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

DISP...

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234 ✓
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264
	)	
	)	

FIRST REPORT AND ORDER

Adopted: August 6, 1998

Released: August 18, 1998

By the Commission: Chairman Kennard issuing a separate statement; Commissioners Furchtgott-Roth and Tristani dissenting in part and concurring in part and issuing a joint statement.

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## I. INTRODUCTION

1. By this *First Report and Order*, we implement provisions of the Balanced Budget Act of 1997, which expanded the Commission's competitive bidding authority under Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j), by adding provisions governing auctions for broadcast services.<sup>1</sup> We adopt general competitive bidding procedures to select among mutually exclusive applicants for commercial analog broadcast service and Instructional Television Fixed Service (ITFS) licenses. We adopt herein a "new entrant" bidding credit to further the goals of the designated entity provisions of Section 309(j). We note, however, that we intend to continue our review of the barriers to entry or growth that may exist for small, minority- and women-owned businesses in broadcasting, and make future adjustments to our auction rules, as appropriate, in light of these studies. In addition, pursuant to our discretion under Section 309(l) to utilize either comparative hearings or competitive bidding procedures to resolve certain mutually exclusive commercial broadcast applications filed before July 1, 1997, we conclude that all of these pre-July 1st applications should be resolved by competitive bidding procedures. We also decide in this *First Report and Order* to resolve pending comparative renewal proceedings that are outside the scope of our auction authority under Sections 309(j) and 309(l) of the Communications Act through comparative hearings in which the applicants may present whatever evidence they believe relevant, with the renewal expectancy remaining the most important factor.

## II. BACKGROUND AND SUMMARY

2. As fully described in the *Notice of Proposed Rulemaking* in this proceeding,<sup>2</sup> the Commission has traditionally used comparative hearings to decide among mutually exclusive applications to provide commercial broadcast service, and it has used a system of random selection to award certain types of broadcast licenses, such as low power television and television translator, pursuant to Section 309(i), 47

<sup>1</sup> Pub. L. No. 105-33, 111 Stat. 251 (1997) (hereafter Budget Act).

<sup>2</sup> 12 FCC Rcd 22363 (1997) (hereafter *Notice*).

U.S.C. § 309(i). For purposes of comparative hearings, the Commission has developed a variety of comparative criteria,<sup>3</sup> including the "integration" of ownership and management, which presumed that a station would offer better service to the extent that its owner(s) were involved in the station's day-to-day management. However, in *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993) (*Bechtel II*), the United States Court of Appeals for the District of Columbia Circuit held that "continued application of the integration preference is arbitrary and capricious, and therefore unlawful." The Commission subsequently froze all ongoing comparative cases (including comparative renewal cases) pending resolution of the questions raised by *Bechtel II*.<sup>4</sup>

3. Subsequently, on August 5, 1997, Congress enacted the Balanced Budget Act of 1997, which expanded the Commission's auction authority under Section 309(j) of the Communications Act to include commercial broadcast applicants. Amended Section 309(j) provides that, except for licenses for certain public safety noncommercial services and for certain digital television services and noncommercial educational or public broadcast stations, "the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding . . . [i]f . . . mutually exclusive applications are accepted for any initial license or construction permit." Balanced Budget Act of 1997, § 3002(a)(1), *codified as* 47 U.S.C. § 309(j). In addition, Section 3002(a)(2), *codified as* 47 U.S.C. § 309(i), amends Section 309(i) to terminate the Commission's authority to issue any license through the use of a system of random selection after July 1, 1997, except for licenses or permits for stations defined by Section 397(6) of the Communications Act (*i.e.*, noncommercial educational or public broadcast stations). Finally, Section 3002(a)(3) adopts Section 309(l), *codified as* 47 U.S.C. § 309(l), which governs the resolution of pending comparative broadcast licensing cases. Specifically, it says the Commission "shall have the authority" to resolve mutually exclusive applications for commercial radio or television stations filed before July 1, 1997 by competitive bidding procedures. It specifies further that any auction conducted under this provision must be restricted to persons filing competing applications before July 1, 1997.

4. As a result of the Budget Act, the Commission no longer has the option of resolving competing applications for commercial broadcast stations by comparative hearings except for certain applications filed before July 1, 1997, and it lacks the authority to resolve competing applications for commercial broadcast stations by a system of random selection. The Commission began this rulemaking proceeding to implement these provisions of the Budget Act.

5. In the *Notice*, the Commission tentatively proposed to adhere to the Commission's existing competitive bidding procedures that are already in place for non-broadcast services, set forth in 47 C.F.R. §§ 1.2101-1.2111, subject to any changes made in these procedures in the ongoing *Part 1 Rulemaking*,

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<sup>3</sup> See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965).

<sup>4</sup> *Public Notice, FCC Freezes Comparative Hearings*, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995). Also, following *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (*Bechtel I*), and again following *Bechtel II*, the Commission issued further notices of proposed rulemaking. In *Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5475 (1993), it proposed to amend 47 C.F.R. § 73.3597, which governs the assignment and transfer of broadcast authorizations to lengthen the period of time that a successful applicant receiving a grant after a comparative hearing must operate its station before selling it. Similar issues had been raised in a petition for reconsideration filed by Black Citizens for a Fair Media in GEN Docket No. 90-264 and in responsive comments. In *Second Further Notice of Proposed Rulemaking*, 9 FCC Rcd 2821 (1994), the Commission sought comments on a variety of issues raised by *Bechtel II*.

where the Commission had proposed certain modifications to those procedures.<sup>5</sup> We invited interested parties to identify any procedures that are inappropriate for broadcast auctions and to propose alternatives. After the release of the *Notice* in this proceeding, the Commission adopted a *Third Report and Order and Second Further Notice of Proposed Rulemaking* in the *Part 1 Rulemaking*, 13 FCC Rcd 374 (1997) (hereafter *Third Report and Order*), in which it modified its competitive bidding procedures in all auctionable services in an effort to streamline the Commission's regulations, make the auction process more efficient, and provide more guidance to auction participants. The general competitive bidding procedures for future applications that are subject to auctions are discussed in Section III(C).

6. In addition to seeking comment on competitive bidding procedures for broadcast auctions, the *Notice* requested comment on a variety of other issues raised by the auction legislation, including our tentative conclusions regarding the scope of Section 309(I). Section III(A) reviews the statutory framework for broadcast auctions, and the special statutory provisions relating to pending comparative licensing cases in Section 309(I). Resolution of the frozen *Bechtel* cases is addressed in Section III(B). Special procedures for pending applications which will be resolved by competitive bidding procedures, either because such resolution is statutorily mandated or because we have concluded that it will better serve the public interest, are outlined in Section III(C). Our statutory obligation to use competitive bidding to award ITFS licenses is discussed in Section III(D). Section III(E) describes how we will handle pending comparative renewal proceedings, which by statute may not be resolved through competitive bidding. Finally, Section III(F) addresses a recusal request filed in regard to this proceeding.

### III. DISCUSSION

#### A. Statutory Overview

##### 1. General Authority to Use Competitive Bidding to Award Secondary and Primary Commercial Broadcast Licenses

7. As indicated above, the Commission's authority to award spectrum licenses is set forth in Section 309(j) of the Communications Act. Prior to the enactment of the Budget Act, Section 309(j) provided that the Commission "shall have the authority . . . to grant . . . any initial license or construction permit . . . through the use of a system of competitive bidding," but that authority was limited to awarding licenses for certain non-broadcast uses of the electromagnetic spectrum and required a determination by the Commission that "a system of competitive bidding will promote the objectives described in" Section 309(j)(3). By virtue of the enactment of the Budget Act, however, Section 309(j)(1) now reads:

If, consistent with the obligations described in paragraph (6)(E) [to avoid mutual exclusivity], mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission *shall grant* the license or permit to a qualified applicant through a system of competitive bidding.

(emphasis added.)

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<sup>5</sup> See *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686 (1997) (hereafter *Part 1 Rulemaking*).

8. Given the express language of amended Section 309(j)(1) providing that the Commission shall grant any initial license or permit through a system of competitive bidding, we tentatively concluded in the *Notice*, 12 FCC Rcd at 22379 (¶ 40), that we are required to use auctions for all pending and new mutually exclusive applications to provide secondary broadcast service, such as low power television (LPTV), and FM and television translators. We also tentatively read Section 309(j)(1) as mandating that, except for certain pending licensing cases, the resolution of which is expressly governed by Section 309(l), and certain digital stations governed by Section 309(j)(2), the Commission must use competitive bidding to award authorizations for all new primary commercial broadcast stations, if mutually exclusive applications are filed.

9. **Discussion.** Based upon the broad, explicit language of Section 309(j)(1), we continue to believe that auctions are mandatory for all secondary commercial broadcast services (*e.g.*, LPTV, FM translator and television translator services). Similarly, we find that, except for certain pending applications that are subject to Section 309(l), our auction authority is mandatory, rather than permissive, for all full power commercial radio and analog television stations. Specifically, our general auction authority set forth in Section 309(j)(1), as amended, now provides that the Commission "*shall grant*" licenses by competitive bidding and it no longer restricts the type of spectrum license which may be awarded through competitive bidding or requires an affirmative public interest determination that the use of competitive bidding will serve the objectives of the statute.

10. In this regard, we disagree with the small number of commenters who contend that we lack statutory authority to use competitive bidding to award licenses to provide secondary broadcast service. Nothing in the statutory language or in the accompanying legislative history indicates that the requirement to use competitive bidding for "any initial license or construction permit" is limited to full power radio and analog television stations, or that Congress intended such a limitation. Nor are secondary commercial broadcast service licenses exempted from the auction requirement under Section 309(j)(2), which enumerates the certain types of spectrum licenses that are not subject to competitive bidding. We find no ambiguity in the statutory language as to the requirement to auction these applications. Moreover, the legislative history does not support the contention that Congress intended to limit auction authority to those types of commercial broadcast licenses generally awarded through the comparative hearing process. The Conference Report states that "[a]ny mutually exclusive applications for radio or television broadcast licenses received after June 30, 1997, shall be subject to the Commission's rules regarding competitive bidding, including applications for *secondary broadcast services* such as low power television, television translators, and television booster stations."<sup>6</sup> This list of secondary broadcast service licenses is illustrative rather than exhaustive. For this reason, the omission of FM translators from that list does not persuade us, as a few commenters urge,<sup>7</sup> that Congress intended to exempt such applications from competitive bidding.

11. We continue to believe, moreover, that all pending mutually exclusive applications for these secondary broadcast services must be resolved through a system of competitive bidding. Nothing in Section 309(j)(1) suggests that the requirement to use auctions applies only to applications filed in the future. The only statutory reference to pending applications is contained in Section 309(l). This provision governs the resolution of pending comparative licensing cases but applies only to "competing applications

<sup>6</sup> H.R. Conf. Rep. 217, 105th Cong. 1st Sess. 573 (1997) (hereafter Conference Report) (emphasis added).

<sup>7</sup> See, *e.g.*, Reply Comments of Beacon Broadcasting Corp. at 2; Duhamel Broadcasting Enterprises at 4-6.

for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997." As set forth in greater detail in Section III(B) below, our authority to auction these applications is permissive, rather than mandatory. Whether we have discretion not to use auctions for pending mutually exclusive commercial secondary broadcast applications filed before July 1, 1997, therefore, depends on whether such applications fall within the scope of subsection (l).

12. We do not believe that Congress intended to include these secondary broadcast applications within Section 309(l). As several commenters note, licenses to provide secondary broadcast services are not awarded through the *comparative* hearing process.<sup>8</sup> Yet, Section 309(l) is expressly titled, and thus governs, the "[r]esolution of pending comparative licensing cases." See also Conference Report at 573 (referring to Section 309(l) as pertaining to "pending comparative licensing cases"). Given that no "pending comparative licensing cases" exist in the secondary broadcast services, we conclude that Congress intended Section 309(l) to apply only to pending pre-July 1, 1997 applications that formerly were resolved through comparative hearings, *i.e.*, commercial full service stations. Moreover, although we previously resolved competing LPTV applications by a system of random selection pursuant to Section 309(i), the Budget Act withdrew that authority. See Budget Act, § 3002(a)(2). Given the simultaneous termination of our lottery authority with respect to these pending applications, we do not believe that Congress contemplated that we instead use comparative hearings, in lieu of auctions, particularly since we do not currently award secondary broadcast service licenses through the comparative hearing process. Accordingly, we conclude that all mutually exclusive applications for secondary broadcast service must be awarded through auctions.

## 2. Statutory Authority to Use Competitive Bidding for Modification Applications

13. In the *Notice*, 12 FCC Rcd at 22382 (¶ 47), we asked for comment on whether we should apply competitive bidding procedures to mutually exclusive applications for major modifications of existing broadcast facilities, as well as applications for minor modifications, which can be mutually exclusive in certain rare instances. Some commenters opposing this proposal argue that the Commission does not have authority to auction modification applications, because Section 309(j) states that mutually exclusive applications for "any initial license or construction permit" shall be subject to competitive bidding. 47 U.S.C. § 309(j)(1).<sup>9</sup>

14. After further consideration, we conclude that the Commission is not precluded by the terms of Section 309(j) from auctioning mutually exclusive modification applications. Applications proposing major changes to existing facilities are, in our view, analogous to applications for construction permits for new stations. In the *Second Report and Order* originally adopting general competitive bidding procedures, we concluded that it may be appropriate in some cases to treat a major modification application as an initial application for competitive bidding purposes. In particular, we said that if the changes to an existing facility proposed in a modification application are substantial and if such modification application is mutually exclusive with another major modification application or with an initial application, then

<sup>8</sup> See, *e.g.*, Comments of Kidd Communications at 5-6; Reply Comments of Beacon Broadcasting Corp. at 2.

<sup>9</sup> See, *e.g.*, Comments of Cox Radio, Inc. at 2; Noncommercial Educational Broadcast Licensees at 9; KM Broadcasting, Inc. at 5; Rio Grande Broadcasting Co. at 13; Heidelberg-Stone Broadcasting Co. at 13; ITFS Parties at 7; Reply Comments of WB Television Network at 12.

resolving the mutual exclusivity by competitive bidding may be appropriate.<sup>10</sup> We note that subjecting a modification application to competitive bidding may also be particularly appropriate where it is mutually exclusive with one (or more) initial applications, as Section 309(j) mandates the use of auctions where mutually exclusive applications are accepted for "any initial license or construction permit." 47 U.S.C. § 309(j)(1) (emphasis added).

15. We note, moreover, that our approach here is consistent with our previous interpretation of the identical statutory language in Section 309(i) authorizing the Commission to award spectrum licenses through a system of random selection "[i]f there is more than one application for any initial license or construction permit." 47 U.S.C. § 309(i)(1)(A) (1996) (emphasis added). In adopting lottery procedures for the LPTV service, we construed the statutory phrase "any initial license or construction permit" to authorize lotteries of mutually exclusive major modification applications, and our lottery procedures for that service therefore encompassed such applications. See *Second Report and Order* in Gen. Docket No. 81-768, 93 FCC 2d 952, 981-82 (1983). When Congress amended Section 309(i) to terminate our authority to use lotteries except with respect to the award of noncommercial broadcast licenses, 47 U.S.C. § 309(i)(5)(B) (1997), it retained the statutory language "any initial license or construction permit." That same language is repeated verbatim in the provision setting forth our general auction authority. See Section 309(j)(1). Consistent with our previous interpretation of Section 309(i) as it pertains to major modification applications, we therefore construe the identical language in Section 309(j)(1) as authorizing us to resolve mutually exclusive major modification applications through a system of competitive bidding.

16. Our determination to subject mutually exclusive major modification applications to competitive bidding is additionally supported by the absence of another viable method for resolving instances of mutual exclusivity in a timely and efficient manner. Although some commenters oppose the auctioning of modification applications, they do not believe that comparative hearings are a "realistic option" for resolving competing modification applications,<sup>11</sup> and they do not suggest another method of resolving mutual exclusivities that are as efficient as auctions. For example, some commenters simply oppose the use of auctions to resolve competing modification applications without suggesting any alternatives,<sup>12</sup> while others suggest procedures that seem time consuming and administratively cumbersome. One commenter recommends the adoption of a point accumulation system to permit the resolution of mutually exclusive modification applications.<sup>13</sup> We do not believe that the development of a new point system for the sole purpose of evaluating a limited number of broadcast major modification applications would be preferable to utilizing the Commission's well-established auction system to resolve mutually

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<sup>10</sup> See *Second Report and Order, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 9 FCC Rcd 2348, 2355 (1994) (hereafter *Second Report and Order*), recon. granted in part, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) (hereafter *Second Memorandum Opinion and Order*).

<sup>11</sup> See Comments of Cox Radio, Inc. at 3 (given rejection by courts of previous comparative hearing criteria, it seems a futile exercise to try to develop in a timely manner new comparative criteria that would withstand judicial scrutiny).

<sup>12</sup> See, e.g., Reply Comments of National Public Radio, Inc., et al. at 7; Comments of Kayo Broadcasting at 1-4.

<sup>13</sup> See Comments of Six Video Broadcast Licensees at 6.

exclusive modification applications. Resolving competing major modification applications on a comparative basis would most likely result in disagreements over criteria to utilize in developing any such new comparative system.<sup>14</sup> Another commenter generally contends that, if modification applications become mutually exclusive, the Commission "staff [should] work with the parties to eliminate [the] mutual exclusivity." If a technical solution cannot be found, then the Commission should allow "the use of alternative dispute resolution techniques or other settlement avenues before considering competitive bidding."<sup>15</sup> This suggestion appears administratively burdensome for the Commission and time consuming for the parties; moreover, if the mutual exclusivity is not resolved by these unidentified alternative dispute resolution techniques, then the use of auctions (or some other method of resolution) would still be required.

17. We recognize, however, that competing major modification applications can often be resolved by changes to the engineering proposals submitted by applicants and may raise special considerations where settlements are particularly appropriate. We will therefore allow applicants who have, under the window filing procedures adopted herein for new and major modification applications, filed either competing major modification applications, or competing major modification and new applications, to resolve their mutual exclusivities by means of engineering solutions or settlements during a limited period after the filing of short-form applications but before the start of the auction.<sup>16</sup> We realize that allowing competing major modification applicants to settle following the filing of short-form applications is not consistent with the terms of the general Part 1 anti-collusion rule, which is triggered by the filing of short-form applications. *See infra* ¶ 155. However, that rule was formulated in the context of geographic area licensing, rather than site-specific licensing as in broadcast where determinations of mutual exclusivity can depend on specific technical proposals, which in some instances may be altered so as to allow the grant of several formerly mutually exclusive applications. We will therefore allow parties with competing major modification applications this limited opportunity to settle or otherwise resolve their mutual exclusivities following submission of their short-form applications, in accordance with our statutory directive "to use engineering solutions . . . and other means" to resolve competing applications. 47 U.S.C. § 309(j)(6)(E). We emphasize that any such settlement agreements must comply with all Commission regulations, and that the Commission will proceed to auction promptly any competing major modification applications that are not resolved by the parties.

18. In the past, we have designated for hearing groups of mutually exclusive broadcast applications involving major modification applications.<sup>17</sup> Given Congress' expressed preference in the

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<sup>14</sup> *See, e.g.*, Comments of Independent Broadcast Consultants, Inc. at 5 (resolve modifications according to "relative merit based on increased population served"); Edward Czelada at 2 (major change applications should be granted "solely on existing public service issues, such as coverage, first service and population").

<sup>15</sup> Comments of the National Association of Broadcasters at 3. This commenter did not specify what "alternative dispute resolution" methods might be utilized.

<sup>16</sup> The precise period for pre-auction settlement of competing modification applications will be specified in the public notice identifying the mutually exclusive applicants who filed in the window.

<sup>17</sup> *See, e.g.*, *Palmetto Communications Co.*, 5 FCC Rcd 5154 (ALJ 1990); *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485 (Rev. Bd. 1984) (cases involving major modification applications resolved on basis of typical comparative criteria, including integration).

Budget Act for competitive bidding as a method of selecting from among competing applicants, we believe that utilizing auctions to resolve competing major modification applications would now be appropriate. Applying competitive bidding procedures to modification applications "comports with our objectives of increasing competition and awarding spectrum to those who value it most highly."<sup>18</sup> Auctions are moreover an efficient method of resolving mutually exclusive applications that should speed the grant of construction permits to competing parties and the improvement or initiation of service to the public. For these reasons, we will apply competitive bidding procedures, as set forth in detail below, to resolve mutual exclusivities among major modification applications and between major modification and initial applications, if the parties are unable to resolve their mutual exclusivities during a limited period, as established by public notice, following the filing of short-form applications.

19. We will not, however, generally subject competing minor modification applications to auction procedures. Given the infrequency with which minor modification applications are mutually exclusive and the less significant changes usually proposed in minor modification applications, we will, as discussed in detail below, encourage parties "to use engineering solutions, negotiation . . . and other means" to resolve any mutual exclusivities. 47 U.S.C. § 309(j)(6)(E). The commenters oppose utilizing auction procedures to resolve competing minor modification applications,<sup>19</sup> and we see less utility to be gained from subjecting minor change applications to competitive bidding procedures. Accordingly, in the rare instances in which minor modification applications become mutually exclusive, the parties will be expected to work together to resolve the mutual exclusivity. *See infra* ¶¶ 177-178. We furthermore note that, particularly if our proposal in another proceeding regarding modifications is ultimately adopted, fewer modifications in the broadcast services will be regarded as "major."<sup>20</sup>

### 3. Statutory Exemption for Noncommercial and Public Broadcast Stations

20. Section 309(j)(2) sets forth three types of spectrum licenses to which our competitive bidding authority does not apply. In addition to licenses for certain public safety radio services and certain digital television stations, we may not use competitive bidding to award licenses for "stations described in section 397(6) of this Act." Section 397(6) of the Communications Act, 47 U.S.C. § 397(6), defines the terms

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<sup>18</sup> *Second Report and Order*, 9 FCC Rcd at 2355 (concluding that "there is merit" in treating major modification applications as akin to initial applications for purposes of competitive bidding, at least in some circumstances).

<sup>19</sup> *See, e.g.*, Comments of Cox Radio, Inc. at 6 (opposing auctioning minor modification applications "under any circumstances").

<sup>20</sup> As several commenters urge in this proceeding, we have proposed in another proceeding to alter the definitions of "major" and "minor" modifications in the AM service and FM translator service, so that fewer modifications in those services are regarded as major. *See* Comments of Cox Radio, Inc. at 6; Jacor Communications, Inc. at 4-5. If this proposal is adopted, then fewer types of modification applications would be subject to auction if mutually exclusive. *See Notice of Proposed Rule Making and Order, 1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, FCC 98-117 at ¶¶ 48-50 (rel. June 15, 1998) (*Technical Streamlining Notice*). Virtually all modifications in the FM and television services are, under our current rules, already regarded as minor.

"noncommercial educational broadcast station" and "public broadcast station."<sup>21</sup> To effectuate this exemption, we proposed in the *Notice*, 12 FCC Rcd at 22383 (¶ 50), that such nonprofit applicants would be exempt from competitive bidding when they applied to use reserved broadcast channels, for which applicants must be noncommercial educational entities. Auctions would be used for nonreserved frequencies, however, where applicants may be either commercial or noncommercial educational entities. We stated that we would treat nonprofit applicants for commercial frequencies, including those who could qualify under 47 C.F.R. § 73.503 as non-profit educational organizations, no differently under the proposed filing and competitive bidding procedures than any other mutually exclusive applicant for commercial frequencies.

21. *Discussion.* Under current Commission regulations, certain television channels and FM frequencies are reserved solely for noncommercial educational use. Nonreserved broadcast channels are usually called "commercial." Currently, noncommercial educational applicants may apply for commercial channels under the same application procedures as commercial applicants. Upon establishment of their qualifications under Sections 73.503 or 73.621, the stations are licensed as noncommercial stations. Because of this dichotomy and as the comments we received in response to the *Notice* made clear, applying the exemption set forth in Section 309(j)(2)(C) in situations where one or more of the mutually exclusive applicants for a broadcast license on a commercial frequency seeks to establish a noncommercial broadcast station is not a simple matter.

22. A number of commenters, including noncommercial educational broadcasters, note that Section 309(j)(2)(C) explicitly provides that the Commission's auction authority does not apply to licenses issued "for stations described in section 397(6)" and that Section 397(6) of the Act, which defines noncommercial educational and public stations, is not expressly limited to stations operating on reserved frequencies. Accordingly, they urge that mutually exclusive applications filed by noncommercial educational or public broadcast entities are exempt from competitive bidding, regardless of whether the frequency applied for is reserved or whether there are also commercial applicants for that frequency.<sup>22</sup>

23. Other commenters oppose this approach. They contend that licenses or construction permits are "issued by the Commission - for stations described in section 397(6)" only in those circumstances where the Commission knows in advance that the ultimate licensee will be a noncommercial educational or public entity. Thus, they would argue, only in situations where by definition the license will be issued

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<sup>21</sup> This provision specifies that "[t]he[se] terms . . . mean a television or radio broadcast station which --  
(A) under the rules and regulations of the Commission in effect on the effective date of this paragraph, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or  
(B) is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes.

<sup>22</sup> See, e.g., Comments of Noncommercial Educational Broadcast Licensees at 3-4; National Public Radio, Inc., *et al.* at 5-6; Board of Education of the City of Atlanta, *et al.* at 3-4; Association of America's Public Television Stations at 5-6; Beacon Broadcasting, Inc. at 2.

to an entity described in Section 397(6), *i.e.*, a reserved frequency is involved, are auctions prohibited.<sup>23</sup> These commenters point out that substantial complexities are raised by interpreting the competitive bidding exemption for noncommercial educational broadcasters to include such broadcasters when applying for commercial channels. For example, if ten commercial entities and one noncommercial entity apply for a nonreserved frequency and if auctions may not be used to resolve the mutual exclusivity because of the presence of the single noncommercial applicant, it is not clear what equities and public policies would govern the procedure to be used to choose among the applicants.

24. We do not believe that we have received sufficiently focused comment to finally resolve the noncommercial issue in this proceeding. While the exemption in Section 309(j)(2)(C) for noncommercial educational broadcasters clearly precludes us from using competitive bidding to award broadcast station licenses on the reserved noncommercial frequencies, there are difficult issues as to how we should apply the provision when licensing frequencies in the commercial band. Different interpretations of the congressional intent of Section 309(j)(2)(C) and its consequences can be made in the context of our allocation and licensing practices. One possible approach would be to prohibit the use of auctions whenever one or more of the competing applicants for a nonreserved channel is a Section 397(6) entity. Another possible approach would be to conclude that frequencies in the commercial band could not be used for noncommercial stations. Yet another option could be to adopt some form of hybrid procedure involving both lotteries and auctions when noncommercial and commercial applicants compete for commercial channels.<sup>24</sup>

25. We did not focus on the complicated nature of this issue in our *Notice* in this proceeding. As a result, we believe that our decision would be aided by a further round of comment. For example, a related question is whether the Commission should modify its standards that allow noncommercial entities to seek to reclassify commercial frequencies as noncommercial.<sup>25</sup> We intend to further develop all possible options for resolving this question and seek further comment in the outstanding rulemaking proceeding (MM Docket No. 95-31) regarding the reexamination of the comparative standards for noncommercial educational applicants. Thus, we will not proceed to auction at this time any cases where both noncommercial and commercial applicants have filed competing applications for nonreserved channels. We will resolve these cases following the release of a report and order in our noncommercial proceeding, MM Docket No. 95-31, although prior to resolution by the Commission, the pending applicants involved in such cases may of course agree to a settlement that complies with all Commission regulations. *See infra* ¶¶ 76-77. In ultimately resolving this question of awarding licenses to noncommercial applicants applying for commercial channels, our goal will be to maximize participation

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<sup>23</sup> See Reply Comments of Jacor Communications, Inc. at 3-6; Lakefront Communications, Inc. at 2-6. The comments of JTL Communications Corporation (at 3) also support the Commission's proposal in ¶ 50 of the *Notice*, arguing that nonprofit applicants should compete in the market like other applicants and that nonprofit applicants were not necessarily faced with the same financial handicaps as small or minority-owned businesses.

<sup>24</sup> The Commission has the authority to award licenses for stations described in Section 397(6) by lottery. *See* 47 U.S.C. § 309(i) as amended by Budget Act.

<sup>25</sup> Under our existing procedures, we grant requests by applicants to reserve for noncommercial educational use FM channels located outside the reserved band, only if channels in the reserved band are not available because of foreign allocations (Canadian or Mexican) or potential interference to operations on VHF television Channel 6. *See, e.g., Lindsay, West Virginia*, 2 FCC Rcd 6046 (Alloc. Br. 1987).

of noncommercial broadcast entities consistent with the statute.

## **B. Resolution of Comparative Initial Licensing Cases Involving Applications Filed Before July 1, 1997**

### **1. Discretion to Use Auctions in Pending Cases**

26. As noted above, Section 309(l) expressly governs the resolution of pending mutually exclusive applications for new commercial radio and television stations filed before July 1, 1997. We tentatively concluded in the *Notice* that this provision accords us the discretion to decide such cases either by a competitive bidding proceeding or through the comparative hearing process. In this regard, we relied on statutory language providing that "the Commission shall . . . have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) to assign such license or permit." We noted, however, that the Conference Report contradicted this reading of the provision in that it states that the section "*requires* the Commission to use competitive bidding to resolve any mutually exclusive applications" filed "prior to July 1, 1997."<sup>26</sup> We asked for comments on whether the statute could be read to require that these pending pre-July 1, 1997 applications must be resolved by competitive bidding procedures.

27. *Discussion.* We continue to believe that we have discretion to resolve comparative licensing proceedings that involve pre-July 1, 1997 applications for new commercial radio and television stations by either competitive bidding procedures or through the comparative hearing process. The vast majority of commenters either support our tentative reading of the statute or acknowledge without addressing the issue that we have statutory authority to use comparative hearings for these cases.<sup>27</sup> We disagree with commenters that either the absence of an express reference to the pre-July 1, 1997 applications in the Section 309(j)(2) exemptions, or the indication in the legislative history accompanying Section 309(l) that auctions are "required," compels a conclusion that auctions are required.<sup>28</sup>

28. The explicit language of Section 309(l)(1) provides that the Commission "shall have the authority to conduct a competitive bidding proceeding," in contrast to the mandatory language of Section 309(j)(1) providing that "the Commission shall grant the license . . . through a system of competitive bidding." The language of Section 309(l), we believe, unambiguously addresses a situation in which auctions are permissible, but are not required. There was thus no reason for Congress to exempt these applications from the Commission's auction authority in Section 309(j)(2) unless Congress meant, in contrast to the permissive language of Section 309(l)(1), to prohibit use of auctions to resolve such applications.

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<sup>26</sup> Conference Report at 573 (emphasis added).

<sup>27</sup> See, e.g., Comments of KM Communications, Inc. at 2; Columbia FM Limited Partnership at 2; Stephen M. Cilurzo, attaching Letter dated October 17, 1997 from Senator John McCain, Chairman, Committee of Commerce, Science, and Transportation to Stephen Cilurzo ("Section 3002 of Title III authorizes the Federal Communications Commission (FCC) to select permittees for radio and television. The authority to use auctions is permissive, not mandatory." ).

<sup>28</sup> See, e.g., Comments of Thomas M. Eells at 1-2; Liberty Productions, LP at 2-3; Willsyr Communications, LP at 16; Reply Comments of Irene Rodriguez Diaz de McComas at 3.

29. Some commenters urge that the absence of language in Section 309(l) affirmatively stating that the Commission may use comparative hearings to resolve these cases signifies that auctions are mandatory rather than permissive.<sup>29</sup> We disagree. Until enactment of the Budget Act, the Commission had disposed of such initial license applications exclusively through the comparative hearing process. Thus, in interpreting Section 309(l), we attach little significance, for example, to Section 3002(a)(2) of the Budget Act, which repeals our lottery authority. Given the Commission's exclusive use of comparative hearings to resolve competing applications to provide full power radio and television service, Congress had no reason to provide statutory language affirming the Commission's existing authority to resolve this group of pending cases through the comparative hearing process. By contrast, it had every reason to provide explicit language prohibiting such resolution, if this was what it meant to do.

30. It is a well-established principle of statutory construction that when congressional intent, as reflected in the statutory language, is clear "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1985). Here, the plain language of Section 309(l)(1) raises no question that justifies resort to the legislative history for clarification as to the proper interpretation. Nor can the statement in the legislative history that auctions are "required" for these cases override the plain language of the statute, which does not impose such a requirement but merely affords the Commission authority to use auctions.<sup>30</sup> We also note that a contrary interpretation would render Section 309(l)(1) superfluous, inasmuch as Section 309(j)(1) already provides authority to use auctions in these cases. This provides additional support, consistent with the statute's express language, that in Section 309(l)(1) Congress intended to single out these pending cases for different treatment, by affording the Commission discretion to determine whether the use of auctions would be appropriate. For these reasons, we conclude that our auction authority for the pre-July 1, 1997 applications is permissive rather than mandatory, and that we have authority to resolve these applications through the comparative hearing process.

## 2. Public Interest Considerations Favoring Resolution by Competitive Bidding

31. In this section we address the general issue of whether to use a system of competitive bidding to resolve mutual exclusivity among any of the pre-July 1, 1997 applications subject to Section 309(l). Special circumstances relating to certain frozen hearing cases, and particularly whether equitable considerations warrant a different approach in those cases, are discussed in Section III(B)(3) below.

32. In the *Notice*, 12 FCC Rcd at 22369-72 (¶¶ 14-19), we tentatively concluded that resolving the pending comparative licensing cases subject to Section 309(l) through a system of competitive bidding would serve the public interest. At the outset, we noted our statutory authority to alter our process for choosing among license applications and to apply amended processing rules to pending applications. We observed that the vast majority of pending applicants, having filed after *Bechtel II* and the imposition of

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<sup>29</sup> See, e.g., Comments of Liberty Productions, LP at 2-3.

<sup>30</sup> See, e.g., *United Air Lines, Inc. v. CAB*, 569 F.2d 640, 647 (D.C. Cir.1977) ("We find no mandate in logic or in case law for reliance on legislative history to reach a result *contrary* to the plain meaning of a statute . . .") (emphasis in original). See also *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) ("It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'") (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978) (same, citing other cases).

the comparative freeze, were unlikely to have relied on any particular selection criteria. *Id.* at 22370 (¶ 15). And, as to those pending applicants filing before *Bechtel*, we noted that the court's invalidation of the integration criterion precluded us from deciding cases according to applicants' reasonable expectations when they filed. In these circumstances, we tentatively concluded that resolving the pending cases by auction was not unfair even for these applicants.

33. We also cited our continuing concern with the potential delay, administrative costs, and uncertainty associated with comparative hearings and the relative advantages of auctions in terms of expediting service to the public in a more cost-effective manner, allocating the spectrum to the applicant valuing it the most, and recovering for the public a portion of the value of spectrum made available for commercial use. We sought comments on our tentative conclusion that generally resolving these competing pre-July 1, 1997 applications through a system of competitive bidding would better serve the public interest than resolving them through the comparative hearing process. In this context, we also proposed to refund, upon request, all hearing fees paid in cases in which we ultimately use competitive bidding procedures to select the winner, as well as filing fees actually paid by applicants declining to participate in the auction.

34. *Discussion.* We continue to believe that auctions will generally be fairer and more expeditious than deciding the pending mutually exclusive applications filed before July 1, 1997 through the comparative hearing process. We conclude that auctions will generally expedite service and better serve the public interest in these cases. Based upon our long experience with the comparative process, we believe that once the competitive bidding procedures, as well as any special processing rules for these pending comparative cases are in place, auctions will result in a more expeditious resolution of each particular case, thereby expediting the initiation of new broadcast service to the public. In this regard, we note that, despite the 180-day period during which we waived our settlement rules as required by Section 309(l)(3), there are approximately 150 proceedings involving more than 600 pre-July 1, 1997 mutually exclusive applications that remain to be decided.<sup>31</sup>

35. Commenters are also correct that holding an auction in these cases will not eliminate possible litigation over the basic qualifications of the winning bidder. We note, however, that the Communications Act authorizes the Commission to prescribe expedited procedures for the resolution of issues concerning the qualifications of winning bidders. *See* 47 U.S.C. § 309(j)(5). We adopt such procedures below. *See* Section III(C). Based on our experience with the hearing process, moreover, we believe that any possible delay caused by such litigation would still be significantly less than what we might reasonably expect if we were to resolve these cases through the comparative hearing process.

36. In this regard, we have long noted the potential for delay inherent in the adjudicatory nature of the comparative process. In connection with a rulemaking initiated in 1989 to explore the possibility

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<sup>31</sup> As of the deadline for filing settlements executed within 180 days after enactment of the Budget Act, settlement agreements had been filed in approximately 225 cases and approximately 150 cases remained to be resolved. Of these approximately 150 cases for which settlement agreements were not filed during the 180-day period, approximately 20 involve noncommercial and commercial applicants competing for nonreserved channels; as described above, resolution of these cases will be addressed in our noncommercial proceeding, MM Docket 95-31. Of the remaining 130 cases involving solely commercial applicants, fewer than ten cases have progressed at least through an Initial Decision by an Administrative Law Judge, and the rest have not been designated for hearing. These numbers could be higher if some pending settlements are not approved.

of using lotteries to award initial broadcast licenses, for example, we estimated that a routine comparative proceeding can take from three to five years or more to complete after designation of the mutually exclusive applications for hearing, and that complex cases may take much more time.<sup>32</sup> More recently in *Orion Communications Limited v. FCC*, 131 F.3d 176, 180 (D.C. Cir. 1997), the court recognized that repetitious appeals may prolong proceedings for years even after the Commission's decision.

37. Here, the potential for delay is also increased by the court's decision in *Bechtel II* invalidating our central comparative criterion, integration of ownership and management, and the resulting freeze on the processing and adjudication of comparative proceedings in effect since February 1994. The commenters are divided over the ease by which the Commission may resolve the standard comparative issue if it elects not to use auctions to resolve the frozen *Bechtel* cases, and the extent to which *Bechtel II* permits us to modify the existing comparative criteria. But none dispute our assertion in the *Notice*, 12 FCC Rcd at 22366-67 (¶ 5), that the integration criterion has been crucial in recent comparative cases, or urge that we decide these cases without regard to the court's express holding in *Bechtel II*, 10 F.3d at 878, that "continued application of the integration preference is arbitrary and capricious, and therefore unlawful." Moreover, we note many other relevant factors (e.g., local residence, civic participation, past broadcast experience) were "enhancements" of the integration criterion. Determining which of these criteria could best survive *Bechtel II*-type scrutiny and determining how such criteria should now be weighted is a difficult process that no doubt would lead to serious challenges in the courts with the outcome unclear.<sup>33</sup> Indeed, there is wide disparity in the record as to what the best approach would be.<sup>34</sup>

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<sup>32</sup> See *Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM, and Television Stations By Random Selection*, 4 FCC Rcd 2256, 2257 (1989), cataloguing various factors contributing to this delay, including the heavy use by comparative broadcast applicants of motions to enlarge issues; complex and intricate discovery procedures that materially add to the cost and length of comparative proceedings; lengthy hearings that may involve numerous witness and hearing exhibits; the 30-90 day time period for filing findings with the Administrative Law Judge; the approximately six-month period that it takes the Administrative Law Judge to issue his opinion; and the time for any administrative or judicial appeals.

<sup>33</sup> See *Bechtel II*, 10 F.3d at 886-87 ("[T]he ability to pick persons and firms who will be 'successful' at delivering any kind of service is a rare one, however success might be defined . . . . [I]f success could be captured in a formula, the skill of identifying future successes would not be so scarce and well rewarded. Any sort of recipe that could be discerned would necessarily abstract criteria from a complex web of facts . . . . All these difficulties flow from the statutory scheme itself.").

<sup>34</sup> See, e.g., Comments of Cromwell Group, Inc. at 2 (rely on factors including local ownership and management, local residence, satisfactory technical proposal that will serve the most people, financial ability to operate for one year, and preferences for the applicant that proposed the frequency and filed earlier); United Broadcasters Co. at 5-8 (rely on comparative coverage, broadcast experience, and diversification); Rio Grande Broadcasting Co. at 5 (just exclude integration); John W. Barger at 3 (just exclude integration); Stephen M. Cilurzo at 6-8 (use an equally weighted point system including broadcast experience (enhanced by the length of experience, the areas of expertise and how they relate to the overall success of a new start up broadcast system), past local residence (enhanced by civic involvement, daytime [sic] preference, and best practical [sic] service, but remand the case to the ALJ if this changes the outcome); J. McCarthy Miller & Biltmore Forest Broadcasting FM, Inc. at 8-10 (decide all cases within 90 days based only on broadcast experience enhanced if in the service area, length of experience, and ownership share); Orion Communications Limited at Exhibit 1 (rely on enhancement factors (broadcast experience, broadcast record, local residence in the proposed service area, civic participation of parties in proportion to their equity interests without regard to minority or female ownership), efficient use of the frequency, and diversification); Susan M. Bechtel at 8-10 (exclude integration, female ownership and minority ownership); J&M

The value of developing a revised comparative system (and expending the associated administrative costs) is further attenuated by the fact that it would only be used for these pending cases (and potentially also a very small number of comparative renewal cases) and would have no future applicability. Thus, we conclude that using a system of competitive bidding rather than the comparative hearing process for competing pre-July 1, 1997 applications that are subject to Section 309(l) will avoid the difficulties and potential delays of developing and defending new or modified comparative criteria to apply in the cases that did not settle during the 180-day period that ended February 1, 1998.

38. Moreover, we are acutely aware of the delay already occasioned in all of the frozen *Bechtel* cases. Section 309(j)(3) provides that "[i]n identifying classes of licenses and permits to be issued by competitive bidding," the Commission shall seek to promote "(A) the development and *rapid* deployment of new technologies . . . for the benefit of the public . . . without administrative or judicial delays." (emphasis added.) As a more general matter, expedited service to the public is an important public interest consideration. We estimate that it would take many years for the Commission's administrative law judges to adjudicate and decide well over 100 cases. Auctions can be carried out much more quickly. And, whatever the cause of past delay in resolving these cases,<sup>35</sup> we believe that minimizing further delay and now providing new service to the public as quickly as possible best serves the public interest.

39. Some commenters favoring the use of comparative hearings for these pending cases express concern that the switch to auctions will detrimentally affect the quality of broadcast service. They focus particularly on the impact that auctions will allegedly have in terms of securing service that is narrowly tailored to the needs of the small, local community.<sup>36</sup> As to these more general policy concerns, however, Congress itself has made the judgment that auctions are generally preferable to comparative hearings by requiring them for commercial broadcast applications filed on or after July 1, 1997. In giving us discretion to determine whether or not to use auctions in pending cases, we believe Congress intended us to focus on any special circumstances in these cases that would tip the policy balance in favor of comparative hearings, not to re-visit the general congressional determination that broadcast auctions serve the public interest. In any event, it is far from clear that a licensee that wins its license in an auction has less incentive to serve the needs and interests of the community than one who wins in a comparative hearing.<sup>37</sup>

40. Moreover, auctions will have significant public interest benefits. In a 1997 report to Congress, we indicated that our experience with auctions shows that competitive bidding is a more efficient and cost-effective method of assigning spectrum in cases of mutual exclusivity than any

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Broadcasting Co., Inc. at 6-8 (comparative coverage, past broadcast record, and meaningful civic participation); Heidelberg-Stone Broadcasting Co. at 5 (just take out integration; *Bechtel* does not authorize any modification of the other criteria); Williams Broadcasting Co. at 4 (rely on diversification).

<sup>35</sup> See, e.g., Comments of Orion Communications Limited at 6.

<sup>36</sup> See, e.g., Comments of Wolfgang V. Kurtz at 1-2; Cromwell Group, Inc. at 1-2.

<sup>37</sup> Cf. *Bechtel II*, 10 F.3d at 884 ("absentee owners thus have strong incentives to ensure that their station complies with the relevant statutes and rules").

previously employed method, including comparative hearings.<sup>38</sup> And, as we stated in the *Notice*, 12 FCC Rcd at 22371 (¶ 18), we have relied on the relative advantages of auctions -- which also include the public interest benefits of encouraging the efficient use of the frequency, assigning the frequency to the eligible party that values it the most and recovering for the public a portion of the value of spectrum made available for commercial use -- in other contexts in which we have faced a choice of either using comparative hearings or a system of competitive bidding to resolve mutual exclusivity among license applicants. We believe many of these same benefits will apply in this context.

41. We continue to believe, moreover, that there is no inherent unfairness in using auctions to resolve mutual exclusivity among these pre-July 1, 1997 applications. Commenters are correct that all of these applicants, including those not designated for hearing, filed in response to public notices stating that mutual exclusivity would be resolved by the comparative hearing process.<sup>39</sup> Most, however, filed after *Bechtel II* and the institution of the comparative freeze, which made it clear that some change in the existing comparative criteria was inevitable. While possibly filing with the expectation of participating in a comparative hearing, these applicants clearly had no basis to rely on a particular selection scheme. And, as to those that filed before *Bechtel II*, the court's holding in that case legally precludes us from deciding their pending applications in accordance with their reasonable expectations when they filed their applications.

42. Additionally, it is by no means certain that an applicant that formulated its comparative proposal based on the criteria in effect before *Bechtel II* will have a better chance of prevailing in a comparative hearing than in an auction. This uncertainty, moreover, is unaffected by the strength of its comparative proposal under the pre-*Bechtel II* criteria. The difficulty is that integration, although one of several factors used to predict which applicant will offer the best service, was nevertheless a crucial element of the comparative scheme before *Bechtel II*. Specifically, quantitative integration (*i.e.*, the extent to which the owners would manage the station on a day-to-day full time basis) determines the credit awarded for a variety of qualitative enhancement factors, such as local residence, civic participation, broadcast experience, past broadcast record and minority ownership. Elimination of this criterion, even if all other criteria are retained, may therefore have a profound, largely unpredictable impact on all comparative proposals. Given the pivotal role assigned to quantitative integration and particularly its potential to diminish or nullify all credit for a multiplicity of possible enhancement factors, we cannot predict how an applicant will fare under such a modified comparative system. Nor can we replicate the remaining standards existing before *Bechtel II* in a manner that would preserve the applicants' relative comparative standing prior to *Bechtel II*.

43. And, although the switch to auctions requires that pending applicants spend additional funds to participate in the auction, the statute requires that such auctions be limited to the pending applicants. *See* Section 309(1)(2), 47 U.S.C. § 309(1)(2). This insulates them from having to bid against applicants not previously incurring costs to secure the license and ensures that these previous expenditures will not unfairly disadvantage the pending applicants in the auction. In all likelihood, the amounts bid for the licenses in these cases will reflect the significant amounts already expended by *all* qualified bidders. In these circumstances, and particularly given that we may not lawfully consider the integration criterion after

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<sup>38</sup> *The FCC Report to Congress on Spectrum Auctions*, 13 FCC Rcd 9601, 9612 (1997).

<sup>39</sup> *See, e.g.*, Comments of Stephen M. Cilurzo at 2-3; Rio Grande Broadcasting Co. at 3; Heidelberg-Stone Broadcasting Co. at 3.

*Bechtel II*, we believe that deciding the competing pre-July 1, 1997 applications by auction entails no inherent unfairness to any of these applicants, including those that had filed their applications before the *Bechtel II* decision.

44. We disagree with commenters that changing the selection process for pending applications filed before July 1, 1997 is impermissibly retroactive or otherwise unlawful.<sup>40</sup> As we indicated in the *Notice*, 12 FCC Rcd at 22369-70 (¶ 14), our statutory authority to alter the way we process applications and to apply the amended processing rules to pending applications is well established. The seminal case is *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956), where the Supreme Court upheld the dismissal without a hearing of an application based on a rule adopted after the application was filed. Following *Storer*, the courts have consistently recognized that filing an application creates no vested right to a hearing, and that an application may be dismissed if the substantive standards subsequently change.<sup>41</sup> The pre-July 1, 1997 applicants, whether their applications are pending on the processing line or have been designated for hearing, have no vested right to a comparative hearing that is abridged by our decision to award such authorizations by a system of competitive bidding. Thus, resolving these cases by auction is not a retroactive rule and is not unlawful under *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), because this does not "impair rights a party possessed when [it] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."<sup>42</sup> Nor is Section 309(l) retroactive "merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269.

45. Rather, our authority to resolve these cases by auction rather than by comparative hearing depends upon whether that decision is arbitrary and capricious. In this regard, we note that the Commission was upheld in its previous determination to decide by lottery cellular applications that had been filed with the expectation that mutual exclusivity would be decided by comparative hearing. See *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987). There, as here, legislation afforded the Commission an alternative to deciding mutually exclusive license applications through the

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<sup>40</sup> See, e.g., Comments of Susan M. Bechtel at 6-8; Lindsay Television, Inc. at 8-10; Throckmorton Broadcasting, Inc. at 3-4.

<sup>41</sup> See, e.g., *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997) (permittee had no vested right in a particular outcome of its extension request that was abridged when the Commission dismissed that request pursuant to a subsequent, more restrictive rule); *Hispanic Information & Telecommunications Network v. FCC*, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989), citing *Storer Broadcasting*, 351 U.S. at 197 (upholding the dismissal without a comparative hearing of an application for an Instructional Television Fixed Service license pursuant to a subsequently adopted rule establishing a one year period during which local ITFS applicants had absolute priority over nonlocal applicants). See also *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309 (D.C. Cir. 1995) (permissible for the Commission in a notice-and-comment rulemaking to make technical changes in the definition of the service areas applicable to all existing licensees).

<sup>42</sup> *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). See also *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (FCC's explicit policy to allocate surrendered direct broadcast satellite (DBS) channels to existing licensees did not create a right that was retroactively abridged under *Landgraf* when the Commission decided that allocating them through competitive bidding would better serve the public interest); *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997) (denial of a request for an extension of time to construct based on a subsequent, more restrictive rule is not retroactive under *Landgraf* because the rule in effect when the permittee sought an extension did not establish a "right" to a given outcome).

comparative hearing process. Moreover, in contrast to this situation, there was no legal impediment to the Commission resolving the pending cellular applications according to the applicants' original expectations. Nevertheless, the court in *Maxcell*, after evaluating the impact of the regulatory change on pending applicants, concluded that the Commission's overriding concern with the efficient processing of cellular applications fully justified the Commission's decision to use lotteries rather than comparative hearings to decide pending applications. Similar considerations justify our decision to use auctions here.

46. We disagree with commenters that *Maxcell* is distinguishable either because none of the pre-July 1st applicants had notice of a possible regulatory change, or because the switch to auctions requires that such applicants make additional expenditures to pursue their bid for licenses.<sup>43</sup> As noted above, as a result of *Bechtel II*, whatever the Commission decides regarding the pending frozen cases, the process will be different than when the pre-*Bechtel II* applications were filed. And the post-*Bechtel II* applicants were on notice that whatever system we adopted would have to be different from the integration-centered system struck down in *Bechtel II*. Moreover, as noted above, any adverse financial impact of having to participate in an auction is mitigated somewhat by the statutory requirement that any auction to decide these cases be limited to the pending applicants for a particular license. Thus, using auctions to resolve the pre-July 1st applications is not arbitrary and capricious or impermissibly retroactive. And, from a public interest standpoint, we believe that, on balance, any adverse financial or equitable impact on the pending applicants is overcome by the strong public interest in the public receiving new broadcast service as quickly as possible and other benefits of auctions, particularly given the legal impossibility of deciding any of these cases based on the comparative criteria in effect before *Bechtel II*.

47. Finally, neither the statute nor our proposed implementation of the statute involves a denial of equal protection or the taking of property without due process under the Fifth Amendment, as argued by some commenters.<sup>44</sup> Pursuant to Section 309(I)(2), only persons filing applications before July 1, 1997 will be allowed to participate in the auction. No equal protection issue ever arises because the law applies equally to these pending applicants, none of which knew when they filed their applications that mutual exclusivity would be resolved by auction. No other persons will be qualified to participate in auctions involving applicants in the frozen *Bechtel* cases. Moreover, the shift to auctions is supported by strong public interest reasons.

48. We also disagree with commenters that there is a violation of due process because applicants who have expended considerable sums to prepare, and in some instances prosecute, their applications through the comparative hearing process now face the prospect, by virtue of an unforeseeable regulatory change, of either abandoning their considerable investment or spending additional funds to participate in an auction.<sup>45</sup> As indicated above, whatever the expectations of these applicants, they had no vested interest in having their applications decided by a comparative hearing, and the impact of this regulatory change is ameliorated somewhat by the statutory requirement that auctions to decide these cases be closed to other participants. In these circumstances, a decision to resolve the pending applications through a

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<sup>43</sup> See Comments of Susan M. Bechtel at 6-7; Lindsay Television, Inc. at 8-9.

<sup>44</sup> See Comments of Susan M. Bechtel at 3-4; Lindsay Television, Inc. at 6-7; Willsyr Communications, LP at 30-31 (Equal Protection, Due Process and Fifth Amendment). Comments of Lauren A. Colby at 2 (Fifth Amendment Taking and Due Process). Comments of Throckmorton Broadcasting, Inc. at 1-2 (Due Process).

<sup>45</sup> See, e.g., Comments of Lauren A. Colby at 2-3; Susan M. Bechtel at 4; Lindsay Television, Inc. at 6.

system of competitive bidding pursuant to subsequent legislation expressly authorizing such resolution thus does not deprive them of due process.

49. The statute is also not a taking of property without just compensation in violation of the Fifth Amendment. The payment of regulatory fees, in this case hearing and filing fees, does not constitute a taking under the Fifth Amendment regardless of whether such fees accurately reflect the cost to the Commission of processing the applications in question.<sup>46</sup> And, in any event, as proposed in the *Notice*, 12 FCC Rcd at 22370-71 (¶ 16), we will refund upon request all hearing fees actually paid by applicants in proceedings in which the construction permit is awarded by auction rather than by comparative hearing, and all filing fees paid by pre-July 1, 1997 applicants within the scope of Section 309(l) who elect not to participate in the auction.

50. We decline the suggestion of various commenters that we go further and reimburse the legitimate and prudent expenses of applicants who either do not participate in the auction or are outbid in the auction.<sup>47</sup> As indicated above, whatever the expectations of these applicants, they had no vested interest in having their applications decided by a comparative hearing, and the impact of this change is ameliorated somewhat by the statutory requirement that auctions to decide these cases be closed to other participants. In these circumstances, a decision to resolve the pending applications instead through a system of competitive bidding, pursuant to subsequent legislation expressly authorizing such resolution, does not, as some have argued,<sup>48</sup> deprive them of due process or constitute a taking without just compensation. Courts have, as commenters note, allowed compensation for losses incurred as a result of an unanticipated regulatory shift,<sup>49</sup> but they have done so only pursuant to a contract in which the government expressly agreed to indemnify private parties against the risk of such a regulatory shift.<sup>50</sup> Thus, even assuming *arguendo*, that we had the legal authority to reimburse these applicants,<sup>51</sup> we have no obligation to reimburse the pending applicants' expenses in prosecuting applications filed with the expectation of participating in a comparative hearing, and we decline to do so.

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<sup>46</sup> *Longshore v. United States*, 77 F.3d 440 (Fed. Cir.), *cert denied*, 117 S.Ct. 52 (1996) (rejecting claim of disappointed cellular applicant that application fee levied by Congress constituted an unlawful taking of property under the Fifth Amendment because it exceeded the Commission's processing costs).

<sup>47</sup> See, e.g., Comments of United Broadcasters Company at 10; Rio Grande Broadcasting Co. at 8-9; Marri Broadcasting, LP at 4-5; Dewey Matthew Runnels at 4-5; Howard G. Bill at 4-5; Heidelberg-Stone Broadcasting Co. at 8-9; Grass Roots Radio, Inc. at 2-3; Willsyr Communications, LP at 32-33; Roy F. Perkins, Jr. at 1-2; Liberty Productions, LP at 3-4; Columbia FM Limited Partnership at 7

<sup>48</sup> See, e.g., Comments of Lauren A. Colby at 2-3; Susan M. Bechtel at 4; Lindsay Television, Inc. at 6.

<sup>49</sup> See, e.g., Comments of Willsyr Communications, LP at 32-33; Lauren A. Colby at 2.

<sup>50</sup> In *United States v. Winstar Corp.*, 116 S.Ct. 2432 (1996), several financial institutions sued a federal regulatory agency when congressional legislation precluded the agency from honoring a contractual promise regarding accounting practices and this change resulted in the closure of the institutions. Recovery was permitted because of an express contractual promise, in which the government agreed to indemnify the thrift institutions against financial loss as a result of a regulatory change.

<sup>51</sup> These commenters do not suggest any legal authority through which we could make such payments and we are aware of none.

### 3. Treatment of Pending Hearing Cases

51. In the *Notice*, 12 FCC Rcd at 22372 (¶ 22), we sought comment on whether, even if we decide to use competitive bidding procedures for most cases involving pre-July 1, 1997 applications, we should nevertheless use comparative hearings for the approximately 20 cases that had progressed at least through an Initial Decision by an Administrative Law Judge before the court held in *Bechtel II* that the principal criterion previously used by the Commission to predict which applicant would offer the best service (integration) was unlawful. In this context, we asked for comment on whether the resources these applicants have expended, as well as the delays they have experienced, raise special equitable concerns that should lead us to resolve this group of cases through the comparative process. Following the expiration of the 180-day waiver period for settlements prescribed by Section 309(1)(3) and discussed in Section III(C)(1) below, fewer than ten hearing cases in which the applications have progressed at least through an Initial Decision by an Administrative Law Judge remain for resolution either through a system of competitive bidding or the comparative hearing process.<sup>52</sup>

52. *Discussion.* We agree with those commenters who argue that, even for the small number of cases that have progressed at least through an Initial Decision, auctions better serve the public interest than comparative hearings.<sup>53</sup> We recognize that these applicants have spent considerable time and money prosecuting their applications before *Bechtel II*, and that as a result of that decision, our consideration of its implications, and congressional consideration and enactment of auction legislation, they have experienced significant delays in obtaining a final decision as to the selection of the licensee.<sup>54</sup> These circumstances, however, do not outweigh the additional delays, uncertainty and administrative costs that would be incurred by resolving these cases through the comparative hearing process and which led us to decide to resolve pending cases through auction. See *supra* discussion at ¶¶ 34-43.

53. We disagree with those commenters who argue that these cases, which have already progressed at least through an Initial Decision, can be expeditiously resolved through the hearing process and that it would be arbitrary and capricious to ignore the results of the prior hearing.<sup>55</sup> Despite the compilation of a hearing record in these cases, we anticipate that their resolution through the hearing process will not be expeditious, and that auctions for these cases will much more likely expedite service to the public. Our experience with the hearing process gives us reason to believe that these cases will

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<sup>52</sup> The number could be somewhat larger if not all pending settlements are approved.

<sup>53</sup> See, e.g., Comments of Columbia FM Limited Partnership at 6; KM Communications, Inc. at 2; Reply Comments of WB Television Network at 6-7; Irene Rodriguez Diaz de McComas at 3-4.

<sup>54</sup> For these reasons, some commenters urge that we use the comparative hearing process to resolve these cases. See, e.g., Comments of J&M Broadcasting Co., Inc. at 3; Orion Communications Limited at 1-3; Heidelberg-Stone Broadcasting Co. at 6-8; United Broadcasters Company at 9; Rio Grande Broadcasting Co. at 7; Stephen M. Cilurzo at 4-6 (also cites mental anguish and stress as equitable factors); Lisa M. Harris at 7-8; Breeze Broadcasting Co., Ltd. at 3-4; Reply Comments of Galaxy Communications, Inc. at 2; Letter of Anchor Broadcasting Limited Partnership at 3.

<sup>55</sup> See, e.g., Comments of Lisa M. Harris at 7-8; Breeze Broadcasting Co., Ltd. at 3-4.

likely involve significant litigation over points of questionable public interest significance.<sup>56</sup>

54. This is particularly true because the key comparative criterion -- integration -- will no longer exist and the Commission would be required to articulate a revised comparative criteria system. To the extent that new criteria would be adopted, as some commenters urge,<sup>57</sup> we would need to allow an opportunity for applicants to supplement the record. In the event factual disputes were to arise with respect to such supplemental filings (which they almost certainly would), and perhaps in any event, supplemental hearings and supplemental Initial Decisions would be required. If the Commission simply used the remaining criteria and qualitative enhancements (with the qualitative enhancements considered as stand-alone comparative criteria), and articulated a clear new weighting system, supplemental hearings and supplemental Initial Decisions might be avoidable. But we would still need to allow supplemental pleadings for applicants to evaluate themselves and the other applicants under the revised comparative system. We are confident every applicant would argue it should win and the competing applicants should lose, and that they would press their views vigorously. Even assuming that all of this could be decided directly by the Commission without a remand to the ALJ in every case, this process would be time-consuming. Thus, while it would not take as much time as those cases that have not been designated for hearing, we believe it would be far more time-consuming than if we held auctions.

55. For all these reasons, we anticipate that, even though the time-consuming tasks associated with prosecuting a case through an Initial Decision have been completed, resolving these cases through the comparative process would further delay service to the public, and thus would not serve the public interest.

56. We recognize that the switch to auctions requires further expenditures by applicants who have already made substantial expenditures in reliance on established Commission procedures for awarding commercial broadcast licenses where there are mutually exclusive applications. As noted above, however, Section 309(i)(2) provides that, in the event auctions are held to resolve cases involving pre-July 1, 1997 applications, only the pending applicants are eligible to be qualified bidders. This means that the pending applicants will be bidding only against the competing applicants that have spent the same amount of time, and presumably incurred similar expenses, in prosecuting their applications through a comparative hearing. In this manner, the pending applicants will not be unfairly disadvantaged in the auction as a result of previous expenditures to secure the license. Rather, as in the case of applicants not designated for hearing, we would expect that the price ultimately paid for the license will reflect the expenditures incurred by all qualified bidders in prosecuting their long-pending applications.

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<sup>56</sup> See, e.g., *Colonial Communications, Inc.*, 5 FCC Rcd 1967 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 2296 (1991), *recon. dismissed*, 7 FCC Rcd 674 (1992) (lengthy litigation over the relative comparative significance of past continuous local residence of several years' duration versus childhood local residence plus current residence for a short period); *Ronald Sorenson*, 6 FCC Rcd 1952 (1991) (litigation over relative comparative significance of longer local residence versus greater involvement in civic activities); *Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984 (1984) (litigation over relative comparative significance of ownership of two distant television permits versus limited media interests in local market plus distant CATV interests).

<sup>57</sup> See, e.g., Comments of Cromwell Group, Inc. at 2; Reply Comments of Howard G. Bill at 3.

57. One commenter<sup>58</sup> suggests that, although Section 309(1)(2) clearly prohibits the Commission from opening new filing periods for additional applications that would be included in auctions involving pre-July 1st applications, it nevertheless leaves open the question of new investors or participants in existing applications. We recently amended our Part 1 rules to prescribe uniform ownership disclosure standards requiring applicants filing short-form applications for future auctions to identify controlling interests as well as all parties holding a 10% or greater interest. *See Third Report and Order*, 13 FCC Rcd at 418-420. To the extent that the comments urge that we require preauction disclosures of all new owners or parties, we disagree that either the letter or the spirit of Section 309(1)(2) warrants the adoption of special disclosure standards for applications that are subject to Section 309(1)(2). Thus, for such applications we will require the reporting prior to the auction of any changes in the ownership information required by our uniform Part 1 disclosure standards. We nevertheless agree that, consistent with Part 1 rules providing that a short-form application is considered to be newly filed if it is amended by a major amendment (*see* 47 C.F.R. § 1.2105(b)(2)), a change in the control of an application otherwise subject to Section 309(1) would render the existing applicant ineligible to participate in an auction that is statutorily limited to pre-July 1st applicants.

58. We also note that proceeding with hearings and concomitant litigation will also be costly for all the applicants. Thus, given the circumstances, additional costs cannot be avoided. Even assuming that the winning bid in an auction will exceed the additional litigation costs the winner would have to pay in a hearing, all the applicants would incur further litigation expenses. It is not at all clear that it is fairer to all the applicants, particularly to those who eventually lose in a hearing, to make them incur significant, additional hearing expenses as a tradeoff for the possibility that the winner's expenses may be less than in an auction. Given the difficulty of predicting who would win under the revised comparative criteria if we resolved these cases through the comparative hearing process (*see supra* ¶ 42), we think it is appropriate to focus on fairness to the class as a whole, not just on the winning applicants.

59. In addition, we are ameliorating the impact of additional expenses by refunding all hearing and certain filing fees. *See infra* ¶¶ 101-104. In sum, the public interest in getting new service to communities long awaiting such service as soon as possible under the circumstances, when combined with the other public interest benefits of auctions, discussed above, outweigh, in our view, any adverse impact on these pending hearing applicants of requiring them to participate in an auction.<sup>59</sup> The auction procedures for these pending hearing cases are set forth in Section III(C)(1), below. These cases should be set for auction particularly quickly in light of how long they have been pending.

### C. General Rules and Procedures for Competitive Bidding

#### 1. Pending Comparative Initial Licensing Cases Subject to Section 309(1)

60. *Scope of Section 309(1)*. Having decided to exercise our discretion under Section 309(1)(1) to resolve through competitive bidding all applications that are subject to that provision, we must now

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<sup>58</sup> *See* Comments of J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 14.

<sup>59</sup> We also note that the value of developing a revised comparative system (and expending the associated administrative costs) would be even less for this small class of cases (as well as the small class of pending comparative renewal cases) than the broader class of pending cases. *See supra* ¶ 37.

establish the rules for the auctions. Paragraph (2) of Section 309(l) restricts the persons we may treat as qualified bidders eligible to participate in a competitive bidding proceeding conducted to resolve these pending cases, and paragraph (3) prescribes special settlement provisions, discussed below, for these cases. To determine whether these paragraphs apply to particular applicants and proceedings, however, we need to define the scope of pending cases covered by Section 309(l).

61. By its express terms, Section 309(l) applies to "competing applications for . . . construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997." Paragraph (2), in contrast to the permissive language in paragraph (1), mandates that if the Commission exercises its discretion to use competitive bidding in these cases it "shall . . . treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such [competitive bidding] proceeding [to assign such license or permit]." In the *Notice*, 12 FCC Rcd at 22373-74 (¶ 24), we tentatively concluded that Section 309(l) did not apply to a single application filed before July 1, 1997. We relied in this regard on the express reference in Section 309(l) to "competing applications." Thus, in the event one or more applications filed after June 30, 1997 are mutually exclusive with a single pre-July 1, 1997 application, we tentatively concluded that an auction was mandated under Section 309(j) and that the special Section 309(l) provisions concerning bidder eligibility and settlements would not apply.

62. In contrast, we tentatively concluded, *Notice*, 12 FCC Rcd at 22374 (¶ 25), that Section 309(l) did apply whenever two or more mutually exclusive pre-July 1, 1997 applications are filed. We found further that paragraph (2), which dictates that "only persons filing such applications" are eligible to be qualified bidders, may require the dismissal of post-June 30, 1997 applications in certain circumstances. In this context, we considered the consequences of a filing period, which opened before June 30, 1997 but closed after that date. We tentatively concluded that, in the event two or more applications were filed before July 1, 1997, any mutually exclusive applications filed after June 30, 1997, because they are ineligible under paragraph (2) to be qualified bidders, must be dismissed. Recognizing that this is a harsh result, particularly when it requires the dismissal of applications timely submitted within an announced filing period, we asked for comment on whether there are other legally permissible interpretations of this provision.

63. *Discussion.* We continue to believe that, where post-June 30th applications are mutually exclusive with two or more pre-July 1, 1997 applications, we are statutorily compelled by the express language of Section 309(l)(2) to dismiss them and conduct a competitive bidding procedure that is restricted to the pre-July 1, 1997 applications. We also believe that given the express reference to "competing applications" in Section 309(l), this provision does not apply to a single pre-July 1, 1997 application. It is well established that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose.<sup>60</sup> With this principle in mind, we turn first to the issue of eligibility to participate in the auction. Paragraph (2) unambiguously provides that the Commission "shall . . . treat the persons filing such applications as the *only* persons eligible to be qualified bidders," and the Conference Report, at 573, confirms that "[t]he Commission *shall* limit the class of eligible applicants who may be considered qualified bidders . . . to the persons who filed applications with the Commission before that date [July 1, 1997]." (emphasis added.) Thus, we confirm our tentative conclusion that we are statutorily precluded from permitting post-June 30th applicants to participate as qualified bidders in a competitive bidding

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<sup>60</sup> See cases listed in note 30 above.

procedure conducted to resolve mutual exclusivity among two or more pre-July 1, 1997 competing applications. Given our decision to use competitive bidding procedures for these cases, we must therefore dismiss any such mutually exclusive applications filed after June 30, 1997.

64. Several commenting parties complain that the distinction between applications filed before July 1 and after June 30 is arbitrary.<sup>61</sup> None, however, offers an alternative, legally persuasive reading of the statute that would permit us to include post-June 30th applications in any competitive bidding procedure involving mutually exclusive pre-July 1st applications. Nor have they cited relevant precedent authorizing us to vary from the plain meaning of the statutory provision. Rather, Congress adopted a bright line distinction. That such a distinction operates to exclude some applicants but to include others does not make it unlawful. Moreover, the practical effect of this bright line distinction will be limited, as we believe that settlement agreements have been filed in connection with the small number of cases involving post-June 30th applications mutually exclusive with two or more pre-July 1, 1997 applications.

65. The express language of Section 309(l) likewise governs the resolution of the second issue, regarding the applicability of any portion of Section 309(l) to singleton applications filed before July 1, 1997. Given the unambiguous reference in Section 309(l) to "competing applications . . . filed with the Commission before July 1, 1997," we are not persuaded that any of its special provisions (regarding bidder eligibility or the 180-day period during which certain settlement rules were waived) apply to a singleton application filed before July 1, 1997. Thus, whether we should grant pre-July 1st singleton applications, or alternatively open new filing periods and conduct auctions in those instances in which mutually exclusive applications are filed, is governed by Section 309(j)(1) rather than by Section 309(l). But Section 309(j) is silent on this question (*see infra* ¶ 106), making it appropriate to look to the legislative history to determine what Congress intended with regard to singleton applications. The legislative history addresses this point at least with respect to situations in which there are no mutually exclusive applications "because the Commission has yet to open a filing window." Specifically, "the conferees expect that, regardless of whether the [singleton] application was filed before, on or after July 1, 1997, the Commission will provide an opportunity for competing applications to be filed, consistent with the Commission's procedures,"<sup>62</sup> and employ competitive bidding to assign the license if competing applications are filed. Where the filing windows or cut-off lists have closed, however, we agree that it is appropriate to grant pending singleton applications.<sup>63</sup> Such applications, even if filed before July 1, 1997, are outside the express scope of Section 309(l)(2). Neither the language of Section 309(j)(1) nor its accompanying legislative history suggests that Congress intended to require that we reopen already closed filing periods if there is only one pending application. Particularly given our obligations under Section 309(j)(6)(E) to avoid mutual exclusivity, nothing in the requirement in Section 309(j) to use competitive bidding procedures to resolve mutually exclusive applications provides a basis to create a further opportunity for the filing of mutually exclusive applications where, despite an opportunity to file competing applications, there is only one pending application. The possibility of our opening an already

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<sup>61</sup> See, e.g., Comments of George S. Flinn at 3-4; Robert B. Mahaffey at 4-7. *But see* Comments of Pappas Telecasting of America at 2-3.

<sup>62</sup> Conference Report at 573-74.

<sup>63</sup> See Reply Comments of Press Communications, LLC at 4; Reply Comments of WB Television Network at 8-9; Comments of De La Hunt Broadcasting Corp. at 2.