating instead that such removals would weigh heavily against such moves in communities of over 7,500 population. These modifications of the *Rural NPRM* proposals were made based upon comments filed by broadcasters, many of whom are small businesses, and are designed to accommodate their concerns while still rectifying the problems identified by the Commission in making the *Rural NPRM* proposals initially. The Commission thus determined that the procedural changes, as adopted, represent the least burdensome means of achieving the stated policy goals.

[214] Memorandum Opinion and Order, 18 FCC Rcd 3414 (2003).

[215] 5 U.S.C. § 603(c)(1)-(c)(4)

20. With regard to the proposed rule banning translator "band hopping" applications, the Commission did consider commenter's proposals but decided to adopt the rule as proposed. The alternatives proposed and considered did not, in the Commission's view, fully address the basic unfairness inherent in allowing certain translator permittees and licensees to change frequencies in order to take advantage of different operating rules in another frequency band. Because this practice gives an unfair advantage to a small subset of translator operators, the Commission believed the proposed rule was necessary to make the operating rules uniform for all such operators.

21. The proposed rule applying AM nighttime mutual exclusivity standards to mutually exclusive AM filing window applications merely codifies current procedure established in Commission precedent, and presents no change or new burden on applicants requiring consideration of less burdensome alternatives. The Commission did propose, in the *Rural NPRM*, to codify certain guidelines for submitting contours using alternate prediction methods. However, in part because commenters identified certain technical difficulties and burdens associated with the proposed guidelines, the Commission declined to adopt the proposal.

22. Finally, the Commission granted on reconsideration a proposal for an alternative tribal coverage provision of the Tribal Priority. As discussed above, Tribes with small tribal lands in some cases could not comply with the Tribal Priority condition that 50 percent or more of the proposed principal community contour cover those tribal lands. Only one proposal was submitted to rectify this problem. While the Commission adopted this proposal, it modified it to provide that the Tribal Priority would not be afforded an applicant who covered more than 50 percent of another, non-applicant Tribe's tribal land. The Commission made this modification to avoid a situation in which Tribes with tribal lands in close proximity raced to be the first to claim limited spectrum in an area. Likewise, on its own motion the Commission determined that proposed service to small Tribal Lands of less than 2,000 population would not be considered significant enough to qualify for the Tribal Priority, and that the Tribal population covered by the proposal is at least 50 percent of the total covered population. This is to avoid the situation in which a relatively small Tribe would gain a priority for service to a potentially much larger non-Tribal population. Thus, while other alternatives were not presented, the Commission considered the problem and arrived at its own modifications in order to avoid potential conflicts among qualified Tribal applicants, and in order to avoid unfairness to non-Tribal applicants at the expense of small Tribes, who nonetheless retain the ability to form consortia to establish new radio service and qualify for the Tribal Priority.

F. Report to Congress

23. The Commission will send a copy of the *Second 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.[216] In addition, the Commission will send a copy of the *Second R&O*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Second R&O* and FRFA (or summaries thereof) will also be published in the Federal Register.[217]

[216] *See id*. § 801(a)(1)(A).

[217] *See id*. § 604(b).

APPENDIX C

Comments Filed in Response to 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, LLC
Priority Radio, Inc.
Vir James, P.C.
Hatfield & Dawson Consulting Engineers, LLC
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., Georgia-Carolina Radiocasting Companies (consisting of Georgia-Carolina Radiocasting Company, LLC, Appalachian Broadcasting Company, Inc., Sutton Radiocasting Corporation, Lake Hartwell Radio, Inc., and Tugart Properties, LLC), 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, Inc.
Communications Technologies, Inc.
National Association of Broadcasters
Educational Media Foundation
duTreil, 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 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.

APPENDIX D

Reply Comments Filed in Response to NPRM

Donald Manro
Charles Sumner
Craig Kuehn
Thomas D. Bentley
Amador S. Bustos and Bustos Media Holdings, LLC
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
duTreil, Lundin & Rackley and Hatfield & Dawson
David Kunian
Booth, Freret, Imlay & Tepper, P.C.
Timothy Stone
Joe Shedlock
Bexley Public Radio Foundation, Broadcasting as WCRX-LP, 102.1 FM
Scott Sanders
Prometheus Radio Project and National Federation of Community Broadcasters
Jeff Shaw
Leigh Robartes
Brantley Broadcast Associates
Jesse Drew
Media Technology Ventures, LLC
Jim Buchanan
Catholic Radio Association
Erubiel Valladares Carranza
Educational Media Foundation
Cherokee Nation
William B. Clay
Radio One, Inc., Minority Media 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

Polnet Communications, Ltd. and Johnson Communications, Inc.
Native Public Media and National Congress of American Indians

APPENDIX E

Comments and Reply Comments Filed in Response to FNPRM

Comments

Catholic Radio Association
Koahnic Broadcast Corporation
Native Public Media and National Congress of American Indians

Reply Comments

Native Public Media and National Congress of American Indians
Coquille Indian Tribe

APPENDIX F

Final Rules

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

1. Section 73.3571 is amended by revising paragraph (h)(1)(ii) and adding Note 1, 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. The engineering proposals in eligible applications remaining after the close of the amendment period will be protected from subsequently filed applications. Determinations as to the acceptability or grantability of an applicant's proposal will not be made prior to an auction.

* * * * *

Note 1 to §73.3571: For purposes of paragraph (h)(1)(ii) of this section, Section 73.182(k) interference standards apply when determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window. Two applications would be deemed to be mutually exclusive if either application would be subject to dismissal because it would enter into, i.e., raise, the twenty-five percent exclusion RSS nighttime limit of the other.

2. Section 73.7000 is amended by revising the definitions of "Tribal Coverage" to read as follows:

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

* * * * *

Tribal Coverage. (a) Coverage of a Tribal Applicant's or Tribal Applicants' Tribal Lands by at least 50 percent of a facility's 60 dBu (1 mV/m) contour, or (b) the facility's 60 dBu (1 mV/m) contour (i) covers 50 percent or more of a Tribal Applicant's or Tribal Applicants' Tribal Lands, (ii) serves at least 2,000 people living on Tribal Lands, and (iii) the total population on Tribal Lands residing within the station's service contour constitutes at least 50 percent of the total covered population. In neither (a) nor (b) may the applicant claim the priority if the proposed principal community contour would cover more than 50 percent of the Tribal Lands of a non-applicant Tribe. 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.

* * * *

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

Section 74.1233 is proposed to be amended by revising section (a)(1) in part, to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

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

* * * *

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures (MB Docket No.09-52); Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands (WT Docket No. 11-40); Improving Communications Services for Native Nations (CG Docket No. 11-41)*

As we developed the National Broadband Plan last year, we asked Americans to share with us their concerns if broadband wasn't available where they lived. And a woman named Sara from White Swan, Washington wrote us back. She told us:

> *With [b]roadband made available here in the rural areas of the Yakama Indian Reservation it would help us out a[]lot. My [s]ister and I are disabled and do not drive much. . . . Faster internet would help with education needs in our home. . . .*
>
> *The phone co[mpany] keeps telling us ["]soon["] for broadband[. W]e have seen them upgrade the lines right in front of our home, but [are] still waiting for some type of upgrades to come in to the substation to allow people further out access to broadband.*

Our job here at the Commission is to help turn "soon" into "today." Because communications services like broadband, wireless communications and radio aren't just valuable as means to deliver entertainment and diversions. They are vital platforms for community-building, cultural preservation, and the promotion of public health, education and economic opportunity in Native Nations.

Native Nations' unique circumstances vary widely – from reservations along the Eastern Seaboard, to Alaska Villages, to the Home Lands of Native Hawaiians – but we also know that many of you share similar visions for how broadband can improve the daily lives of Native Americans. Today's items are about ways to help the leaders of Native Nations achieve those visions for their own communities.

Our first item will help Native Nations preserve their culture, language, and community values by making it easier to deploy rural radio service. This will particularly help Native Nations with small or irregularly shaped lands and non-landed Native Nations provide their citizens with programming that meets their needs and interests.

Our second item, the Spectrum over Tribal Lands NPRM, will create new opportunities for Native Nations to gain access to spectrum and create new incentives for licensees to deploy wireless services on Tribal Lands. We know that there have been lives lost in Native America because of the lack of basic communications services. We know that in the cold of a recent winter, when a car broke down on a reservation in the North Plains and a signal was not available, two young Indian men froze to death. We know that not too long ago in Arizona Indian Country, when a father and family man had a heart attack, his family had too far to travel just to reach a telephone. When emergency services finally arrived, it was too late.

But we *also* know that wireless availability can help bridge these gaps and even save lives. Wireless can make it easier to manage chronic diseases that plague places like Indian Country in Southern Arizona, where over one-third of American Indians over 20 have been diagnosed with diabetes. And so I am hopeful that this item will not just help more people in Native Nations obtain access to wireless, but also in some small way help communities tackle the public health challenges they face today.

And our third item, a Notice of Inquiry on Improving Communications Services for Native Nations, will lay the groundwork for policies that can help Native Nations build economic and educational opportunity for their members on their own sovereign lands.
I've said on many occasions that broadband is indispensable infrastructure for economic growth and job creation. And nowhere is that need more acutely felt than on Tribal lands. The lack of robust broadband services contributes to the challenges each of you face in building strong economies with diverse businesses and development projects. So we seek comment on the best ways to support sustainable broadband deployment, adoption, and digital literacy training on Tribal lands.

Among other important questions, we also ask about opportunities to use communications services to help Native Nations address public safety challenges on Tribal lands, including the broad lack of 911 and E-911 services, and the needs of persons with disabilities. We consider how barriers to entry might be preventing the deployment of satellite services in the most remote parts of Native Nations. And we also begin a new inquiry into the status of Hawaiian Home Lands.

In all these efforts, we look forward to working directly with you and finding the right answers to complex problems, to ensure that our actions are wisely taken and lead to effective solutions in your communities. Because as I said to many of you a year ago at the same NCAI winter conference that many of you have just attended, an important and unique trust relationship exists between the Commission and Native Nations. And that trust relationship has borne fruit today. Several of the items we adopt today grow largely out of ideas and proposals advocated by the Native community, and begin to break down barriers for Native Nations and their governmental entities to enter the communications field themselves. These actions recognize the important role that Native Nations play in planning and delivering services and the genuine potential of Tribal or Native-centric approaches to developing successful service models.

We are committed to honoring your sovereignty and self-determination, and strengthening our nation-to-nation relationships. In that spirit, later today, the Office of Native Affairs and Policy and our Bureaus will be hosting a separate session to engage in a dialogue and listening session with our guests from Native Nations on these items. And because we place a high value on your input and consultative guidance, I am pleased to announce today another action to help us work better together: the establishment of an FCC-Native Nations Broadband Task Force, as recommended by the National Broadband Plan, comprised of leaders from across the Native Nations and senior staff from across the Commission. This Task Force, co-chaired by Geoff Blackwell and a co-chair elected from among the 19 Native Nations representatives on the Task Force, will be a permanent mechanism for this Commission and sovereign Native Nations to work together on a positive policy agenda for communications in Native America.

Thank you again to our honorable guests for coming to the Commission today. Like my colleagues, I look forward to coming to your Nations in person soon, and hope that you will find our afternoon discussions informative and productive.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures (MB Docket No.09-52); Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands (WT Docket No. 11-40); Improving Communications Services for Native Nations (CG Docket No. 11-41)*

Honorable Tribal Leaders, thank you for joining us here at the Federal Communications Commission. This past November, I had the privilege to talk with many of you at the Annual Conference of the National Congress of American Indians in Albuquerque. I brought with me to that meeting Chairman Genachowski's pledge that we would hold this meeting—a Tribal Issues Commission Meeting to focus on the telecommunications and media issues that matter most to Indian Country. It has been a long time in coming, but today we are now moving seriously toward a more comprehensive, consultative and holistic approach to identifying and removing barriers to the deployment and adoption of services on and near Tribal lands.

Providing every person in this country with Twenty-first century communications is the great infrastructure challenge of our time. We cannot afford to leave ***any*** American behind. That must certainly include the original Americans—Native Americans—so that they, too, can reap the benefits of these enabling communications technologies. On my visits to Indian Country, I have seen first-hand how much harm the lack of telecommunications infrastructure is inflicting on the people living on and near Tribal lands, Alaska Native Villages and Hawaiian Home Lands. In so many places where Native Americans live, poverty endures, unemployment is at levels no society should tolerate, education languishes, and even basic public safety falls far short of what people have a right to expect. Modern telecommunications and ubiquitous media are strangers in much of Indian Country. Even plain old telephone service is at shockingly low levels of penetration—below seventy percent of Native American households, and in some areas far less than that. And we don't even begin to have reliable data on the status of Internet subscribership on Tribal lands. Anecdotally, we know that broadband access on Tribal lands is minimal, and certainly lower than ten percent. It's a national disgrace—and it's hurting us all. While I have seen some marked improvements in some places in Indian Country over the last decade, so much more cries out to be done. There's an old saying: Access denied is opportunity denied. Until Indian Country is connected to a Twenty-first century broadband telecommunications grid, opportunity will pass quicker than a meteor over Indian Country. And the people who live there will only fall farther behind the rest of the country and the rest of the world.

When we created the Office of Native Affairs and Policy last August, I was encouraged that we were on the path to meaningful progress on these challenges. And, I was even more encouraged when my old friend, Geoff Blackwell, was selected to head that office. What a gift he is to this Commission! And we have beefed up, by orders of magnitude, the FCC's resources dedicated to building a better trust relationship with Tribal Governments. Having the structures and people in place, though, won't by itself solve these generations-long and deep-rooted problems. We need a serious commitment on the part of this agency to get the job done—and, with this Chairman and with this Commission, we are finally making that commitment.

But success here can only be the product of our cooperative work together. If the Commission is going to help resolve the challenges you face, it must first understand them. See them. Feel them. We need to hear from you on an ongoing basis about your experiences, your ideas and your priorities to help shape our day-to-day decision making. Tribal Nations are sovereigns within this great country, and the FCC must have your input on the life-changing communications issues that matter most to your communities. I recognize that it can be a challenge to find the resources and that you must target them

appropriately, but I am a believer in the adage that decisions without you are usually not the best decisions for you. Your being here today provides valuable and much-needed input. Similarly, our coming—as a Commission—to Indian Country and other Native areas is equally important in making sure we are all seeing the same challenges and responding to the same sets of facts. I hope we will do that soon—and often.

With the three proceedings we launch today, we have a real opportunity, working together, to identify barriers to the deployment and adoption of communications and media services in Indian Country and to take swift action to remove these barriers. The *Native Nations Notice of Inquiry* highlights the breadth of our examination—from radio to broadband to public safety communications. Specifically, we seek input on whether to expand the Tribal Priority for the allocation and assignment of radio channels to make it easier for Native Nations to provide other services—wireless, wireline and satellite—to their communities. We ask about sustainable broadband models for Indian Country, and the funding needs for deployment, adoption and digital literacy on Tribal lands. Given the unique ways that public safety communications are provisioned in Indian Country, we seek to develop a comprehensive record on the funding, jurisdictional, geographic and other challenges to ensuring that Tribal lands have access to the ubiquitous, effective and high-quality emergency communications they need and deserve. And, for the first time to my knowledge, we ask critically important questions about accessibility barriers for persons living with disabilities on Tribal lands.

Today, we also adopt a *Native Nations Spectrum Notice of Proposed Rulemaking* aimed at promoting greater use of spectrum over Tribal lands. We propose a number of innovative ideas for maximizing the spectrum resource and expanding opportunities for wireless service to Native Americans. Among the proposals, we are looking to expand the Tribal Priority that currently applies to broadcast radio to cover commercial wireless, to require good faith on the part of incumbent wireless licensees in any negotiations for secondary market access to spectrum over Tribal lands, and to incent the building of wireless facilities by applying a safe harbor for construction obligations when a specified level of service on Tribal lands is met. Too often, wireless carriers find that they don't need to cover Tribal lands to meet our far-too-lenient build-out requirements—except, of course, if they happen to want to cover a highway that cuts through the area. I have long believed that we need to apply some degree of a use-it-or-lose-it approach when it comes to the public spectrum resource. That is why I strongly support the build-or-divest process we propose today. Under the proposal, a Tribal Government could initiate a build-or-divest process by giving us notice that it plans to extend coverage over its Tribal lands that are unserved or underserved by licensees of that spectrum and geographic area.

Last, but certainly not least, in the *Rural Radio* item we address the implementation of the Tribal Priority for radio broadcast licensing for those Tribes with very small, irregularly-shaped, or no land holdings. Our policies need to recognize that only 312 of the 564 federally-recognized Tribes occupy reservations, and I am pleased that we have initiated a waiver process to make this priority available for those Tribes. We seek further comment on ways to maximize the benefit of this priority for Tribal entities seeking FM commercial licenses.

There is a truly path-breaking idea presented in the *Rural Radio* item that proposes the use of threshold qualifications as an alternative to the Tribal Bidding Credit. The objective here is to increase opportunities for Tribal entities to own FM broadcast stations to serve their communities. I wish we had developed this idea earlier, but in light of the significant assurances I have received that its consideration will be fast-tracked, I think it may be the idea whose time has come. I am anxiously awaiting commenters' reaction to it. There are far too few radio station licenses in the hands of Native Americans —less than one-third of one percent—and this lack pulls us apart. Media can do much to bring us closer together. Native American interests are a fundamental component of the public interest obligations that this Commission is charged by law to safeguard and advance.

We have a long way yet to go to turn our words into concrete results for Native Americans. And, we are all too aware of earlier times in our shared history when hopes and promises spread across Indian Country, only to be under-cut by a lack of follow-through and, sometimes, by outright deceit. That history was often a trail of tears, and the ground is still damp with the sorrow and hurt that were visited upon generations of Native Americans. Bringing opportunity and prosperity out of that sad history is one of the major challenges confronting our country today. It is time to do justice—real justice—for Indian Country and for us all. Let us move forward together in this new spirit of hope and progress, and let us work, government-to-government, to make sure the results match the promise.

I also want to commend the adoption in the *Rural Radio* item of a rebuttable urbanized area presumption that I believe will help better serve communities and new entrant broadcasters alike. We adopt this item to avoid gaming of our 307(b) preference, which is designed to ensure the fair, efficient and equitable distribution of radio service. I believe strongly that ***all*** of our communities, large and small, deserve to be served.

I want to thank the Chairman and fellow Commissioners for their constructive engagement on all three items. I commend Geoff Blackwell and his fantastic team in the Office of Native Affairs and Policy for coordinating these items across the Commission, pulling in expertise from throughout the agency. I also thank and commend the Media and Wireless Telecommunications Bureaus for their major role in today's actions. I hope in the future people will look back upon this day as a truly formative, perhaps even historic, day.

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); Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands (WT Docket No. 11-40); Improving Communications Services for Native Nations (CG Docket No. 11-41)*

Our efforts today are an important part of the Commission's commitment to tribal sovereignty and the federal trust responsibility. I am pleased to support these opportunities to share ideas for helping to promote tribal self-sufficiency and economic development. I thank all of the honorable Tribal and Alaska Native representatives for joining us today. I also hope that this group – the Commission and all of us – will meet again somewhere on Tribal lands and Alaska Native lands.

I'll start with a bit of historical perspective. In May 2008, the Commission adopted a cap on competitive eligible telecommunications carrier access to high-cost universal service support. While controlling the growth of the fund was important, I felt it critical that the Commission include an exception to that cap for all of the providers serving tribes across the country – some of the most overlooked parts of America. This limited exception was designed to ensure that companies operating in these areas will continue to receive high-cost support to provide their services while we move toward permanent comprehensive reform of the Universal Service system. At that time, my colleagues and I pledged to resolve questions regarding the implementation of that proposed exception. I was relieved that we fulfilled that pledge – adopting an order less than a year thereafter.

Back in 2009, I was also pleased to support the First Report and Order in the "Rural Radio" proceeding, which affords a priority under Commission rules to American Indian Tribes, Alaska Native Villages, and tribal consortia, to assist them in obtaining new radio stations designed to serve Tribal and Alaska Native lands. The Second Report and Order before us today is designed to extend that relief to Tribes that lack officially recognized lands, as defined in our First Order, but that nonetheless wish to serve geographically identifiable Tribal populations. Our latest rule change provides for a waiver standard that will allow such Tribes to make a detailed showing specific to their circumstances – and is designed to balance the demonstrable needs of Tribal populations with the needs and interests of the public at large. I support this initiative as well because it aims to fulfill our statutory obligation to provide a "fair, efficient and equitable distribution of radio service" across the nation.

The Second Report and Order in the Rural Radio docket also addresses the "fair, efficient and equitable distribution" issue generally by adjusting the Commission's allotment priorities for *all* radio stations. This set of rule changes will affect proposals for new AM and FM stations, as well as city-of-license changes for existing facilities, by essentially making it presumptively more difficult to add stations to urban markets. Our action today is the latest chapter in a long history of re-adjustments the FCC has made over time in seeking to ensure that all populations – urban, suburban and rural – have access to a number of competing radio stations. Although I have some concerns about how today's decision may affect the long-term financial viability of some stations, I note that the rule changes establish only rebuttable presumptions, not blanket bans, concerning the location of stations. I will be watching with interest to see how reasonably flexible the revised approach turns out to be.

And although I am pleased that we are grandfathering some of the pending applications for new facilities under the old prioritization standard, I would have gone further to extend the same treatment to all applications on file as of today. Not every pending FCC application merits protection from rule changes that may occur before agency action on the individual adjudication, of course. A change of this

magnitude, however, warrants special consideration because it affects nearly 30 years of precedent that afforded licensees greater scope to make market-driven judgments.

Regarding the Notice of Inquiry, I am particularly encouraged that we seek to identify Commission rules that are currently barriers to the provision of service on Tribal Lands. If we identify particular rules during the comment cycle, I hope that we take a serious look at reviewing the reasons behind those rules in a timely manner and move forward in removing unnecessary barriers where appropriate.

Thank you to the staff of the multiple bureaus who contributed to these proceedings. I recognize Geoff Blackwell for his leadership in not only shepherding through these proposals today but for his tireless work here at the Commission overall as well. He is helping to ensure that Native Americans and Alaska Natives have a voice not just within these proceedings but at the Commission in general.

We obviously still have much to accomplish in this area. This is especially true as America transitions to a new broadband era. As we constantly push forward, I look forward to working with all of you, my colleagues here at the Commission, and other stakeholders to fulfill our commitments.

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); Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands (WT Docket No. 11-40); Improving Communications Services for Native Nations (CG Docket No. 11-41)*

I am also pleased to welcome the Native Nation leaders to this morning's meeting. For far too long, we have not engaged in an appropriate examination of the unique challenges on Native Nation lands. We have known, since at least the 2000 decennial census, that only 68 percent of households on Tribal lands in the lower 48 have basic wireline telephone service, while the national rate stands at 98 percent.

I was excited to see how much attention the National Broadband Plan devoted to attempting to address the many issues that contribute to the lack of communications infrastructure and services on Tribal lands. Although the challenges to deployment of communications infrastructure on Tribal lands are difficult, not trying to resolve them, only makes the job harder and the digital divide wider. The available studies show, that less than 10% of residents on Tribal lands, have access to terrestrial broadband networks. The main import of the National Broadband Plan's recommendations for Tribal lands, and the items we adopt today, is that we will be stronger, when all of our communities can leverage broadband, to contribute to our Nation's overall well-being. By adopting these three items, this Commission sends the message, that if we are serious about ensuring, that all Americans have access to emerging services and technologies, we must make the concerns of historically underserved communities, such as Native Nations, a top policy priority.

Furthermore, this Commission has a historic trust relationship with federally recognized Tribes. To properly fulfill our fiduciary responsibility to people living on Tribal lands, we must do more. We must commit to taking new approaches for those lands where past regulatory approaches have not worked.

Geoffrey Blackwell, and the FCC staff members who worked on these three items, have crafted a thoughtful strategy, to find solutions to the most difficult barriers to deployment and adoption on Tribal lands. With regard to those initiatives the Tribes have been seeking for years, and for which we have a developed a sufficient record, such as access to broadcast and wireless spectrum, we should strive to adopt rules as soon as possible.

I truly enjoyed working with Geoff and his team, as well as our Media Bureau, on further improving radio coverage, availability, and ownership in America's Tribal areas. I was startled to learn that 0.3 percent of the 13,000 radio facilities in this country, belong to recognized Tribes, and I applaud the Commission for addressing this disparity head-on and taking significant strides toward improvement.

Our actions, today, will serve to encourage Tribes and individuals to venture into broadcasting in order to inform and entertain their peers and neighbors, and the lack of significant broadcasting experience, will no longer be the imposing brick wall, that it once was. We are well aware of the prohibitive costs that so often keep vital and intelligent voices off the air. The threshold language in this item offers a solution to that omnipresent problem, via our strong steps toward a Tribal priority. This proceeding demonstrates that there is still a paramount and urgent need, for the Commission to ensure that licensees are meeting the needs of their service communities, and I am proud of our Bureaus for taking proactive measures to address this issue.

The wireless spectrum NPRM proposes a number of exciting new initiatives to improve the rate of wireless service coverage on Tribal lands. Notably, the Licensing Priority would allow Tribal entities to acquire valuable spectrum without an auction. Since only 10 percent of people living on Tribal lands have access to broadband networks, I am interested in creative ideas, about how we can ensure that all Tribal entities are properly informed about this opportunity. I am also pleased to see the multi-faceted approach the NPRM takes, to creating incentives for wireless licensees, to do a better job of serving people living on Tribal lands. Hopefully, the proposed Construction Safe Harbor and modifications to the Land Bidding Credit Program will encourage more entities to use their wireless licenses to serve Tribal lands.

Since we have heard that there are some licensees who have been reluctant to enter into secondary market arrangements with Tribes, it is time for the Commission to consider a process that would bring these licensees to the negotiating table. Also creative is the build-or-divest proposal, which should urge more licensees to deploy wireless networks on Tribal lands. Furthermore, it shows that this Commission is committed to allowing Tribal entities to take an active role in encouraging licensees to help them address their wireless needs. This goes a long way to improve our agency's government-to-government relationship with recognized Tribes.

Our Native Nations NOI sets forth a number of other proposals to allow for a more productive, consultative process, with Native Nations -- something I fully support. First, it is of paramount importance, that the Commission work with Native Nations, to identify successful deployment of communications infrastructure and services. Second, we should do all we can to encourage the replication of those successes on Tribal Lands. We owe all of our citizens, the benefits of a fully connected community, in order to promote public safety, education, and the economic development on Tribal Lands. Access to 9-1-1, and other public safety services, is critical to every American no matter their location. Likewise, broadband service to anchor institutions and residential areas is beneficial to our entire Nation. Thus, we must engage with our Native Nations, to ensure that they too benefit from a fully connected society.

I want to express my sincere gratitude to Commissioner Copps for his relentless efforts in shining the spotlight on the difficulties Native Nations face. Today, thanks to the leadership of Chairman Genachowski, the FCC is giving those difficulties the attention they have long deserved. We must not leave our Native Nations behind.

STATEMENT OF
COMMISSIONER MEREDITH ATTWELL BAKER

Re: *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures (MB Docket No.09-52); Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands (WT Docket No. 11-40); Improving Communications Services for Native Nations (CG Docket No. 11-41)*

There is no dispute that the communications needs facing Tribal nations are great. Communications services that many take for granted—something as simple as a dial tone, bars on a mobile phone, and the most basic access to the Internet—are just missing in many areas. The statistics are staggering, with some estimates putting the broadband adoption rate as low as five percent in some parts of Indian Country. When there is Internet access, it is estimated that over 90% of individuals in Tribal communities utilize the Internet at least once a day, much greater than the national average. And for that access, individuals in Tribal lands pay more on average: only 9% pay under $20 per month for Internet access in Indian Country, compared to 18% nationally, while 11% pay between $61 and $80 per month for Internet access, compared to only 1% nationally.

The Commission has recognized these problems repeatedly over the last decade. In a 2000 Policy Statement on our government-to-government relationship with Indian Tribes, the Commission committed at that time to work with the Tribal communities to ensure "that Indian Tribes have adequate access to communications services." Fast forward to Acting Chairman Copps' 2009 report, "Bringing Broadband to Rural America," and the Commission again recognized the "unique issues" associated with broadband deployment in Tribal lands. And most recently in the National Broadband Plan–fast approaching its first birthday–we recognized the need "to support sustainable broadband deployment and adoption in Tribal lands." Yet we still have Native American communities with the lowest adoption rates in the country, and we are still talking about the problems without proposing any real solutions.

It is time for action, and I hope that includes leaving the confines of the Beltway to hear directly from the people impacted by this digital divide. Given the many different groups represented here today, I am certain there is no one-size-fits-all solution. I commit to consulting directly with the people of the Tribal nations as to how we can best help them, whether it's by encouraging the deployment of fixed and mobile broadband or promoting adoption and digital literacy.

I am pleased to see the efforts of so many of our Bureaus and Offices, under the guidance and leadership of Geoff Blackwell and the Office of Native Affairs and Policy, to formulate a coordinated framework under which we can proceed. I hope that these proceedings that we initiate today lead to actual, measurable progress in addressing the communications and technology gaps facing Tribal nations.