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

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

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 1999 **Released:** April 20, 1999

By the Commission: Chairman Kennard approving in part, abstaining in part and issuing a statement.

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I. INTRODUCTION AND BACKGROUND

1. The Commission has before it petitions for reconsideration of the *First Report and Order* in MM Docket No. 97-234, GC Docket No. 92-52 and GEN Docket No. 90-264, 13 FCC Rcd 15920 (1998) (*First Report and Order*), which implemented provisions of the Balanced Budget Act of 1997 expanding the Commission's competitive bidding authority, under Sections 309(j) and 309(l) of the Communications Act of 1934, 47 U.S.C. §§ 309(j), 309(l),[1] to include the broadcast services. Prior to the passage of the Budget Act, the Commission traditionally used comparative hearings to decide among mutually exclusive applications to provide commercial broadcast service. It also used a system of random selection to award certain types of secondary broadcast licenses (low power television and television translator), pursuant to Section 309(i) of the Communications Act, 47 U.S.C. § 309(i). For purposes of comparative hearings, the Commission developed a variety of comparative criteria,[2] including the "integration" of ownership and management, which presumed that a station would offer better service to the public 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 pending resolution of the questions raised by *Bechtel II*,[3] and released a further notice of proposed rulemaking seeking comment on a variety of issues raised by *Bechtel II*.[4]

2. On August 5, 1997, Congress enacted the Budget Act, 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), amended 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

[1] Pub. L. No. 105-33, 111 Stat. 251 (1997) (hereafter Budget Act).

[2] *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965).

[3] *Public Notice, FCC Freezes Comparative Hearings*, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995).

[4] *See Second Further Notice of Proposed Rulemaking*, 9 FCC Rcd 2821 (1994).

Communications Act (*i.e.*, noncommercial educational or public broadcast stations). Finally, Section 3002(a)(3) adopted new Section 309(l), *codified as* 47 U.S.C. § 309(l), which governs the resolution of pending comparative broadcast licensing cases. This section 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 pursuant to this provision must be restricted to persons filing competing applications before July 1, 1997. Thus, as a result of passage of the Budget Act, the Commission may no longer resolve competing applications for commercial broadcast stations by comparative hearings, except for certain applications filed before July 1, 1997, and we lack the authority to resolve competing applications for commercial broadcast stations by a system of random selection.

3. To implement these provisions of the Budget Act expanding the Commission's competitive bidding authority to include the various broadcast services, we released a *Notice of Proposed Rulemaking* requesting comment on proposed auction procedures,[5] and subsequently adopted the *First Report and Order*. In that order, the Commission adopted competitive bidding procedures to select among mutually exclusive applicants for the commercial analog broadcast services and the Instructional Television Fixed Service (ITFS), as mandated by the amended Section 309(j).[6] More specifically, the *First Report and Order* determined to follow, as closely as possible, the Commission's recently revised Part 1 auction rules in conducting auctions for the broadcast services.[7] To facilitate the efficient determination of groups of mutually exclusive applications for auction purposes, we replaced the disparate filing procedures for the various broadcast and secondary broadcast services with a uniform window filing approach. In conjunction with broadcast service auctions, we also adopted a "new entrant" bidding credit to further the goals of the designated entity provisions of Section 309(j). 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, the *First Report and Order* determined that all of these pre-July 1st applications should be resolved by competitive bidding procedures.

4. Thirty-one parties have now filed petitions for reconsideration on various aspects of the *First Report and Order*, including the procedures adopted for auctioning the pre-July 1, 1997 competing full service commercial broadcast applications, the application of the general anti-collusion rule to broadcast

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[5] 12 FCC Rcd 22363 (1997) (*Notice*).

[6] As explained in the *First Report and Order*, the Commission felt compelled to conclude, based on the express terms of Section 309(j), that competing ITFS applications were subject to auction. We were concerned, however, that Section 309(j), as adopted, may not reflect Congress' intent with regard to the treatment of competing ITFS applications. Given the instructional nature of the service and the reservation of ITFS spectrum for noncommercial educational use, we thought it possible that Congress did not intend its expansion of our auction authority in the Budget Act to include that service. Accordingly, the *First Report and Order* concluded that the Commission would not proceed immediately with the auction of ITFS applications, but would seek Congressional guidance with regard to auctioning ITFS. *See* 13 FCC Rcd at 16002. If Congress does amend our auction authority to exempt ITFS from competitive bidding, then any decisions in this *Memorandum Opinion and Order* concerning ITFS will, of course, be moot.

[7] *See Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374 (1997) (*Third Report and Order*) (Commission modified its general competitive bidding procedures in all auctionable services in an effort to streamline its regulations, make the auction process more efficient, and provide more guidance to auction participants).

auctions, and the eligibility standards for the "new entrant" bidding credit. Oppositions to those petitions, and replies to the oppositions, have also been received by the Commission.[8] We will grant certain aspects of the petitions for reconsideration, most notably amending the applicability of the anti-collusion rule and refining the standards for applicants to qualify for the "new entrant" bidding credit. We will deny other issues presented in the petitions, and clarify certain aspects of the rules adopted in the *First Report and Order*. In addition, we have considered certain issues pertaining to the *First Report and Order* on our own motion. We discuss each of the subjects raised by the petitions for reconsideration in turn.

II. DISCUSSION

A. Issues Pertaining to Pending Competing Applications

1. Use of Auctions

5. ***Background.*** In the *First Report and Order*, 13 FCC Rcd at 15931, the Commission determined that it had authority under Section 309(l) of the Communications Act to resolve competing applications filed before July 1, 1997 for full-service commercial radio or analog television stations by either competitive bidding or the comparative hearing process. Exercising this discretion, the Commission concluded that auctions would generally be fairer and more expeditious than deciding through the comparative hearing process the approximately 130 cases involving an estimated 600 pre-July 1st commercial applications that did not settle. *Id.* at 15933.[9] In concluding that auctions would better serve the public interest, the Commission cited its long experience with the delays and uncertainties associated with the comparative hearing process, the complexities raised by the court's invalidation in *Bechtel II* of a central comparative criterion previously used to decide such cases, and the difficulties and delays associated with developing and defending a revised comparative system that would have only limited applicability, now that auctions are required for mutually exclusive applications filed after June 30, 1997. *Id.* at 15933-35. Using auctions for pending pre-July 1st applications was also not unfair, the Commission reasoned, because the vast majority of these applications were filed after *Bechtel II* and the imposition of the comparative freeze when the need for a change in the comparative system was clear, and because *Bechtel II* legally precludes the Commission from deciding any pending case in accordance with the expectations of those applicants that filed prior to *Bechtel II*. *Id.* at 15936.

6. The Commission also focused on the special considerations raised in the fewer than ten remaining hearing cases that had been prosecuted at least through an Initial Decision by an Administrative Law Judge before the Commission in February 1994 imposed a freeze on all ongoing comparative proceedings pending resolution of the issues raised by *Bechtel II*. Although recognizing the considerable expenditures of time and money by these applicants in prosecuting their applications before *Bechtel II* and the unusual delays encountered in obtaining a final decision on their applications, the Commission concluded that these circumstances did not outweigh the additional delays, uncertainties and costs that would result if the Commission were to resolve these cases through the comparative hearing process rather than by a system of competitive bidding. *Id.* at 15940. Particularly in light of the court's invalidation of

[8] A list of parties filing petitions for reconsideration, oppositions and replies is provided in Appendix A.

[9] In addition to these 130 pending cases, there are also pending approximately 25 pre-July 1, 1997 cases involving both noncommercial and commercial applicants competing for nonreserved, or "commercial," channels. As described in the *First Report and Order*, 13 FCC Rcd at 15930, resolution of these cases will be addressed in our general noncommercial proceeding, MM Docket No. 95-31.

the central comparative criterion in *Bechtel II*, the lengthy comparative freeze, and the tendency of the comparative process to produce significant litigation over matters of questionable public interest importance, the Commission anticipated that auctions would be speedier than the comparative process. *Id.* at 15940-41. It noted that the financial impact of having to participate in an auction was mitigated somewhat by the statutory provision restricting eligible bidders to other pending applicants in a particular proceeding, and that pending applicants would likely incur additional expenditures whether their applications were resolved through the comparative hearing process or by a system of competitive bidding. *Id.* at 15941-42.

7. ***Pleadings.*** Two petitions for reconsideration challenge our determination to use auctions to decide among pending broadcast applications. First, Barbara D. Marmet, one of two pending applicants in a pre-July 1, 1997 hearing case, has filed a petition for reconsideration, as well as a motion to stay the auction rules as they pertain to resolution of her adjudicatory proceeding. She maintains that special circumstances militate against the use of an auction in this specific proceeding, particularly given her pending request that the Commission resolve a basic qualifications issue allegedly warranting the denial of the only other pending applicant, Jerome Thomas Lamprecht.[10] She also cites the age of her proceeding, the fact that the Commission twice granted her application on comparative grounds, and the fact that, as a result of her interim operation, the resolution of this proceeding will not bring additional broadcast service to the public. In opposition, Lamprecht asserts that the petition for reconsideration repeats arguments made by Marmet in a series of pleadings filed in the adjudicatory proceeding and that he has filed responsive pleadings substantively and factually challenging Marmet's claims. Second, Michael Ferrigno, a post-June 30, 1997 applicant, argues that auctions will not promote the maximum diversification of the airwaves. He predicts that auctions will totally eliminate the participation of small entities in broadcasting. Auctions, according to Ferrigno, are particularly unfair to pending applicants, who, prior to the adoption of auction rules for mutually exclusive commercial broadcast applications, bore the expense and time necessary to have the frequency at stake in the licensing proceeding allocated to the community.

8. ***Discussion.*** We deny Marmet's petition for reconsideration and dismiss as moot the related motion for stay. Marmet seeks relief in the context of a particular proceeding, urging that it is arbitrary and capricious to use an auction, given her more than sixteen-year prosecution of her application in reliance on the comparative hearing process, her more than eight-year interim operation on Station WAFY(FM), and her repeated requests that the Commission consider the merits of Lamprecht's alleged admission in September 1990 that he lost his transmitter site in 1982. The delays and costs incurred by Marmet, however, are not appreciably different from those experienced by other applicants in the frozen hearing cases, and, in any event, do not offset the additional costs, delays and uncertainties that would result if we proceeded with the hearing in this case. Despite two non-final Commission decisions granting Marmet's application, those decisions are invalidated by *Bechtel II*, inasmuch as the comparative issue was dispositive in both decisions. Additional costs and delays are therefore unavoidable, whether we proceed with the hearing or use an auction. It is far from clear that the additional costs likely to be incurred by both applicants in this proceeding would be greater if it is resolved through competitive bidding procedures. As we reasoned in the *First Report and Order*, 13 FCC Rcd at 15942, even assuming the additional costs to the prevailing applicant will be greater in the case of an auction, it is unclear that it is fairer to the losing applicants to make them bear the significant, additional costs of proceeding with the hearing. Here, the allegations regarding Lamprecht are disputed and have not been litigated; thus, their

[10] Marmet states that she did not file comments in response to the *Notice* in this rulemaking proceeding because, having filed a motion to dismiss Lamprecht's application on basic qualifications grounds, she no longer considered her hearing case to be a comparative proceeding.

resolution is unlikely to be without cost or particularly expeditious.[11] At a minimum, consideration of the merits of Marmet's motion to dismiss would require that the Commission determine whether Marmet's allegations raise a substantial and material question of fact warranting the specification of a qualifications issue against Lamprecht. Moreover, resolution of Marmet's request would avoid an auction in this proceeding only if it were determined, after a lengthy evidentiary hearing and the exhaustion of all possible administrative and judicial appeals, that Lamprecht is not qualified. Without expressing any view on what will or should happen in an auction, the possibility of such further hearing proceeding over Lamprecht's qualifications will not arise at all unless Lamprecht wins the auction, and, further, may not be necessary if the Commission decides that designation is not warranted, either because Marmet's allegations are not pertinent under our auction procedures or because they are not sufficient to present a substantial and material question of fact on matters that are pertinent to the grant of an auction winner's (Lamprecht's) application. We are therefore not persuaded that proceeding with the hearing and immediately considering the questions involving Lamprecht would be more expeditious or fairer than conducting an auction. Further, whether or not Station WAFY(FM) is already on the air, resolving this proceeding as expeditiously as possible serves the public interest by the conserving the resources of the applicants and of the Commission. Thus, we are not persuaded that Marmet's specific proceeding presents special circumstances making it inappropriate to use an auction.

9. We also deny the petition for reconsideration filed by Michael Ferrigno, a small business owner, who challenges generally our decision to use auctions to award broadcast permits where there are mutually exclusive applications. To the extent that Ferrigno predicts that the use of auctions will detrimentally affect the provision of local broadcast service and our efforts to maximize diversification of ownership, we noted in the *First Report and Order,* 13 FCC Rcd at 15935, that Congress had made the judgment that auctions are generally preferable by requiring them for all mutually exclusive commercial broadcast applications filed on or after July 1, 1997. This would include Ferrigno, who, despite his efforts beginning in January 1996 to have a new FM frequency allocated, was not afforded an opportunity to file an application for that channel before July 1, 1997.[12] We consider in Section C(5) below Ferrigno's request for the adoption of a more significant bidding credit reflecting the expenditure of time and money by persons, such as Ferrigno, who undertake successfully the procedure required to have a new frequency added to the FM Table of Allotments.

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[11] Marmet also urges that consideration on the merits of her motion to dismiss, filed initially February 16, 1996 and resubmitted on January 20, and October 1, 1998, is consistent with the Commission's stated intention in two 1994 Public Notices to resolve potentially dispositive basic qualifications issues during the comparative freeze. Whether the questions raised by Marmet would be dispositive in this case is uncertain, however. And, in implementing the Commission's former freeze policy it was clearly appropriate to evaluate the likelihood of potentially dispositive issue(s) actually eliminating the need for comparative analysis. *See Elinor Lewis Stephens,* 10 FCC Rcd 2863 (1995) (refusing to order an ALJ to issue a partial Initial Decision on a potentially dispositive issue); *Rem Malloy Broadcasting*, 10 FCC Rcd 503, 505 (1995) (upholding on procedural grounds a Review Board decision remanding case for further hearings on a potentially dispositive issue, but expressing its confidence that the Board would not have ordered such hearings unless it concluded, based on a careful review of the pleadings, that disqualification could eliminate the need for further comparative analysis of the applicants). Consideration of Marmet's request to dismiss Lamprecht's application was therefore not required, even under our former comparative freeze policy.

[12] Michael Ferrigno filed his application in response to a filing window that opened on October 20, and closed November 20, 1997. By a Report and Order, released on September 5, 1997, the Commission granted Ferrigno's request and allocated channel 268C1 to Oakley, Utah and specified the dates for filing competing applications for that channel. *See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Levan, and Oakley, Utah and Green River, Wyoming)*, 12 FCC Rcd 13388 (1997).

2. Reimbursement of Expenses

10. ***Background.*** In response to the *Notice* several commenters suggested that the Commission has a legal obligation to reimburse all expenses incurred by broadcast applicants who filed with the expectation that, if mutually exclusive applications were filed, the Commission would use a comparative hearing to select the licensee. The Commission rejected this argument in the *First Report and Order.* 13 FCC Rcd at 15939. It indicated that, whatever these applicants' expectations, they had no vested interest in having their pending applications decided by comparative hearing. A decision to resolve these cases through a system of competitive bidding, pursuant to subsequent legislation expressly authorizing such resolution, in the Commission's view, did not entail a deprivation of due process or a taking of property. The Commission also questioned whether it had legal authority to grant such compensation and distinguished cases in which courts had awarded compensation for losses stemming from unanticipated regulatory action in the context of contractual agreements in which the government had expressly agreed to indemnify parties against such loss.

11. ***Pleadings.*** Several petitioners seek reconsideration of this point. In virtually identical pleadings, three pre-July 1st applicants in frozen hearing cases[13] challenge as unlawful the Commission's refusal to reimburse applicants in comparative proceedings that assertedly were adversely affected by the decision to resolve these cases instead by auction. Three applicants in frozen comparative cases, as well as two pending applicants who filed on or after July 1, 1997, also seek reimbursement of all expenditures incurred with the expectation that the license would be awarded through the comparative hearing process.[14] They claim to have filed in reliance on the Commission's express invitation indicating that any mutually exclusive applications would be resolved by a comparative hearing. They maintain that subjecting pending applications to auction without fully reimbursing pending applicants for the substantial legal and engineering fees incurred in preparing their applications, and in some instances prosecuting them through the Commission and in court, constitutes an unconstitutional taking of property without due process of law. In this regard, they rely on *United States v. Winstar Corp.*, 518 U.S. 839 (1996), in which the Supreme Court held that the government may not retroactively repudiate a contract with a private party. Additionally, the applicants in hearing cases dispute the Commission's conclusions that pending applicants have no vested interest in having their mutually exclusive applications resolved through the comparative hearing process, and that the restriction on bidder eligibility somehow mitigates the adverse economic impact of the Commission's determination to dispense with the comparative hearing process. Citing precedent in which the Commission assertedly recognized that reliance on Commission rules or policies creates equitable interests, they submit further that under the Fifth Amendment the public, not private individuals, should bear the cost of developing an evidentiary record upon which the Commission can identify the applicant that will best serve the public interest when the Commission dispenses with its comparative system.

12. ***Discussion.*** For the reasons set forth in the *First Report and Order* the decision to use auctions, pursuant to legislation expressly authorizing auctions in some cases and requiring them in other cases, does not authorize, let alone require, reimbursement of pending applicants for expenditures incurred

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[13] The three applicants are Liberty Productions (Biltmore Forest, North Carolina), Heidelberg-Stone Broadcasting (Goodlettesville, Tennessee) and Rio Grande Broadcasting (Puerto Rico).

[14] The pre-July 1st applicants in frozen non-hearing cases are: Thomas F. Beschta (Spooner, Wisconsin); Ronald K. Bishop (Williamstown, West Virginia); and James W. Lawson (Greensboro, Alabama and State College, Mississippi). The applicants who filed their applications after June 30, 1997 are Michael J. Powell (Snow Hill, Maryland) and Island Broadcasting Company (Chincoteague, Virginia).

in reliance on the existing comparative hearing process. Petitioners have not cited any precedent authorizing the Commission to make the requested reimbursements. Even if we did have such authority there is no legal obligation to reimburse pending applicants for expenses incurred in connection with the now discarded comparative process. Reliance on Commission rules or policies may create equitable interests under certain circumstances. However, as the Supreme Court made clear in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956), and courts have consistently recognized, pending applicants do not have a vested right in having their applications decided by hearing, and, moreover, pending applications may be dismissed based on changed processing rules. Here, we determined that the public interest would be best served by using auctions to resolve all pending mutually exclusive commercial broadcast applications, and there has been no taking of property without due process that would warrant compensation under the Fifth Amendment. Nor, as the Commission indicated in the *First Report and Order*, 13 FCC Rcd at 15937, is the application of competitive bidding procedures to pending applications 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 v. USI Film Prods.*, 511 U.S. 244, 269 (1994).

13. By the same token, *Winstar* is clearly inapposite. Reimbursement was allowed in that case because the court found that the government had contractually agreed to indemnify private banks against financial loss as a result of a regulatory change. When Congress enacted legislation effectively deleting retroactively terms on which the banks had agreed to take over failing financial institutions, the Court held that the government was liable under ordinary contract principles to reimburse the banks for their losses.[15] In contrast, the Commission, by releasing Public Notices that accurately reflected then-current procedures for resolving mutually exclusive applications, made no promise, either express or implied, that it would reimburse prospective applicants for expenditures incurred in anticipation of a comparative hearing, if a change in the processing rules made such expenses unnecessary. Finally, the statutory limitation on bidder eligibility for proceedings involving applications filed before July 1, 1997 -- as well our determination to exercise our discretion not to solicit competing applications in proceedings involving mutually exclusive applications filed after June 30, 1997 -- ensures that none of the pending applicants will be disadvantaged in the auction as a result of expenditures made in anticipation of a comparative hearing. All eligible bidders are likely to have incurred similar expenditures, which mitigates somewhat the economic impact on these applicants of having the licensee selected by competitive bidding procedures instead of by comparative hearing. The special circumstances raised by an interim operator are addressed in ¶¶ 23-26 below.

3. Pre-Auction Procedures

14. ***Background.*** In the *First Report and Order*, 13 FCC Rcd at 15951-53, 15960, the Commission determined that, in accordance with its usual practice in auctions generally, it would defer until after the auction consideration of outstanding basic qualifications issues and resolve such questions after the auction only with regard to the winning bidder. It reasoned that this would avoid unnecessary litigation that would delay service to the public. *Id.* at 15952-53. Even where resolution of an outstanding qualifications issue raised either in a petition to deny or a motion to enlarge issues would potentially eliminate all but one applicant, the Commission concluded that the fairer and more expeditious approach would be to resolve any outstanding issues after the auction. *Id.*

[15] *United States v. Winstar Corporation*, 518 U.S. 839 (1996). *See also Wells Fargo Bank v. United States*, 88 F.3d 1012, 1018 (Fed. Cir. 1996) (recovery was premised on the finding of a unilateral contract by which the government agreed to guarantee the loan upon Wells Fargo's performance of the conditions specified, and the court held that the government was contractually bound when Wells Fargo accepted its offer by making the loan).

15. ***Pleadings.*** Several petitions for reconsideration address this issue. Snyder Hill Broadcasting, a pre-July 1, 1997 applicant for a new FM station in Ithaca, New York, contends that conducting the auction before resolving a pending petition to deny against the only other applicant violates due process and is contrary to Section 309(j)(1)'s requirement that the license be awarded to a qualified applicant. It complains that this places the applicant in the awkward position of having to bid against a potentially unqualified bidder with no certainty as to the ultimate resolution of the bidder's qualifications; it must either gamble that the Commission will adversely resolve the issue or risk being the high bidder (and having to pay) for a license that would have not been decided by auction if the competing applicant were ultimately disqualified. Pre-auction resolution of basic qualifications, Snyder Hill argues, is the best assurance that the ultimate licensee will be qualified. Additionally, the law firm of Bechtel & Cole seeks reconsideration urging that the Commission should adopt pre-auction procedures to verify the *bona fides* of pending pre-July 1st applicants in non-hearing cases, and to exclude from the auction any applicant unable to demonstrate both that it was financially qualified at the time of certification and that its application was not filed for the purpose of entering into a settlement agreement. In a related context, two applicants in frozen hearing cases, who filed settlement agreements within the 180-day period specified in Section 309(l)(3), seek clarification of the determination in ¶ 89 of the *First Report and Order* that an applicant whose application has not been finally denied or dismissed is entitled to participate in the auction without regard to any outstanding basic qualifications issues.[16] Specifically, they argue that applicants disqualified or dismissed in the context of a settlement agreement, which is contingent on the disqualification of one or more applicants, should not be entitled to participate in the auction even if the disposition of those applications is not final.

16. ***Discussion.*** We deny reconsideration of our determination to defer until after the auction basic qualifications issues, whether raised in an unresolved petition to deny or motion to enlarge issues, or in an outstanding hearing issue. As we indicated in the *First Report and Order*, 13 FCC Rcd at 15953-54, Section 309(j)(1) specifies that a license may be awarded only to a qualified applicant, but the statute accords the Commission discretion to make the determination as to basic qualifications to hold a license either before, or after, the auction. *See also infra* ¶ 55. We concluded, moreover, that the public interest would be best served by not delaying the commencement of the auction to litigate potentially irrelevant issues, and that deferring these issues conserves the resources of the private litigants as well as of the Commission, thereby expediting service to the public. We are not persuaded that the public interest would be served by instituting special pre-auction procedures to verify the *bona fides* of certain pre-July 1st applicants in non-hearing cases who filed their applications after the imposition of the comparative freeze in February 1994. With regard to questions concerning specific applications, these matters can be considered more expeditiously after the auction.[17] To the extent that Bechtel and Cole focus generally on

[16] The 180-day settlement period ended February 1, 1998. Petitions for reconsideration were filed by Breeze Broadcasting Company and Homewood Radio Company. In an Order adopted on October 28, 1998, the Commission rejected a contingent settlement agreement filed December 29, 1997 in the Gulf Breeze, Florida proceeding based upon its determination that the third applicant, J. McCarthy Miller, was financially qualified. *Breeze Broadcasting Co., Ltd.*, 13 FCC Rcd 22548 (1998). And in an Order adopted on December 23, 1998, the Commission denied a second petition for reconsideration of its approval of a contingent settlement agreement, filed September 12 1997, terminating the Homewood, Alabama comparative proceeding. *Heidi Damsky*, FCC 98-342 (rel. Jan. 6, 1999), *appeal pending sub nom. Heidi Damsky v. FCC*, Case No. 99-1018 (D.C. Cir. filed Jan. 13, 1999).

[17] To the extent that the law firm of Bechtel & Cole makes specific allegations concerning the *bona fides* of certain pending applications filed by so-called application mills, such allegations are beyond the scope of this rulemaking proceeding and should be raised in petitions to deny a specific application. These allegations, as well as any purportedly responsive material submitted by KM Communications in its November 12, 1998 Opposition, have

financial qualifications and speculative intent, we continue to believe that our auction rules, by penalizing applicants who default on their bids or who are ultimately disqualified and by prescribing special disclosure requirements for transfers or assignments of stations held less than three years, afford adequate safeguards against financially unqualified applicants or applicants who filed their applications for a speculative purpose.[18] *See First Report and Order*, 13 FCC Rcd at 15956. Given that these rules apply fully to pending applicants who elect to participate in the auction, it is unnecessary to pursue site and financial issues except to the extent that they involve a question of false certification. Nor does this approach abridge any cognizable rights of competing applicants.[19] In deciding whether to participate in the auction, however, pending applicants who filed their applications before the adoption of competitive bidding procedures should carefully consider the impact of auction rules prescribing penalties in the event of default or disqualification.

17. We are not persuaded that a different approach is warranted in proceedings involving only two applications. We recognize that, in such proceedings, one applicant must participate in an auction without certainty as to whether the competing applicant will ultimately be found qualified by the Commission.[20] Any uncertainty as to whether a competing applicant will prevail if its basic qualifications are challenged is not different from the uncertainty that exists in all contested licensing proceedings, whether the licensee is selected by competitive bidding, by comparative hearing, or by some other method. Litigating a competing applicant's basic qualifications is not without cost, moreover. We would accordingly expect that, in formulating their auction bids, applicants in two party proceedings will take into account the likelihood of establishing that a competing applicant is basically unqualified, as well as the estimated time and expense of litigation to establish the applicant's disqualification. We do not believe, therefore, that deferring consideration of potentially irrelevant issues deprives applicants in two applicant proceedings of due process or forces them to take unfair risks. We thus reaffirm our determination that, regardless of how many applicants remain and whether an issue is potentially dispositive, the public interest is best served by deferring the consideration of outstanding qualifications issues until after the auction and resolving such issues only with respect to auction winners.

18. Finally, we clarify the circumstances under which applicants may participate in an auction without regard to an outstanding qualifications issue. We indicated in ¶ 89 of the *First Report and Order* that where the Commission has dismissed or disqualified an applicant in a frozen hearing case, and where the latter ruling is not subject to further administrative or judicial review, the applicant would not be

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not been considered here. For this reason, we also decline KM Communications' request that we impose sanctions against Bechtel & Cole for the filing of an allegedly scandalous and unsupported pleading.

[18] *See* 47 C.F.R. § 1.2104(g) (providing for penalties in the case of default or disqualification after the close of the auction). *See also* 47 C.F.R. § 1.2111(a) (prescribing special disclosure requirements in the event of a transfer or assignment of a license held by auction winner within three years of the receipt of the license); *First Report and Order*, 13 FCC Rcd at 15992.

[19] *See Alegria I, Inc.* 5 FCC Rcd 7309, 7311 (1990), *aff'd*, 947 F.2d 986 (D.C. Cir. 1991), *citing Crosthwait v. FCC*, 584 F.2d 550, 555 (D.C. Cir. 1978) (an applicant has no vested interest in the disqualification of a competing applicant).

[20] Pursuant to our general Part 1 auction rules, 47 C.F.R. §§ 1.2109(c) and 1.2104(g)(2), and as we explained in the *First Report and Order*, 13 FCC Rcd at 15956, if the high bidder is disqualified or defaults for any reason, the license would be offered to the second highest bidder (in this case the sole competing applicant) at its final bid. The defaulting high bidder would also be liable for the default payment set forth in Section 1.2104(g)(2).

entitled to participate in the auction. We also stated that all pending applicants remaining in the proceeding would be entitled to participate in the auction without regard to any unresolved issues as to their basic qualifications. We were, however, referring in ¶ 89 only to cases that did not settle pursuant to Section 309(l)(3), and we were not addressing the special circumstances raised by a settlement agreement executed by February 1, 1998 expressly conditioned on the Commission's resolving specific basic qualifications issues. In this regard, our practice under the former comparative freeze policy has been to adjudicate basic qualifications issues in the context of a settlement agreement that is contingent on the resolution of a specific basic qualifications issue.[21] To facilitate settlements of the frozen comparative cases, Section 309(l)(3) provides that, for settlement requests executed by February 1, 1998, the Commission must waive certain regulations to permit settlements among competing pre-July 1st applications. Therefore, consistent with the underlying thrust of Section 309(l)(3) and settlements under our comparative freeze policy, applicants disqualified by the Commission pursuant to such a contingent settlement agreement executed by February 1, 1998 will be permitted to participate in an auction only if an auction becomes necessary as a consequence of a subsequent court decision that reverses their disqualification.[22] As we recently recognized, the congressional purpose of facilitating settlements in these cases would be thwarted if we held that, notwithstanding a settlement agreement contingent on the disqualification of one or more applicants, an auction is nevertheless required so long as an applicant's disqualification or dismissal has not become final.[23] In contrast, if a court subsequently remanded our dismissal or disqualification of an applicant, we would either reaffirm our decision regarding that applicant's basic qualifications or return the applicants to the status *quo ante,*[24] and only hold an auction (or consider an amended settlement agreement[25]) among all the qualified applicants, upon finding that the dismissed or disqualified applicant is fully qualified and should be reinstated. These policies ensure that no applicant's right to compete for the license will be forfeited based on a non-final determination as to its basic qualifications, but also serve the public interest, in accordance with congressional intent, by facilitating the resolution of frozen comparative proceedings in which the applicants executed a settlement

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[21] *Modification of FCC Comparative Proceedings Freeze Policy*, 9 FCC Rcd 6689, 6690 (1994) ("If . . . the parties actually file a request for approval of a settlement, which is contingent upon resolution of specified basic qualifying issues, such issues will be adjudicated.").

[22] *See, e.g, Heidi Damsky,* 13 FCC Rcd 11688 (1998), *recon. denied,* FCC 98-202 (rel. Aug. 25, 1998), *further petition for reconsideration denied,* FCC 98-342 (rel. Jan. 6, 1999) (Commission approved a settlement agreement among two applicants, affirmed the disqualification on financial grounds of a third applicant, and terminated the proceeding); *Breeze Broadcasting Co., Ltd.*, 13 FCC Rcd 22548 (1998) (Commission dismissed a settlement agreement between two applicants that was contingent on the disqualification of the third applicant and reversed the disqualification on financial grounds of the third applicant). *See also Lorenzo Jelks v. Federal Communications Commission,* Case No. 97-1544 (D.C. Cir. filed Dec. 10, 1998), *cert. denied* (Feb. 22, 1999) (court denied a motion for remand filed by an applicant disqualified by the Commission in the context of a contingent settlement agreement, thereby rejecting the (disqualified) applicant's contention that, pursuant to ¶ 89, it was entitled to participate in the auction because its disqualification (although upheld by the D.C. Circuit) was not final).

[23] *Heidi Damsky*, FCC 98-342, ¶¶ 11-12.

[24] *See* 47 U.S.C. § 402(h) providing that "[i]n the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of proceedings to review such judgment, to forthwith give effect thereto . . . "; *Alianza Federal de Mercedes v. Federal Communications Commission,* 539 F.2d 732 (D.C. Cir. 1976).

[25] *See Breeze Broadcasting,* 13 FCC at 22555, *amended agreement approved,* FCC 99I-03 (rel. Feb. 18, 1999).

agreement meeting the requirements of Section 309(l)(3).

4. Pending Applications With Requests for Waiver of the Freeze on the Filing of Television Applications

19. ***Background.*** In the *Sixth Further Notice* in the digital television proceeding, the Commission indicated that it would no longer accept applications for vacant analog television allotments, but afforded an additional 30-day period (until September 20, 1996) for the filing of such applications.[26] It indicated further that it would continue to process on a case-by-case basis pending requests for waiver of the 1987 freeze involving the top-30 markets and requests for waiver of the permanent freeze. It also pledged to provide a cut-off period for the filing of competing applications if it granted any waiver requests and accepted the related television applications. In response to several commenters, the Commission in the *First Report and Order*, 13 FCC Rcd at 15945-47, considered whether pending television applications with waiver requests, all filed before July 1, 1997, were subject to Section 309(l). Of particular concern was the applicability of Section 309(l)(2), which precludes the acceptance of additional applications that would be mutually exclusive with, and would be included in any auction employed to resolve, competing applications filed before July 1, 1997. Discerning no distinction in the statute between applications and applications filed with waiver requests, we concluded that Section 309(l) does apply to multiple pending applications with waiver requests that, if accepted for filing, would result in mutually exclusive pending applications for a particular television allotment. *Id.* at 15945. We determined, however, that Section 309(l) would not apply if only one application was ever filed for a particular allotment (such that the grant of the waiver request would result in the acceptance of a singleton application), because the threshold requirement of "*competing* applications . . . filed with the Commission before July 1, 1997" was not satisfied. Citing legislative history reflecting that the Commission should open a filing window where there is a singleton application "because the Commission has yet to open a filing window,"[27] we advised that in the event we grant a waiver and accept a singleton application, we would open a filing period and use an auction to select the licensee if mutually exclusive applications are filed.

20. ***Pleadings.*** Petitions filed by Davis Television Duluth and Davis Television Topeka, and by Montgomery Communications, seek reconsideration of the Commission's determination to open filing windows and permit the filing of competing applications that would be mutually exclusive with a singleton pre-July 1st application with a pending waiver request.[28] Davis Television Duluth/Topeka, the only applicants that filed applications with freeze waiver requests by September 20, 1996 for channels 27 in Duluth and channel 43 in Topeka, respectively, urge that their waiver requests should be immediately processed and the related television applications granted. Montgomery Communications is the licensee of a LPTV station on channel 43 that would be displaced if Davis's application for channel 43 is granted. By way of explanation, Montgomery states that, given the freeze involving the top-30 markets, it did not file an application for channel 43 by the September 20, 1996 deadline; but that, threatened with the loss

[26] *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 11 FCC Rcd 10968, 10992 (1996). The further filing opportunity announced in the *Sixth Further Notice* actually lasted 37 days (*i.e.*, from the release of the *Sixth Further Notice* on August 14, 1996 until 30 days after its publication in the Federal Register).

[27] H.R. Conf. Rep. 217, 105th Cong. 1st Sess. 574 (1997) (hereafter Conference Report).

[28] A single petition for reconsideration, as well as a single opposition to Montgomery's petition for reconsideration, was filed by Davis Television Duluth and Davis Television Topeka. Montgomery filed an opposition to Davis' petition for reconsideration.

of its LPTV station, it filed an application on August 20, 1997 that is mutually exclusive with Davis' September 20, 1996 application.

21. The Davis petitioners submit that the Commission effectively opened a filing window, as contemplated by Congress in the Conference Report, when it announced in the *Sixth Further Notice* a further period ending on September 20, 1996 for the filing of applications for vacant television allotments before it ceased accepting such applications. Petitioners therefore claim that there is no basis to open a further window for the filing of competing applications. They point out that, although the Commission concluded that the 30-day period was intended to permit the filing of applications already in progress, there was no threshold requirement that applicants submitting applications by the September 20, 1996 deadline demonstrate that they were in the process of preparing such applications when the Commission announced the filing deadline. The petitioners therefore reason that anyone interested in filing applications for channels 27 and 43 had an opportunity to do so. To further support the claim that the Commission should not solicit additional applications for channels 27 and 43, they rely on Sections 309(j)(6)(E) and 309(j)(7), respectively, requiring the Commission to avoid mutual exclusivity and prohibiting it from basing a public interest finding solely or predominately on the expectation of federal revenues from the use of a system of competitive bidding to select the licensee. Montgomery, on the other hand, agrees with the Commission that, for purposes of determining whether to grant a singleton application without affording an opportunity for the filing of competing applications, the 30-day period announced in the *Sixth Further Notice* did not constitute a filing window as contemplated by Congress in the Conference Report. It maintains, however, that the Conference Report does not require that the Commission open a filing period for competing applications for channel 43 since mutually exclusive applications have already been filed for that channel. It therefore urges the Commission to process the pending applications and related waiver requests and to restrict the qualified bidders to the two pending applicants. Montgomery also asserts that the Budget Act is an unconstitutional *ex post facto* law in that it distinguishes between two groups of applications already on file when the legislation was enacted on August 5, 1997 (that is, applications filed before July 1, and applications filed after June 30, 1997), although prospective applicants had no notice of the legal significance of filing an application before July 1, 1997 until that date had passed.

22. ***Discussion.*** We deny the petitions for reconsideration of our determination that Section 309(l) does not preclude the opening of a new filing window with respect to singleton television applications (with waiver requests) filed by September 20, 1996. We reaffirm our conclusion that, in the event that waiver requests are granted and related singleton applications are accepted, a filing window for competing applications should be opened. For the reasons set forth in the *First Report and Order*, 13 FCC Rcd at 15946-47, we continue to believe that the 30-day period ending September 20, 1996 does not constitute a filing window as contemplated by Congress in the Conference Report. The period for submitting analog television applications that ended on September 20, 1996 may, as the Davis petitioners suggest, have afforded additional time to permit the filing of applications not already in progress when that deadline was announced. However, the Commission did not publish a list of applications already on file or otherwise give notice of an opportunity to file competing applications as it had promised in the *Sixth Further Notice.* As to the competing applications for channel 43 submitted on September 20, 1996 by Davis/Topeka and on August 20, 1997 by Montgomery, Section 309(l), which would preclude the opening of a filing window for competing applications under certain circumstances, is inapplicable, inasmuch as only Davis's application was filed before July 1, 1997. The threshold requirement of *competing* applications filed before July 1, 1997 is therefore not satisfied. Indeed, Montgomery's mutually exclusive application, submitted after June 30, 1997 and nearly a year after the September 20, 1996 filing

deadline, has been returned.[29] And, because no filing period was ever opened for competing applications for either channel 27 or channel 43, Sections 309(j)(6) and 309(j)(7) do not provide a basis for granting the applications of Davis Duluth/Topeka for these channels. Thus, consistent with Congress's expectation and the Commission's explicit pledge in the *Sixth Further Notice* to provide a further opportunity for the filing of competing applications with respect to any waiver requests filed by September 20, 1996 that the Commission grants, we will provide such an opportunity in the event that Davis's waiver requests are granted and the related applications are accepted.[30] At that time, Montgomery may resubmit its application for channel 43. There is, however, no statutory basis for restricting the eligible bidders for that channel as petitioners request. Finally, contrary to Montgomery's suggestion, the Budget Act is not an *ex post facto* law or impermissibly retroactive, inasmuch as it is neither a penal statute nor does it change the legal consequences of past conduct.[31]

5. Interim Operation

23. ***Background.*** One of the fewer than ten frozen hearing cases that has not settled and that remains for resolution by the competitive bidding procedures adopted in the *First Report and Order* is the Biltmore Forest, North Carolina FM proceeding. The Commission initially awarded a construction permit to Orion, the comparative winner under the criterion in place before *Bechtel,* but later rescinded Orion's construction permit and operating authority.[32] Thereafter, the Commission granted an application for joint interim operating authority filed by a non-profit consortium comprised of the other competing applicants for the Biltmore Forest station. (Orion was invited to participate in the consortium but declined to do so.) The D.C. Circuit subsequently concluded that the Commission erred in rescinding Orion's construction permit and operating authority, and it ordered that Orion be reinstated as the interim operator.[33] Altogether Orion has operated the Biltmore Forest station on a for-profit basis for more than three years.

24. ***Pleadings.*** One of the members of the consortium in the Biltmore Forest FM proceeding, Biltmore Forest Broadcasting FM, Inc. (BFB), seeks reconsideration arguing that the competitive bidding procedures should make some provision for the fact that Orion has been allowed to operate the station for profit, whereas the consortium was required to operate on a not-for-profit basis. This disparity, according to BFB, has permitted Orion to amass funds through the operation of the FM station that can now be used to its advantage in bidding in the auction for the permanent license for the station. BFB asserts that this deprives the consortium members of an opportunity to compete fairly in the auction against Orion, thereby

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[29] *See* Letter, dated April 9, 1999, from Clay C. Pendarvis, Chief, Television Branch, Video Services Division, Mass Media Bureau.

[30] To the extent that Montgomery in its Opposition challenges the merits of Davis/Topeka's freeze waiver request and the acceptability of the related application for channel 43, these matters are beyond the scope of this rulemaking proceeding and have not been considered.

[31] *See Wottlin v. Fleming*, 136 F.3d 1032, 1037 (5th Cir. 1998), *citing Collins v. Youngblood,* 497 U.S. 37, 41 (1990) and *California Dep't of Corrections v. Morales,* 514 U.S. 499, 506 n.3 (1995) ("The Supreme Court has indicated that 'the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them'" [and] "stat[ed] that the focus of the *ex post facto* inquiry is . . . whether . . . [a legislative] change alters the definition of criminal conduct or increases the penalty by which a crime is punishable").

[32] *Orion Communications, Ltd.*, 10 FCC Rcd 13066 (1995), *recon. denied*, 11 FCC Rcd 19589 (1996).

[33] *Orion Communications Ltd. v. FCC*, 131 F.3d 176 (D.C. Cir. 1997).

undermining the Commission's conclusion in the *First Report and Order* (13 FCC Rcd at 15936, 15941) that the switch to auctions does not unfairly disadvantage pending applicants who, pursuant to Section 309(l)(2)'s restriction on bidder eligibility, will be competing only against other, similarly situated, pending applicants. Maintaining that Orion's selection as the high bidder is a foregone conclusion, BFB claims that allowing the for-profit operation of the station by Orion violates the fundamental principle of *Community Broadcasting Co. v. FCC*, 274 F.2d 753 (D.C. Cir. 1960), that interim operators not be allowed to secure a comparative advantage in the permanent licensing proceeding as a result of the interim operation. Orion's unique status, according to BFB, also contravenes *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), by effectively precluding the other mutually exclusive applicants from a fair opportunity to compete with Orion for the license. BFB suggests a variety of options for ameliorating the alleged unfairness of this situation. These include requiring Orion to cease its interim operation in order to participate in the auction; requiring Orion to make a detailed accounting with the other applicants being accorded bidding credits equal to any profit earned by Orion; and allowing the other applicants to join in the interim operation.

25. ***Discussion.*** We deny BFB's petition for reconsideration. Orion's operation of station WZLS(FM) is pursuant to a court of appeals decision expressly instructing the Commission "to reinstate Orion forthwith as the interim licensee pending such further proceedings as the Commission may conduct in order to choose either an interim or a final licensee."[34] Moreover, in reversing the Commission's grant of interim authority to a consortium comprised of the other competing applicants, the court implicitly rejected the argument that interim operation by Orion is fundamentally unfair to the other applicants. Specifically, the court interpreted 47 C.F.R. § 73.3592(b) and *Consolidated Nine, Inc. v. FCC*, 403 F.2d 585 (D.C. Cir. 1968), to apply only in cases in which a hearing is yet to be held. The court again rejected this argument when it dismissed a court appeal of the Commission's order installing Orion as the interim operator.[35] It concluded that all of the issues raised by that appeal, including whether the Commission must order Orion to operate on a not for-profit basis to avoid prejudicing the other applicants, "either were raised and answered in, or are logically precluded by, our opinion in *Orion Communications Limited v. FCC*, 131 F.3d 176 (1997)."[36]

26. Orion's interim operation of the station pursuant to the court's explicit order in no way contravenes the rights of the competing applicants to a fair and impartial selection process under the principles articulated in *Community* and *Ashbacker*. Nor is some accommodation warranted because the consortium's joint interim operation was on a non-profit basis, whereas Orion's operation has been on a for-profit basis. Specifically regarding profits accrued by an interim operator, the court has made clear that the paramount interest is in ensuring that the interim operation does not unfairly influence the choice of the permanent licensee, not in equalizing the economic pressures on competing applicants.[37] By the

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[34] *Id.* at 182.

[35] *Biltmore Forest Broadcasting FM v. FCC*, D.C. Cir. Case No. 98-1026 (filed Jan. 16, 1998).

[36] *Order*, Case No. 98-1026, dated March 2, 1998, p.1.

[37] In *Consolidated Nine*, 403 F.2d at 595, the court rejected the argument that profits realized by the interim operator were unfair to other applicants because they enabled the interim operator to meet the substantial costs of prosecuting its applications. The court stated

> The paramount interest in a license determination is that of the public and that interest can yield to no other. Hence, the only relevance of the economic pressures on the parties is in determining whether

same token, we do not believe that disparities in the individual financial circumstances of competing applicants, even if arguably attributable to interim operations authorized by the Commission, undercut our conclusion that the statutory requirement limiting auctions in these cases to the competing applicants mitigates somewhat the unfairness of requiring such applicants to compete in an auction. We reasoned that such applicants, having incurred similar expenses and delays in prosecuting their applications, would not be disadvantaged in the auction process as a result of their previous efforts to secure the license through the comparative hearing process. While we cited this circumstance as one of several reasons supporting our decision to use auctions in these cases, it does not mean that we would delve into the financial situation of competing pre-July 1st applicants or otherwise take steps to equalize the particular financial circumstances of the pending applicants.[38] We, of course, do not foreclose the possibility that, in the event we ultimately adopt bidding credits for small businesses in broadcast auctions, applicants' particular financial circumstances (*e.g.*, gross revenues) would be considered in determining eligibility for such bidding credits in subsequent auctions.

B. Filing and Other Procedural Issues

1. Window Filing Approach for FM Translator and AM Services

27. ***Background.*** As described in the *Notice* in this proceeding, 12 FCC Rcd at 22387, the broadcast and secondary broadcast services have traditionally all had differing filing procedures, and none of these procedures was designed to work in conjunction with the auction of mutually exclusive applications. In the *First Report and Order*, we replaced these disparate filing procedures for the various services with a uniform window filing approach that would facilitate the efficient determination of groups of mutually exclusive applications for auction purposes. As explained in the *First Report and Order*, there would be, under this approach, specific time periods, or auction windows, during which all applicants seeking to participate in an auction must file their applications for new broadcast facilities or for major changes to existing facilities.[39] Prior to any broadcast auction, the Mass Media and Wireless Telecommunication Bureaus would release a public notice announcing an upcoming auction and specifying when the window for filing to participate in the auction would open and how long it would remain open. In response to a public notice announcing a window for the filing of broadcast and/or secondary broadcast applications for new stations and for major changes to existing facilities, the *First Report and Order* determined to require applicants to file only a short-form application (FCC Form 175), along with any

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those pressures will influence the choice of the licensee. This was the thrust of our holding in *Community Broadcasting*. The mere unfairness of the economic pressures on one party or the other is not of paramount importance.

[38] In concluding that it was not unfair to require pending applicants to incur the additional expense of participating in an auction, we noted further that the *Bechtel II* decision prevented us from deciding any of these cases according to the applicants' original expectations, and that under these circumstances additional costs could not be avoided even if the case were resolved through the comparative process. *First Report and Order*, 13 FCC Rcd at 15942.

[39] In contrast, minor modification applications could generally continue to be filed at any time, and would continue to be governed by first come/first served processing procedures. *See First Report and Order*, 13 FCC Rcd at 15989.

engineering data necessary to determine mutual exclusivity in a particular service. *See* 13 FCC Rcd at 15972-73.

28. The Commission retained the discretion in the *First Report and Order* to have combined filing windows allowing the submission of applications for several broadcast services, or to have separate filing windows for each type of broadcast or secondary broadcast service. We also stated that filing windows for the broadcast services would be opened as often as our resources allowed, taking into consideration, *inter alia*, the Commission's need to maintain orderly processing procedures and the frequency with which broadcast auctions may be efficiently conducted. In adopting this uniform window filing approach for all broadcast and secondary broadcast services, we stated that this approach best complemented the auction process and, at the same time, provided the staff with a mechanism to control effectively the filing and processing of broadcast applications. In particular, we felt that adherence to date certain openings and closings of filing windows (rather than first come/first served processing) would enable the Commission to identify more efficiently discrete groups of mutually exclusive applications for auction purposes. The *First Report and Order* also noted the "paucity" of substantive comments even addressing our window filing proposal, and concluded that commenters had no strong objections to the replacement of our existing disparate filing procedures with a uniform window filing approach. 13 FCC Rcd at 15973-74.

29. ***Pleadings***. Several petitioners oppose the replacement of the Commission's traditional procedures for the filing and processing of FM translator and AM applications with the uniform window filing approach described above.[40] These petitioners state that they were unaware that the Commission was anticipating such a drastic change in the procedures applicable to the filing of FM translator and AM applications, and, had they been aware that such a drastic change was contemplated, they would have filed comments to oppose the change. Because mutually exclusive FM translator applications and AM applications are, according to these petitioners, rarely filed, a window filing procedure makes little sense, but inhibits the functioning of the free market by limiting entrepreneurs from seeking FM translator or AM licenses on a demand basis. These petitioners argue that the Commission should return to its traditional "cut-off" list procedure for the filing and processing of FM translator and AM applications, and, if competing applications were to be filed under this "cut-off" list approach, then the Commission could resolve such mutual exclusivities by auction.[41] If, however, the Commission determines to retain its window filing approach for AM applications, one petitioner additionally asserts that, in its rulemaking proceeding to streamline radio technical rules, the Commission should classify as "minor" as many types of changes as possible in the facilities of existing AM stations. In particular, this petitioner requests that the Commission classify a change in an AM station from daytime only to unlimited time as a "minor" modification.[42]

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[40] *See* Petitions of David Benns at 1-4; Thomas Beschta at 1-4; William B. Grant at 2-3; Monroe-Stephens Broadcasting, Inc. at 2-4; Birach Broadcasting Corp. at 2-5.

[41] Under the Commission's former "cut-off" list procedure, an FM translator or AM application could be filed at any time. After an initial review for acceptability, the lead application was placed on an "A" cut-off list by a public notice, which announced a cut-off date by which applications mutually exclusive with, and petitions to deny, the lead application must be filed. Following an initial review of applications filed in response to the "A" cut-off list and a determination as to which of these applications were mutually exclusive with the lead application, a "B" cut-off list, which enumerated such applications and set the date for filing petitions to deny against them, was released.

[42] *See* Petition of Birach Broadcasting Corp. at 3-4.

30. ***Discussion***. Initially, we note that, despite petitioners' asserted lack of awareness, the Commission provided clear notice to interested parties of its proposal to replace the existing disparate filing procedures for the various broadcast services with a uniform window filing approach. *See Notice*, 12 FCC Rcd at 22387. Following consideration of the petitions on this issue, we continue to believe that the application filing procedures for all broadcast and secondary broadcast services, including AM stations and FM translators, should be uniform, given that construction permits for all these services must now be awarded by the same method (*i.e.*, a system of competitive bidding). As discussed in detail in the *First Report and Order,* we believe that a uniform window filing method best complements the competitive bidding process, and provides the staff with a sufficiently flexible mechanism to control effectively the filing and processing of broadcast applications for auction purposes. *See* 13 FCC Rcd at 15973. Unlike the traditional broadcast comparative licensing process, in which an individual hearing was conducted for each mutually exclusive group of applications, auctions involve multiple groups of mutually exclusive applications. Broadcast applications submitted in response to a delineated filing window, rather than solitary "A" or "B" cut-off lists, may be more efficiently consolidated for such auction resolution. For these reasons, we feel that a window filing system effectively fulfills the unique procedural requirements of an auction environment and will result in the most efficient processing of applications to participate in broadcast service auctions, in accordance with Section 309(j) of the Communications Act.[43]

31. We additionally reject petitioners' implication that a window filing system constitutes a radical transformation of AM spectrum allocation. AM spectrum will continue to be allotted on a demand basis, whereby individuals identify a need for new or expanded AM service and develop specific proposals to meet that need.[44] The fundamental nature of AM spectrum allocation will not change in this regard; institution of a window filing approach only alters the timeframe within which those proposals may be filed with the Commission.[45]

32. Moreover, with regard to the FM translator and AM services, the Commission recently revised the definitions of "major" and "minor" change in these services.[46] This rule revision reduced the number of modification applications regarded as "major" and therefore subject to competitive bidding and the associated uniform window filing procedures. Specifically, the Commission expanded the definition of minor change for the FM translator and AM services to conform more closely to the commercial FM definition, where generally only proposed changes in the community of license and changes to non-adjacent or non-intermediate channels are defined as major changes. *See* 47 C.F.R. § 73.3573(a)(1).

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[43] *See* 47 U.S.C. § 309(j)(3)(A) (in designing competitive bidding systems, Commission shall promote rapid deployment of new services for public without administrative delays).

[44] An application submitted on a "demand" basis refers to a uniquely engineered application in which the technical parameters, such as frequency and power, and the community of license are determined by an individual applicant, as opposed to an application filed for a community designated in the context of a rulemaking proceeding and specifically identified in a formal Table of Allotments, such as in the FM or television services. *See* 47 C.F.R. § 73.202 and 47 C.F.R. § 73.606, respectively, for the FM and television tables of allotment.

[45] We also note that, during AM auction filing windows, applicants will not be able to file applications for new facilities or for major changes within the AM expanded band, as frequencies in the expanded band are reserved for specific stations. *See Report and Order* in MM Docket No. 87-267, 6 FCC Rcd 6273, 6306 (1991), *on reconsideration*, 8 FCC Rcd 3250, 3255 (1993).

[46] *See First Report and Order, 1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, FCC 99-55 (rel. March 30, 1999).

Changes in power, antenna height and/or antenna location for stations in the FM translator and AM services are now classified as minor changes, provided that FM translator stations proposing antenna location changes continue to provide 1 mV/m service to some portion of their authorized 1 mV/m service areas. In addition, the Commission now classifies as "minor" any changes to the hours of authorized operation of AM stations or the addition of nighttime service to daytime only AM stations. *See* 47 C.F.R. §§ 73.3571(a)(1); 74.1233(a)(1). Because minor modification applications may be filed at any time and are governed by first come/first served processing procedures (*see supra* ¶ 27 n.39), the relief accorded through this technical rulemaking proceeding should significantly assuage petitioners' concerns about restrictions on the filing of modification applications.

2. Protection of Preferred FM Site Coordinates

33. ***Background***. The *Notice* in this proceeding proposed that applicants in the FM service would apply by submitting a short-form application (FCC Form 175) for any vacant allotment specified in the public notice announcing the auction filing window. Applications specifying the same vacant FM allotment would be mutually exclusive, and no supplemental engineering would be necessary to make this determination. *Notice*, 12 FCC Rcd at 22390. Commenters, however, noted that the Commission's proposal would protect from subsequently filed applications (such as minor change applications that may be filed at any time) only the reference points of any vacant allotment. According to these commenters, the reference point of a vacant allotment and an applicant's actual desired location might be separated by a considerable distance, and they argued that FM applicants should be allowed to submit actual site preferences prior to the auction, emphasizing that the ability to protect a specific tower or site from subsequently filed proposals would be a crucial factor in deciding whether to participate in an auction and how much to bid. To address these concerns, the Commission determined in the *First Report and Order* to give FM applicants the opportunity to submit a set of preferred site coordinates as a supplement to the FCC Form 175. We also emphasized that FM applicants were not required to submit a set of preferred site coordinates, and could simply indicate on their short-form applications the vacant allotments upon which they intended to bid. Any specific site indicated by FM applicants would be entered into the Commission's database without determining its ultimate acceptability from a technical standpoint, and the site would be protected from subsequently filed applications (such as minor modification applications) as a full-class facility. *See First Report and Order*, 13 FCC Rcd at 15974-75.

34. ***Pleadings***. Two petitioners oppose our determination in the *First Report and Order* to protect the preferred site coordinates an FM applicant may submit with its short-form application, as well as the reference points of the vacant allotment.[47] These petitioners assert that such practice will create unnecessary congestion, require significant expenditures of time and resources by Commission staff, and impede the ability of existing licensees and permittees to improve and upgrade their facilities. Because substantial numbers of short-form applications may be submitted in an auction window, an obligation to protect preferred site coordinates could, according to these petitioners, significantly increase the number of sites that must be protected. Given the Commission's elimination of the site certification requirement and the liberalization of the rules pertaining to amendment of long-form applications, these petitioners additionally contend that there exists little need for protecting preferred coordinates for every prospective bidder.

35. ***Discussion***. We affirm our decision allowing for the optional submission of preferred site coordinates as a supplement to the FCC Form 175 when applying for vacant FM allotments. These specified coordinates submitted by prospective bidders will be entered into the Commission's engineering

[47] *See* Petitions of Colon Johnston at ¶¶ 17-18; Olvie E. Sisk at ¶¶ 17-18.

database and protected from subsequently filed applications, such as minor modification applications. As described in the *First Report and Order*, commenters in this proceeding maintained that potential sites would be extensively investigated before an applicant decided whether to apply for a particular FM allotment or determined how much to bid on any vacant allotment. We agree with commenters that an applicant's ability to protect its preferred FM site will be an important factor in establishing the monetary value of a vacant FM allotment and a key consideration in any applicant's bidding strategy. Unless an applicant's site preference is protected and "cut-off" from subsequently filed applications, an auction winner may find that, at the conclusion of the auction, its preferred site is no longer available for use. Given the importance to all applicants of obtaining a desirable site for their proposed FM stations, we believe that affording auction participants temporary "cut-off" protection for their preferred sites is reasonable.

36. Petitioners' apprehension derives from the assumption that potentially large numbers of short-form applications may be filed in auction windows, and that the Commission's assurance to provide protection for preferred coordinates would consequently considerably increase the number of sites which must be protected. According to petitioners, providing such protection to auction participants would require a significant expenditure of time and resources by Commission staff, and would impede the ability of existing licensees and permittees to upgrade their facilities by filing minor modification applications.

37. We believe petitioners' concerns to be unfounded, and reject their arguments concerning the extent of the burden imposed on Commission staff and the magnitude of the preclusionary impact on existing licensees. Under our previous window filing system for newly-allotted FM channels, the preferred sites specified by all competing applicants were protected from subsequently filed applications. Thus, our decision to protect the preferred FM sites submitted with FCC Form 175 applications merely affords the same degree of protection to applicants filing in an auction window that was previously afforded to FM applicants filing under our former system, and causes no greater preclusionary impact on existing licensees. Moreover, with the advent of electronic filing for Mass Media Bureau application forms, data such as engineering parameters will be electronically submitted and automatically recorded in Commission databases, without significant resource expenditure by Commission staff.[48] We also anticipate that the auction process will proceed expeditiously, without the delays associated with traditional broadcast comparative licensing proceedings. Accordingly, the period between the filing of short-form applications and the grant of the winning bidder's long-form application, the interim during which the preferred site coordinates submitted by auction applicants must be protected, will be relatively brief. We do not believe that the protection of FM preferred site coordinates during this short time period will impose an onerous burden on the Commission, nor unduly impede the ability of existing licensees to modify their existing facilities.

3. Petition to Deny Period

38. ***Background***. The Commission has in the past generally provided a 30-day period for the filing of petitions to deny against broadcast applications. In Section 3008 of the Budget Act, Congress granted the Commission the authority to shorten the period for filing petitions to deny against applications for authorizations filed by auction winners. Although Section 3008 permitted the Commission to establish a petition to deny period as brief as five days, the *First Report and Order* concluded that a petition to

[48] The Commission mandated the electronic filing of various broadcast application and reporting forms as part of a wide-ranging effort to streamline the Mass Media Bureau's procedures and to provide improved service to the public. *See Report and Order* in MM Docket Nos. 98-43 and 94-149, 13 FCC Rcd 23056, 23060 (1998) (*Nontechnical Streamlining Report & Order*).

deny period of ten days was appropriate for long-form applications for broadcast and secondary broadcast construction permits obtained through the competitive bidding process. The *First Report and Order* also concluded that the time for filing oppositions would be five days from the filing date for petitions to deny, and the time for filing replies would be five days from the filing date for oppositions. 13 FCC Rcd at 15985. These same filing periods were also established for petitions to deny against the long-form applications filed by winning bidders in ITFS auctions. *See* 47 C.F.R. § 73.5006.

39. ***Pleadings***. One petitioner argues that the filing period for petitions to deny against translator (television and FM) applications should not be reduced as provided in the *First Report and Order*. Specifically, the National Translator Association asserts that the Commission should allow a 15-day period for the filing of petitions to deny against translator applications and a 15-day period for the filing of oppositions to petitions to deny. This petitioner contends that translator licensees need this additional time to file petitions to deny because such licensees typically have other full-time employment and are rarely represented by consulting engineers or attorneys.[49]

40. ***Discussion***. In establishing the abbreviated 10-day petition to deny period for all auctionable broadcast services, we realized that the brevity of this petition period would require prospective petitioners to act expeditiously. After further consideration, we conclude that a period as brief as 10 days may indeed present special difficulties for those prospective petitioners in the LPTV and television and FM translator services. We realize that secondary service applicants and licensees are often not represented by attorneys or consulting engineers and are frequently not even full-time broadcasters. Thus, we will amend our rules to require that any petition to deny against a long-form application filed by a winning bidder in a secondary broadcast service auction must be filed within 15 days following the issuance of a public notice announcing that the long-form application has been accepted for filing.[50] We believe that this extension of the petition to deny period is a reasonable accommodation to make for low power television and translator applicants and licensees, and will not unduly delay the commencement of new secondary broadcast service to the public.

41. We will also, on our own motion, apply this lengthened 15-day petition to deny period with regard to the long-form applications filed by winning bidders in ITFS auctions. Given the noncommercial educational nature of the applicants and licensees in ITFS, we believe it appropriate to allow these applicants to also take advantage of the longer petition to deny period. Accordingly, we will amend our rules, including 47 C.F.R. §§ 73.5006 and 74.912,[51] to reflect this extended period for petitions to deny against the long-form applications filed by ITFS and secondary broadcast service auction winners.

4. Use of Proprietary Network and Software for Filing Applications Electronically

42. ***Background***. In accordance with the general Part 1 auction rules, the *First Report and Order*

[49] *See* Petition of National Translator Association at 9-10.

[50] We emphasize, however, that the time period for filing petitions to deny against the long-form applications filed by winning bidders in the full power broadcast services will remain 10 days. Thus, if any secondary broadcast service licensee wishes to file a petition to deny against the long-form application filed by a full service broadcast auction winner, such a prospective petitioner will be subject to the 10-day petition to deny period.

[51] Section 74.912 provides for differing periods to file petitions to deny various types of ITFS applications, including applications for new ITFS facilities and for major changes to those facilities, applications for renewal of licenses of ITFS stations, and notifications regarding ITFS booster stations.

determined that all broadcast and secondary broadcast applicants would be required to file electronically their short-form applications (FCC Form 175) to participate in an auction. *See* 13 FCC Rcd at 15977; 47 C.F.R. §§ 1.2105(a), 73.5002(b). With regard to the long-form applications filed by broadcast service auction winners, the *First Report and Order* referred to the Commission's then-pending streamlining proceeding,[52] and stated that the Commission may require all winning bidders to file their long-form applications (FCC Forms 301, 346 or 349) electronically, when electronic procedures become available for the submission of broadcast service long-form applications. *See* 13 FCC Rcd at 15984-85. The Commission subsequently determined in that streamlining proceeding to make electronic filing mandatory, on a form-by-form basis, six months after each Mass Media Bureau form becomes available for filing electronically.[53]

43. ***Pleadings***. Three petitioners[54] state that the *First Report and Order* requires the electronic filing of short-form applications and "implies" that electronic filing of short-forms, as well as any electronic inspection of filed applications, would be solely by means of a proprietary network and software. Given its prior practice, petitioners assert that the Commission "apparently intends" to limit access to this proprietary network by imposing a toll charge of up to $2.99 per minute. Although petitioners support electronic filing requirements, they object to utilization of a proprietary network and software, and urge the Commission to adopt an Internet-based approach, which they contend would better serve the public interest and reduce barriers to entry. Even if the Commission persists in utilizing a proprietary network and software for submission of short-form applications, petitioners argue that the Commission should nonetheless provide access to inspect electronically filed short-form applications by an Internet connection to its World Wide Web server.[55]

44. ***Discussion***. After consideration, we decline to alter our system for the electronic filing and inspection of short-form applications. Based on our experience in conducting 20 prior auctions, we believe it appropriate, for several reasons, to continue using our wide area network (WAN) for conducting Commission auctions, including for the filing of short-form applications to participate in an auction. First, the WAN and associated software provide the highest degree of security for the Commission's electronic auction system, as well as guaranteed accessibility to the system at all times during the progress of an auction and during the period of an auction short-form application filing window. In addition, we are not persuaded that utilization of our WAN for broadcast auctions presents a barrier to entry of any

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[52] *See Notice of Proposed Rulemaking* in MM Docket No. 98-43, 13 FCC Rcd 11349 (1998) (requesting comment on various streamlining measures, including the electronic filing of various Mass Media Bureau applications and reporting forms).

[53] *See Nontechnical Streamlining Report and Order*, 13 FCC Rcd at 23060-61.

[54] *See* Petitions of Colon Johnston at ¶¶ 19-22; Ruth P. Carman at ¶¶ 17-20; Olvie E. Sisk at ¶¶ 19-22.

[55] These petitioners additionally assert that the *First Report and Order* required long-form applications to be filed electronically, which, as discussed immediately above, is incorrect. It was in the *Nontechnical Streamlining Report and Order*, 13 FCC Rcd at 23060, that the Commission, as described above, mandated electronic filing of various Mass Media Bureau reporting forms and applications, including the FCC Forms 301, 346 and 349. The *Nontechnical Streamlining Report and Order* also made clear that such applications would be filed electronically, and would be available for inspection electronically, via the Commission's site on the World Wide Web. *See id.* at 23062, 23064. Thus, the petitioners' arguments objecting to the Commission's use of proprietary networks or software for the filing and inspection of applications are relevant only in relation to short-form applications to participate in broadcast auctions.

significance. The Commission imposes no fee or on-line charge for the electronic filing of short-form applications, and provides all prospective applicants access to the software needed to file such applications via the WAN for no charge. To inspect the electronically filed short-form applications submitted by other applicants, the Commission does currently impose an on-line charge for access to the WAN of $2.30 per minute. We believe this on-line access charge presents no significant barrier to entry for auction applicants, as it appears comparable to the expenses that competing applicants generally bear in obtaining hard copies of manually-filed applications, and it may be further reduced in the future.[56] In sum, we are not inclined to alter the system used successfully by the Commission for the electronic filing and review of short-form applications in numerous previous auctions, as petitioners have not persuaded us that changes in the utilization of our WAN are necessary, or indeed desirable, for the conducting of broadcast service auctions.

5. Ownership Disclosure Requirements for Transfer and Assignment Applications

45. On our own motion, we also address the applicability of Section 1.2112(a) to transfer and assignment applications filed by broadcast licensees and permittees. This provision, contained in the general Part 1 auction rules, requires the submission of detailed ownership information not only with short-form applications to participate in competitive bidding, but also with various other types of applications, including assignment or transfer of control. *See* 47 C.F.R. § 1.2112(a).[57] In the *First Report and Order*, we stated that we would revisit the issue of applying Section 1.2112(a) to broadcast transfer and assignment applications, in light of the Mass Media Bureau's streamlining initiatives. *See* 13 FCC Rcd at 15992 note 215. After consideration, we believe that it is unnecessary to apply the ownership disclosure requirements contained in Section 1.2112(a) to parties filing applications to transfer or assign broadcast licenses and permits, whether those authorizations were awarded by competitive bidding or other means. Our broadcast assignment and transfer application forms (FCC Form 314 and Form 315) already require the submission of ownership information, including information concerning the holders of attributable interests in the assignee and transferee and the other broadcast stations in which any party to the application has an attributable interest. Broadcast licensees and permittees must also, in their Ownership Reports (FCC Form 323), submit detailed ownership information, including information on holders of attributable interests in the licensee and the attributable interests in other broadcast stations held by the licensee and these other attributable parties.[58] Because broadcast licensees and permittees generally, and those applying to transfer or assign their licenses specifically, are subject to such significant ownership disclosure requirements, we believe it unnecessary to also require broadcast licensees and permittees seeking to assign or transfer their authorizations to submit the ownership information specified in Section 1.2112(a). Requiring the repetitive submission of similar ownership information serves no clear regulatory

[56] Moreover, prospective bidders or other interested parties can review electronically filed short-form applications without any charge through computer terminals located in our reference rooms.

[57] Section 1.2112(a) requires, *inter alia*, the disclosure of any party holding a ten percent or greater interest in the applicant; all parties holding indirect ownership interests equaling ten percent or more of the applicant; and any FCC-regulated business ten percent or more of whose stock, warrants, options or debt securities are owned by the applicant.

[58] The Commission recently modified its ownership reporting rules to require broadcast licensees to file Ownership Reports every two years, rather than annually. Broadcast licensees and permittees must also file an Ownership Report within 30 days of consummating authorized assignments or transfers of licenses or permits. *See* 47 C.F.R. § 73.3615; *Nontechnical Streamlining Report and Order*, 13 FCC Rcd at 23094.

purpose and is contrary to the intent of the Commission's recent broadcast streamlining initiatives.[59] We therefore amend Section 73.5009 of our rules to clarify that the ownership disclosure requirements of Section 1.2112(a) will not apply to applicants seeking consent to assign or transfer control of broadcast construction permits or licenses.[60]

C. Competitive Bidding Issues

1. Auctioning of LPTV and Television Translator Displacement Applications

46. ***Background.*** On June 1, 1998, the Commission received over one thousand LPTV and television translator applications requesting replacement channels due to displacement by new digital television (DTV) stations.[61] Although displacement applications filed by LPTV and television translator licensees and permittees propose operations on new channels that may be at new locations as well, and thus are akin to applications for new facilities,[62] such applications are technically regarded as minor modification applications under our rules. *See* 47 C.F.R. § 73.3572(a)(2). We generally determined in the *First Report and Order* not to subject minor modification applications to competitive bidding in the rare instances where they can be mutually exclusive. As with other competing minor modification applications, the *First Report and Order* stated that we expected these LPTV displacement applicants to use engineering solutions and negotiations to resolve any mutual exclusivities. But in this unusual situation due to the large number of applications filed on the same day all seeking a limited number of replacement channels, we noted that these applicants may experience greater difficulties in resolving the mutual exclusivities. Thus, the *First Report and Order* concluded that if, following a reasonable period after release of a public notice identifying any mutually exclusive LPTV displacement applicants, a significant number of these applicants had been unable to resolve their mutual exclusivities, then the Commission reserved the right to subject these competing displacement applications to competitive bidding. *See* 13 FCC Rcd at 15990.

47. ***Pleadings.*** The Latin Communications Group Television, Inc. asks for clarification of the

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[59] *See Nontechnical Streamlining Report and Order*, 13 FCC at 23058 (measures in this order designed to eliminate unnecessary regulatory burdens in connection with licensing of new broadcast stations and in transfer and assignment of those facilities).

[60] Under Section 73.5009, however, an applicant seeking approval for a transfer of control or assignment of a broadcast construction permit or license within three years of receiving such permit or license by means of competitive bidding will still be subject to the reporting requirement of Section 1.2111(a), which requires the submission to the Commission of the sale contract or other agreement disclosing the consideration received in return for the transfer or assignment of the license. *See Nontechnical Streamlining Report and Order*, 13 FCC Rcd at 23076 (determining to retain the Section 1.2111(a) reporting requirement, in light of the contract submission procedures adopted therein for assignments and transfers of broadcast licenses generally).

[61] June 1, 1998 was the first day for filing DTV displacement relief applications by LPTV and television translator licensees and permittees who face eventual channel displacement by DTV stations or by stations authorized to operate on Channels 60-69. Because displacement applications are filed on a first-come, first-served basis and because there may not be enough channels to accommodate all displaced stations, there was a premium on filing applications on this initial June 1st filing date. *See Public Notice, Commission Postpones Initial Date for Filing TV Translator and Low Power TV Applications for Displacement Channels*, Mimeo No. 82914 (rel. April 16, 1998).

[62] *See First Report and Order*, 13 FCC Rcd at 15990 n. 206.

statement in the *First Report and Order* that the Commission reserves the right to subject the competing LPTV displacement applications filed June 1, 1998, to competitive bidding. This petitioner urges the Commission to first use other methods to resolve mutual exclusivities between the June 1st displacement applications prior to subjecting them to competitive bidding. Specifically, this petitioner suggests several priorities that the Commission could use to decide between competing displacement applications.[63]

48. ***Discussion***. Pursuant to the procedures set forth in the *First Report and Order*, the Commission released on September 2, 1998, a public notice identifying 280 mutually exclusive LPTV and television translator displacement applications that had been filed on June 1, 1998. The public notice announced an initial 90-day period (subsequently extended) during which these mutually exclusive applicants were encouraged to use engineering solutions to resolve their mutual exclusivities.[64] If there are competing June 1st displacement applications remaining after the expiration of this extended settlement period, we decline to resolve them by the various priorities suggested by the Latin Communications Group Television, Inc. The adoption of the comparative criteria proposed by this petitioner would likely be challenged by applicants disadvantaged by such criteria, thereby leading to considerable delays in resolving the June 1st displacement applications. The adoption and implementation of new comparative criteria for resolving applications in a service previously subject to lottery would also be of doubtful utility,[65] given the applicability of any such criteria only to a very limited (and as yet unidentified) group of June 1st displacement applications that were not resolved during an extended settlement period. Due to these uncertainties associated with establishing new comparative criteria, and the delays likely to result, we deny this petitioner's proposal.

2. Minimum Opening Bids and Reserve Prices

49. ***Background***. In the Balanced Budget Act, Congress added a new provision to the Commission's competitive bidding authority, which explicitly directed us to

> prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

47 U.S.C. § 309(j)(4)(F). All five auctions conducted since enactment of the Balanced Budget Act have utilized minimum opening bids.[66] In addition, we employed this mechanism in two earlier auctions.[67]

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[63] For example, displacement applications filed by operating LPTV stations could have priority over displacement applications filed by permittees who had not yet built their stations; LPTV stations could also be given priority based on the length of service to their communities or on other criteria. *See* Petition of Latin Communications Group Television, Inc. at 3-6.

[64] *See Public Notice, Low Power Television and Television Translators: Mutually Exclusive Displacement Applications*, Mimeo No. 85299 (rel. Sept. 2, 1998). This initial period has been extended for additional periods by subsequent public notices.

[65] Mutually exclusive LPTV and television translator applications were previously resolved by lottery, rather than by any comparative system, but the Budget Act eliminated our authority to utilize lotteries for these services.

[66] They are: 800 MHz Specialized Mobile Radio Service (Upper 10 MHz Band); Local Multipoint Distribution Service; Phase II 220 MHz Service; VHF Public Coast Service; and Location and Monitoring Service.

Given the terms of Section 309(j)(4)(F) and the successful use of minimum opening bids in previous Commission auctions, the *First Report and Order* delegated to the Wireless Telecommunications Bureau and the Mass Media Bureau (the Bureaus) the authority to seek comment on and, as appropriate, to establish minimum opening bids and/or reserve prices for each auction or group of auctions of broadcast service construction permits. This grant of joint delegated authority to the Bureaus followed the model employed in the DBS proceeding, where we directed the Wireless Telecommunications Bureau (WTB) and the International Bureau to jointly determine minimum opening bids.[68] It is also consistent with our Part 1 general competitive bidding rules, which provide for the establishment of minimum opening bids or reserve prices by WTB after public comment is sought prior to specific auctions.[69] The *First Report and Order* identified several factors that the Bureaus may consider in establishing these mechanisms in the broadcast context. *See* 13 FCC Rcd at 15971.[70]

50. ***Pleadings.*** Several petitioners assert that imposition of a reserve price or minimum bid requirement does not serve the public interest.[71] These petitioners argue that the *First Report and Order* failed to set forth any basis, as required by Section 309(j)(4)(F), for the Commission's conclusion that the public interest would be served by imposition of reserve prices or minimum opening bids. There are, according to these petitioners, a number of reasons for concluding that imposition of a reserve price or minimum opening bid requirement would disserve the public interest. Specifically, these petitioners contend that neither the Commission nor its staff has the expertise to determine an appropriate reserve price, so any such determination would be "essentially arbitrary." Rather, the auction itself should establish the fair market value of the broadcast authorizations to be awarded. Furthermore, it would not serve the public interest if an authorization was not awarded (and no new service commenced) because an "arbitrary" reserve price was not met in an auction.

51. ***Discussion.*** The Balanced Budget Act creates a presumption that reserve prices and minimum opening bids are in the public interest, absent circumstances that convince us to the contrary.[72] We reject petitioners' assertions that these mechanisms disserve the public interest in the broadcast context and that we should not permit the Bureaus to use them. Minimum opening bids have been utilized in seven auctions to date in the licensing of a disparate array of services, all without the problems envisioned by

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[67] Minimum opening bids were first used in the Direct Broadcast Satellite (DBS) auction. *See Revision of Rules and Policies for DBS*, 11 FCC Rcd 9712, 9787-88 (1995) (*DBS Order*). The same feature was later employed in initiating the Digital Audio Radio Satellite service (DARS). *See Establishment of Rules and Policies for DARS in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5818 (1997).

[68] *See DBS Order*, 11 FCC Rcd at 9787-88.

[69] *See* 47 C.F.R. § 1.2104(c). *See also Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding*, 12 FCC Rcd 5686, 5697-98 (1997); *Third Report and Order*, 13 FCC Rcd at 454-456.

[70] We provided a similar list of factors to WTB when we clarified and discussed its delegated authority to employ minimum opening bids and reserve prices after enactment of the Balanced Budget Act. *See Third Report and Order*, 13 FCC Rcd at 455-456.

[71] *See* Petitions of Heidelberg-Stone Broadcasting Co. at ¶¶ 12-14; Rio Grande Broadcasting Co. at ¶¶ 12-14; Liberty Productions, LP at ¶¶ 11-13; Colon Johnston at ¶¶ 9-12; Olvie E. Sisk at ¶¶ 9-12; Ruth P. Carman at ¶¶ 9-12.

[72] *See Third Report and Order*, 13 FCC Rcd at 454-455.

petitioners. For specific auctions, WTB has, for example, found that the use of minimum opening bids advances the public interest objectives contained in Section 309(j) of the Communications Act, including promotion of competition, dissemination of licenses among a variety of applicants, efficient spectrum use, and recovery for the public of a portion of the value of the spectrum.[73] Petitioners have not shown these presumptive public interest benefits to be overridden by any detriment. We will therefore leave it to the Bureaus to seek comment on and establish minimum opening bids or reserve prices prior to specific broadcast auctions, unless the Bureaus determine that to do so in particular circumstances would not be in the public interest.

3. "Qualified" Applicants and Grants by Default

52. ***Background***. Under the procedures adopted in the *First Report and Order*, a prospective bidder in any broadcast auction must, prior to the auction, submit a short-form application (FCC Form 175) that is acceptable for filing and the requisite upfront payment. Following each auction, a winning bidder must, within ten business days of release of a public notice announcing the close of the auction and identifying the winning bidders, submit its down payment and must, within 30 days of that public notice, file an appropriate long-form application (FCC Form 301, 346 or 349) for each construction permit for which it was the high bidder. After the winning bidder's long-form application has been accepted for filing, a public notice will be released announcing that fact, thereby triggering the ten-day filing window for petitions to deny. If the Commission denies or dismisses all petitions to deny (if any are filed), and is otherwise satisfied that the applicant is qualified, a public notice will be issued announcing that the construction permit is ready to be granted. Auction winners are required to pay the balance of their winning bids in a lump sum within ten business days following the release of this public notice. *See First Report and Order*, 13 FCC Rcd at 15983-86; 47 C.F.R. §§ 73.5003, 73.5005, 73.5006. These broadcast auction procedures follow the Commission's Part 1 auction rules, under which only winning bidders are required to submit long-form applications and petitions to deny are entertained only against the long-form applications of winning bidders. *See* 47 C.F.R. §§ 1.2107, 1.2108, 1.2109.[74]

53. ***Pleadings***. Several petitioners[75] contend that Section 309(j)(1) and Section 309(j)(6)(E) show the intent of Congress that authorizations be awarded by competitive bidding only where there exists more than one *qualified* applicant.[76] To assure this outcome, these petitioners contend that the Commission

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[73] *See Order, Auction of 800 MHz SMR (Upper 10 MHz Band)*, DA 97-2147 at ¶ 11 (rel. Oct. 6, 1997).

[74] *See also Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348, 2376 (1994) (*Second Report and Order*) (in adopting general Part 1 auction rules, bidders were required to only submit short-form applications before auction and only auction winners were required to submit long-forms, so as to reduce administrative burdens and minimize potential for delay).

[75] *See* Petitions of Heidelberg-Stone Broadcasting Co. at ¶¶ 15-16; Rio Grande Broadcasting Co. at ¶¶ 15-16; Liberty Productions, LP at ¶¶ 14-15; Colon Johnston at ¶¶ 13-16; Olvie E. Sisk at ¶¶ 13-16; Ruth P. Carman at ¶¶ 13-16.

[76] Section 309(j)(1) provides that, where "mutually exclusive applications are accepted for any initial license or construction permit, then . . . the Commission shall grant the license or permit to a *qualified* applicant through a system of competitive bidding." 47 U.S.C. § 309(j)(1) (emphasis added). Section 309(j)(6)(E) states that nothing in the use of competitive bidding shall "relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, *threshold qualifications*, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. § 309(j)(6)(E) (emphasis added).

should adopt "some" procedure to be applied on a case-by-case basis whereby, upon petition by the winning bidder, it would consider evidence that the winning bidder is the sole qualified applicant and therefore entitled to a "grant by default." In cases in which such a demonstration is successfully made, the winning bidder should be relieved of its obligation to remit the payment of its winning bid.

54. ***Discussion***. These petitioners contend that a winning bidder, by an unspecified mechanism, should be able to attempt to demonstrate that their unsuccessful competitors in an auction were in some way "unqualified" and that the winning bidder should be relieved from its payment obligations because, in essence, the construction permit at issue should not have been awarded by competitive bidding due to the absence of "qualified" competing applicants. We reject the petitioners' argument, as the Commission's well-established auction application and licensing procedures, which the *First Report and Order* closely follows, are clearly in accord with Section 309(j) and congressional intent. As described in ¶ 52 above, all prospective bidders, to be allowed to participate in any broadcast auction, must submit prior to auction a short-form application that the Commission finds acceptable for filing. The Commission will conduct competitive bidding for any broadcast permit only where competing applicants have submitted acceptable short-form applications for that permit and have been found qualified to bid.[77] This application procedure is clearly consistent with the Commission's statutory auction authority. Section 309(j)(5) provides that "[n]o person shall be permitted to participate in a system of competitive bidding . . . unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is *acceptable for filing*." 47 U.S.C. § 309(j)(5) (emphasis added). Section 309(j)(1), moreover, mandates the use of competitive bidding if "mutually exclusive applications *are accepted* for any initial license or construction permit." 47 U.S.C. § 309(j)(1) (emphasis added).

55. Because all prospective bidders are found qualified to bid before being allowed to participate in an auction, we find the adoption of some post-auction procedure that would be utilized to demonstrate that losing bidders were somehow "unqualified" to bid to be unnecessary and, indeed, redundant. If petitioners are also asserting that broadcast authorizations should be awarded by competitive bidding only where all applicants to participate in an auction are not only shown to be qualified to bid but also qualified to be granted a license, then we reject their position as contrary to the terms of Section 309(j) and the intent of our competitive bidding authority. Section 309(j)(1) and Section 309(j)(5) do require that licenses be granted via competitive bidding only to qualified applicants,[78] and our procedures ensure this outcome by requiring winning bidders to submit long-form applications that are subject to petitions to deny. *See* 47 C.F.R. §§ 1.2107, 1.2108, 73.5005, 73.5006. These statutory provisions do not, however, require that every auction participant demonstrate its qualifications to be a licensee (rather than to be qualified to bid). In this regard, Section 309(j)(5) provides that "the Commission shall, by regulation prescribe expedited procedures consistent with the procedures authorized by *subsection (i)(2)* for the resolution of any substantial and material issues of fact concerning qualifications." 47 U.S.C. § 309(j)(5) (emphasis added). Despite the termination of our lottery authority to award certain types of commercial

[77] *See* 47 C.F.R. § 73.5002(a) & (b) (in event that short-form applications are submitted that are not mutually exclusive with any other application in the same service, such applications will not be subject to auction). *See also Second Report and Order*, 9 FCC Rcd at 2376 (if Commission receives only one short-form application that is acceptable for filing for a particular license, mutual exclusivity would be lacking and Commission would be prohibited from using competitive bidding to award license).

[78] *See* 47 U.S.C. § 309(j)(1) (if mutually exclusive applications for a license are accepted, then Commission shall grant license to a qualified applicant through competitive bidding); 47 U.S.C. § 309(j)(5) (no license shall be granted to an applicant pursuant to Section 309(j) unless the Commission determines that the applicant is qualified pursuant to Sections 309(a), 308(b) and 310).

broadcast licenses, Section 309(i)(2) still accords the Commission discretion to make the determination of basic qualifications to be a licensee with respect to the lottery winner only.[79] Auction authority was, like lottery authority, granted to avoid the costs and delays of comparative hearings,[80] and the language in Section 309(i) is comparable to Section 309(j)(1) in that both prescribe requirements that must be met before the Commission can award a license, not before it conducts a lottery or auction.[81] Thus, we conclude that the Commission has clear statutory authority to continue, with respect to broadcast service auctions, its established practice of determining qualifications to be a licensee only with respect to winning bidders. We accordingly reject the petitioners' position that Section 309(j) requires the creation of some post-auction mechanism by which a winning bidder could attempt to be relieved of its payment obligation by showing that its unsuccessful competing applicants were somehow unqualified to be licensees.

56. Indeed, we believe that establishment of the post-auction mechanism supported by these petitioners would be contrary to the purpose of Section 309(j), which is intended to, *inter alia*, encourage the development and rapid deployment of new services for the public without administrative or judicial delays and to recover for the public a portion of the value of the public spectrum resource available for commercial use. *See* 47 U.S.C. § 309(j)(3)(A) & (C). The implementation of such a mechanism could encourage auction winners to claim that their unsuccessful competing bidders were unqualified so as to avoid their obligations to pay their winning bids. The consideration of claims by winning bidders asserting that their competitors were unqualified would be time-consuming and administratively burdensome for the Commission, and would delay both the ultimate grant of construction permits to auction winners and the commencement of service to the public. We also remain unclear how such a mechanism would operate in practice; in particular, we are unsure of the basis on which the alleged lack of qualifications of a losing bidder would be determined, as an unsuccessful bidder is not required to submit a long-form application, which is the usual basis for determining any broadcast applicant's qualifications to be a licensee. We therefore conclude that implementation of the petitioners' suggested post-auction mechanism would be administratively burdensome and inconsistent with the intent of Section 309(j), and consequently deny these petitions.

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[79] Section 309(i)(2)(C) provides that "the Commission may, by rule, and notwithstanding any other provision of law . . . (C) omit the determination [of basic qualifications] with respect to any application other than the one selected pursuant to paragraph (1)." 47 U.S.C. § 309(i)(2)(C). In fact, we initially declined to adopt rules implementing our authority to award licenses through a system of random selection precisely because the statute originally required that we adjudicate the applicants' basic qualifications before the lottery. This undermined the primary purpose of the statute, which was to reduce the expense, delays and backlogs resulting from comparative proceedings. *See Amendment of Part 1 of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 89 FCC 2d 257, 277-279 (1982).

[80] *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 8 FCC Rcd 7653, 7651 (1993), *citing* H.R. Rep. 111, 103d Cong. 1st Sess. 254, 258 (1993).

[81] Prior to the Budget Act, Section 309(i)(2) provided that "[n]o license or construction permit shall be granted to an applicant selected pursuant to [random selection procedures] unless the Commission determines the qualifications of such applicant . . ." As amended by the Budget Act, Section 309(i) now provides that "the Commission shall have the authority to grant such license or permit to a qualified applicant through the use of a system of random selection." Virtually identical language is contained in amended Section 309(j), which specifies that "the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding."

4. Anti-Collusion Rule

57. ***Background.*** In the *First Report and Order*, we determined to subject applicants for broadcast auctions to the Commission's Part 1 anti-collusion rule, which provides that, after the short-form filing deadline, applicants generally may not discuss the substance of their bids or bidding strategies with other bidders that have applied to bid on the same licenses or permits. *See* 47 C.F.R. § 1.2105(c).[82] The Commission adopted the anti-collusion rule to both prevent and to facilitate the detection of collusive conduct, thereby enhancing the competitiveness of the auction process and post-auction market structure, and we concluded that the rule should generally apply in the broadcast context. *See* 13 FCC Rcd at 15980-81. As noted in the *Notice* in this proceeding and in the *First Report and Order*, the terms of the anti-collusion rule would prohibit applicants who file mutually exclusive short-form applications in response to broadcast auction windows from procuring the removal of competing applications by means of either settlement agreements or amendments to any engineering data submitted with their short-form applications following the short-form filing deadline. *See Notice*, 12 FCC Rcd at 22393-94; *First Report and Order*, 13 FCC Rcd at 15981.

58. The *First Report and Order* also determined to apply competitive bidding procedures to mutually exclusive applications for major modifications of existing broadcast facilities, as well as to competing applications for new facilities. We recognized, however, that competing major modification applications could often be resolved by changes to the engineering proposals submitted by applicants and might raise special considerations where settlements would be particularly appropriate. We therefore determined to allow applicants who, under the window filing procedures adopted in the *First Report and Order*, filed either competing major modification applications, or competing major modification and new facility 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. *See* 13 FCC Rcd at 15927; 47 C.F.R. § 73.5002(c) & (d). The *First Report and Order* expressly noted that allowing competing major modification applicants to settle following the filing of short-form applications was not consistent with the terms of the general Part 1 anti-collusion rule, which is triggered by the filing of short-form applications. We stated, however, that the anti-collusion rule was formulated in the context of geographic area licensing, rather than site-specific licensing as in broadcast where determinations of mutual exclusivity could depend on specific technical proposals, which in some instances might be altered so as to allow the grant of several formerly mutually exclusive applications. We therefore concluded in the *First Report and Order* to allow parties with competing major modification applications a 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).

59. ***Pleadings.*** A number of petitioners contend that the Commission should, despite the terms of the general anti-collusion rule, nonetheless allow a discrete period (such as 60 or 90 days) to allow mutually exclusive applicants for new facilities to settle after the filing of short-form applications in a

[82] 47 C.F.R. § 1.2105(c)(1) provides that, after the filing of short-form applications, "applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the high bidder makes the required down payment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application."

broadcast auction window.[83] These petitioners note the Commission's past practice of encouraging settlements of competing broadcast applications, and contend that settlements serve the public interest by conserving Commission resources and providing service to the public more quickly. Also, petitioners assert that applying the anti-collusion rule to preclude settlements after the filing of short-forms is inconsistent with Section 309(j)(6)(E), which provides that nothing in the use of competitive bidding shall be construed to relieve the Commission of the obligation "to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means" to avoid mutual exclusivity. 47 U.S.C. § 309(j)(6)(E). Moreover, petitioners point out that the legislative history of the Budget Act specifically admonished the Commission about its obligations under Section 309(j)(6)(E) by emphasizing that

> notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.

Conference Report at 572. These petitioners assert that the Commission has implemented the anti-collusion rule in a manner violating congressional intent, as expressed in legislative history, and the express terms of Section 309(j)(6)(E).

60. Additional petitioners argue that application of the anti-collusion rule to preclude settlements or engineering solutions to eliminate mutual exclusivity would disproportionately impact the LPTV and television and FM translator services.[84] These petitioners similarly contend that, given the terms of Section 309(j)(6)(E) and the Budget Act's legislative history, LPTV and translator applicants for new facilities should be given the right to resolve conflicts between applications and amend applications to eliminate mutual exclusivity after short-forms are filed.[85] The National Translator Association in particular points out that the Commission's existing rules provide translator applicants "unique flexibility" to resolve mutual exclusivities, which the anti-collusion rule would prevent applicants from utilizing.[86] Moreover, many translator applicants are counties or other governmental entities or community associations that want to become licensees to bring broadcast service (particularly television) to small rural communities. Given the nature of translator applicants and licensees, this petitioner contends that, if the anti-collusion rule were

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[83] *See* Petitions of Howard G. Bill at 1-9; Dewey Matthew Runnels at 1-9; Colon Johnston at ¶¶ 3-8; Olvie E. Sisk at ¶¶ 3-8; Ruth P. Carman at ¶¶ 3-8; Thomas Beschta at 3-4; James W. Lawson at 3-4.

[84] *See* Petitions of Community Broadcasters Association at 5-6; National Translator Association at 1-9.

[85] As explained in ¶ 58 above, the *First Report and Order* determined to allow competing major modification applicants in all broadcast services to resolve their mutual exclusivities during a limited period after the filing of short-form applications. *See* 47 C.F.R. § 73.5002(d).

[86] For example, existing rules allow television translator and LPTV applicants to avoid mutual exclusivity (*i.e.*, predicted prohibited interference) by demonstrating that there will be no actual interference due to terrain shielding. *See* 47 C.F.R. § 74.703(a). These applicants are also permitted to avoid mutual exclusivity by agreeing to accept interference, or by filing minor amendments to their applications. *See* 47 C.F.R. §§ 74.703(a). FM translator applicants may also avoid mutual exclusivity by demonstrating that no actual interference will occur due to intervening terrain. *See* 47 C.F.R. § 74.1204(d).

to be strictly applied to translators, mutually exclusive translator applicants would not bid at auction, but would merely refile their applications in a subsequent filing window in an effort to avoid mutual exclusivity, thereby delaying commencement of new service to rural areas in contravention of Section 309(j).[87]

61. ***Discussion***. After consideration, we decline to adopt the wide-ranging exception to the anti-collusion rule that some petitioners support, but we grant reconsideration in part for the secondary broadcast services. As previously explained, the anti-collusion rule prohibits applicants, after the filing of short-forms, from discussing the substance of their bids and bidding strategies with competing applicants and also precludes the transfer of indirect information that affects, or could affect, bids or bidding strategies. *See First Report and Order*, 13 FCC Rcd at 15980. The Commission continues to believe that such prohibitions are generally necessary to enhance the competitiveness of the auction process and the post-auction market structure. *See Second Report and Order*, 9 FCC Rcd at 2386-88. Permitting competing applicants for new facilities in all broadcast services to engage in discussions concerning settlements or other resolution of their mutual exclusivities following submission of their short-form applications, as some petitioners support, would, we believe, reduce the effectiveness of the anti-collusion rule. For example, if competing broadcast auction applicants were permitted to engage in discussions concerning settlement or other resolution of mutual exclusivities, these competing applicants would almost inevitably transfer information at least indirectly affecting bids or bidding strategies, thereby adversely impacting the competitiveness of the auction.[88] Moreover, given our statutory obligation to utilize auctions as a primary licensing tool, "the protection of the integrity of the auction process is of paramount importance," and we are consequently concerned about "actions that compromise the integrity" of the process, particularly "behavior that violates the anti-collusion rule."[89] The Commission's experience in conducting numerous previous auctions has demonstrated the importance of the anti-collusion rule in preventing and facilitating the detection of collusive conduct. For these reasons, we are reluctant to adopt the broad exception to the anti-collusion rule urged by some petitioners.

62. We are also not persuaded that any Commission policy traditionally favoring settlements in the broadcast context should alter the applicability of our well-established anti-collusion rule to broadcast auctions. Although, as petitioners note, the Commission has in the past encouraged the settlement of broadcast applications, we did so in the context of the lengthy and costly comparative hearing process. Because even routine comparative proceedings can take from three to five years or more to complete after designation of the mutually exclusive applications for hearing,[90] settlements in the comparative hearing context did conserve substantial Commission resources and facilitate the commencement of service to the

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[87] *See* 47 U.S.C. § 309(j)(3)(A) (in designing systems of competitive bidding, Commission shall promote development and deployment of products and services for public, including those residing in rural areas, without administrative or judicial delays).

[88] We believe it very likely, for instance, that discussions concerning settlements would tend to reveal the level of interest in, and commitment to obtaining, the broadcast authorizations applied for by applicants. Especially if a settlement were not reached with regard to particular authorizations, then the participants in those discussions would have gained information that may likely affect their bidding strategies in the subsequent auction.

[89] *US West Communications, Inc.*, 13 FCC Rcd 8286, 8296 (1998) and *Western PCS BTA I Corporation*, 13 FCC Rcd 8305, 8316 (1998) (finding two participants in Personal Communications Services auction apparently liable for forfeiture of $1,200,000 each for violating anti-collusion rule).

[90] *See First Report and Order*, 13 FCC Rcd at 15934.

public. In the auction context, however, allowing settlements following the filing of short-forms would not conserve significant Commission resources or substantially speed service to the public, because an auction can be commenced shortly after the filing of short-forms and the auction winner quickly licensed. Thus, allowing post-short-form settlements in the auction context would not serve the same policy goals as settlements in the comparative hearing process.[91] And, with respect to pre-July 1, 1997 applicants in the frozen comparative cases, we have already afforded multiple settlement opportunities to them, and see no basis for allowing them to enter into post-short-form settlement agreements.

63. Finally, we do not believe that Section 309(j)(6)(E) requires the Commission to make an across-the-board exception to the anti-collusion rule in the broadcast context. Section 309(j)(6)(E) was included in the Commission's original auction authority granted in 1993, and the language of that section was not altered by the 1997 Balanced Budget Act. As stated in the Budget Act's legislative history, Congress was "concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations" under the existing Section 309(j)(6)(E).[92] The Commission, by determining that its well-established anti-collusion rule should preclude competing applicants for new broadcast facilities from discussing settlements or otherwise resolving their mutual exclusivities after the filing of short-forms, has not minimized its obligations under Section 309(j)(6)(E), but has merely continued to apply consistently a rule adopted in 1994 and subsequently applied to every auction conducted by the Commission. Moreover, we feel that the application and licensing procedures adopted in the *First Report and Order* are in conformance with the Commission's obligations under Section 309(j)(6)(E) to avoid mutual exclusivity by various means. For example, the adoption of a uniform window filing approach for all broadcast services -- and the concomitant elimination of "A" and "B" cut-off filing procedures for several services -- may reduce the likelihood of particular applicants becoming mutually exclusive.[93] The *First Report and Order* furthermore retained the traditional site- or allotment-specific licensing for the various broadcast services, rather than adopting other licensing schemes, such as one based on pre-defined geographic areas.[94] We believe this retention of our long-established licensing practices for broadcast may also tend to minimize instances of mutual exclusivity, especially in cases

[91] Indeed, allowing settlements following the short-form deadline could be seen as contrary to one of the purposes of the auction statute, the recovery for the public of a portion of the value of the spectrum made available for commercial use. 47 U.S.C. § 309(j)(3)(C).

[92] Conference Report at 572. In the Budget Act's expansion of the Commission's auction mandate in Section 309(j)(1), Congress also included an express reference to Section 309(j)(6)(E). *See* 47 U.S.C. § 309(j)(1) ("[i]f, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit," then the Commission must grant the license or permit by competitive bidding.).

[93] Placing a lead application on an "A" cut-off list by public notice essentially invites anyone who wishes to file an application competing against that lone application. In a window filing system, all applicants file during the same window, and no applications are specifically identified in advance for prospective applicants to file against. Such a system may result in a significant number of singleton applications; the Commission estimates that, for example, 50% of the applications filed in past LPTV and television translator filing windows have been singletons.

[94] *Compare Report and Order* in MM Docket No. 94-131 and PP Docket No. 93-253, 10 FCC Rcd 9589 (1995) (in order adopting auction procedures for Multipoint Distribution Service (MDS), filing and licensing procedures for MDS altered from a site-by-site approach to an approach based on pre-defined geographic areas (Basic Trading Areas)).

where applicants propose site-specific service areas that are relatively small in size.[95] Thus, the broadcast application and auction procedures adopted in the *First Report and Order* are consistent with our obligations under Section 309(j)(6)(E) "to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. § 309(j)(6)(E).

64. Nevertheless, although we are not compelled by statute to allow competing broadcast applicants to resolve their mutual exclusivities by engineering solutions or other means following the submission of short-form applications, we conclude that doing so would serve the public interest in the secondary broadcast services, for several reasons. The *First Report and Order* specifically noted that the secondary nature of the LPTV and television and FM translator services would not be altered by the awarding of construction permits for these services by auction (*see* 13 FCC Rcd at 15961), and, thus, an auction winner in these services may be displaced by a full service licensee or otherwise not permitted to operate.[96] Given the secondary status, limited coverage areas and restricted power of LPTV and translator stations, no limit has ever been placed on the number of these stations that any person or entity may own,[97] and they are not subject to any of the Commission's broadcast multiple ownership rules, which have the objective of fostering maximum competition in broadcasting.[98] Furthermore, as specifically noted by one petitioner, secondary broadcast service applicants currently enjoy considerable flexibility in resolving mutual exclusivities by engineering means, and, upon consideration, we are reluctant to circumscribe the existing rights of applicants in these services.[99] The Commission has moreover consistently made efforts to ameliorate the adverse affect that the development of digital television (DTV)

[95] For instance, due to the limited geographic scope of LPTV service areas, multiple applicants may be able to propose LPTV facilities in the same general area that are not mutually exclusive with each other. If, in contrast, the LPTV licensing system was based on larger pre-defined geographic areas, then instances of mutual exclusivity might increase because applicants interested in proposing LPTV stations anywhere within the larger pre-defined area would be mutually exclusive with each other.

[96] *See* 47 C.F.R. §§ 73.3572(a); 74.703(b) (rules establishing secondary status of LPTV and television translators); 47 C.F.R. §§ 74.1203(a) & (b); 74.1204(f); 74.1232(h) (rules concerning secondary status of FM translators). With regard to the secondary status of LPTV stations only, the Commission has requested comment on a petition for rulemaking proposing a new "Class A" television service for which certain LPTV stations could qualify. *See Public Notice, Petition for Rulemaking for "Class A" TV Service* (rel. April 21, 1998).

[97] *See Report and Order, An Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 51 RR 2d 476, 516-17 (1982) (in order authorizing LPTV service, Commission adopted no ownership restrictions for LPTV because these stations "have limited coverage potential, which effectively limits the area from which advertising support may be garnered; their secondary status poses the possibility that they might be required to alter facilities or cease operation at any time; the majority of channel availabilities are in rural areas, where viability generally is less certain than in urbanized areas").

[98] *See Multiple Ownership Rules*, 22 FCC Rcd 306, 307 (1970), *recon. granted in part*, 28 FCC 2d 662 (1971) (multiple ownership rules have twofold objective of fostering maximum competition in broadcasting and promoting diversification of programming sources and viewpoints).

[99] *See* 47 C.F.R. §§ 74.703(a); 74.705(d)(1); 74.1204(d) (allowing LPTV and television and FM translator applicants to avoid mutual exclusivity through various means, including terrain shielding).

will have on the LPTV and translator services.[100] Allowing competing LPTV and television translator applicants an opportunity to resolve their mutual exclusivities before auction is a reasonable accommodation to make for these services, whose licensees and permittees are additionally subject to displacement by DTV stations. Finally, because these secondary services have minor competitive significance in the media marketplace,[101] we believe that the usual role played by the anti-collusion rule in enhancing the competitiveness of auctions and, particularly, of the post-auction market, is less significant with regard to the secondary broadcast services. An accommodation of our anti-collusion rule to allow competing secondary service applicants an opportunity to resolve their mutual exclusivities prior to auction will not compromise the competitiveness of the broadcasting marketplace. In sum, we believe it appropriate to continue to allow competing secondary broadcast service applicants for new facilities to use engineering solutions to resolve mutual exclusivities pursuant to our existing rules, and will amend the terms of the anti-collusion rule as it applies to the secondary services to this extent.

65. Thus, we will allow applicants who file competing applications for new facilities in the secondary services 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. Any settlement must comply with all applicable Commission regulations, including the limitations on payments to settling applicants and the prohibition against non-party (or "white knight") settlements. *See* 47 C.F.R. § 73.3525(a). Any amendments filed by competing applicants to resolve their mutual exclusivities must be minor, as defined by the rules of the applicable service. *See* 47 C.F.R. §§ 73.3572(a); 74.1233(a).[102] To resolve mutual exclusivities, applicants may also, as permitted under existing Commission rules, file negotiated agreements to accept interference, or demonstrate that, based on terrain shielding, no actual interference will occur. *See* 47 C.F.R. §§ 74.703(a); 74.1204(d).[103]

66. We emphasize, however, that this post-short-form settlement period will be available only to secondary service applicants that apply in future auction filing windows. Pending competing LPTV and translator applicants have already had significant opportunity to resolve their mutual exclusivities, and, indeed, may continue to resolve their mutual exclusivities (by means of engineering solutions or settlements complying with all Commission regulations) at any time prior to the filing of short-form applications to participate in an auction. Thus, an additional settlement period following the filing of

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[100] *See, e.g., Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 14588, 14653-54 (1997) (LPTV stations and television translators displaced by new DTV stations are allowed to apply for suitable replacement channels at any time without waiting for a filing window to open and without being subject to competing applications).

[101] *See Global Information Technologies, Inc.*, 8 FCC Rcd 4024, 4029 (1993) (noting the secondary nature, limited coverage potential and "minor significance in the media marketplace" of LPTV service).

[102] This is consistent with our general window filing approach, under which minor modification applications can be filed at any time but applications for new facilities and for major changes to existing facilities may be filed only during specified windows. *See also First Report and Order*, 13 FCC Rcd at 15986 (providing that deficiencies in long-form applications filed by winning bidders can be cured by the filing of minor amendments but not by major amendment).

[103] In the LPTV and television translator services, such terrain showings are, in effect, regarded as requests for waiver of our interference rules, which are based on predicted interference. *See* 47 C.F.R. §§ 74.703(a); 74.707. These demonstrations that no actual interference will occur due to terrain shielding are the only types of waiver requests that the Commission will entertain prior to auction.

short-form applications is unnecessary and would merely serve to delay the commencement of competitive bidding. For these same reasons, we also clarify that the post-short-form settlement period adopted in the *First Report and Order* for competing major modification applications in all broadcast services (*see supra* ¶ 58) will be available only to mutually exclusive major modification applicants that file in future auction windows.

67. We also determine, on our own motion, to permit competing applicants for new facilities in the Instructional Television Fixed Service 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 an auction.[104] Similar to the LPTV and television translator services, mutually exclusive ITFS applicants currently have considerable flexibility in resolving mutual exclusivities, and we are reluctant to circumscribe the existing settlement rights of applicants in this service.[105] Moreover, as discussed in the *First Report and Order*, ITFS channels are allocated to educational institutions and governmental educational entities, and are intended primarily for the transmission of instructional, cultural and other types of educational material to enrolled students at accredited schools. *See* 47 C.F.R. § 74.931(a)(1). Given the instructional nature of this service and the long-standing reservation of ITFS spectrum for noncommercial educational use, we believe that the purpose of the anti-collusion rule -- to enhance the competitiveness of auctions and post-auction market structures -- would not be violated by allowing these noncommercial applicants an opportunity to resolve their mutual exclusivities prior to auction. Thus, we will allow competing ITFS applicants during a limited period following submission of their short-form applications, to enter into settlement agreements complying with all applicable Commission regulations or to utilize engineering solutions or other means to resolve their mutual exclusivities. Consistent with existing practice in this service, ITFS applicants will be permitted to file amendments to resolve their mutually exclusive applications, so long as no additional interference results. *See Report and Order* in MM Docket No. 93-24, 10 FCC Rcd 2907, 2911 (1995). This post-short-form settlement period will be available only to ITFS applicants that apply in future auction filing windows, as pending competing ITFS applicants have already been afforded an opportunity for settlement.[106]

5. Eligibility for and Terms of New Entrant Bidding Credit

68. ***Background.*** Section 309(j) of the Communications Act provides that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."

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[104] The Commission's existing rules adopted in the *First Report and Order* allow competing major modification ITFS applicants to resolve their mutual exclusivities during a limited period after the filing of short-form applications. *See* 47 C.F.R. § 73.5002(d).

[105] Competing ITFS applicants may currently propose any necessary technical change to resolve mutual exclusivities, so long as the change would not cause new interference or create a new mutually exclusive situation. For example, competing ITFS applicants may file "no objection" letters stating that they agree to accept interference. *See* 47 C.F.R. § 74.903(b)(4). In addition, competing ITFS applicants may by voluntary agreement utilize frequency offset techniques to resolve mutually exclusive situations, and may demonstrate that no actual interference will occur due to an obstructed electrical path. *See Report and Order* in MM Docket No. 93-24, 10 FCC Rcd 2907, 2920-21 (1995); 47 C.F.R. § 74.903(b)(1).

[106] *See First Report and Order*, 13 FCC Rcd at 16003 (providing for 120-day period during which the Commission would waive its rules limiting the terms for settlement among pending competing ITFS applicants).

47 U.S.C. § 309(j)(4)(D). To fulfill our obligations under Section 309(j) and to further our long-standing commitment to promoting the diversification of ownership of broadcast facilities, we adopted in the *First Report and Order* a tiered "new entrant" bidding credit for auction applicants with no, or very few, other media interests. *See* 13 FCC Rcd at 15995-96. Specifically, the *First Report and Order* provided for a 35% bidding credit for a winning bidder to lower the cost of its winning bid on any broadcast construction permit, if the winning bidder and/or its owners had no "recognizable" interest (more than 50% or *de facto* control) in any other media of mass communications.[107] A 25% bidding credit would be given to a winning bidder if it and/or its owners had a recognizable (*i.e.*, controlling) interest in no more than three mass media facilities. No bidding credit, however, would be given if any of these commonly owned mass media facilities served the "same area" as the proposed broadcast station. 47 C.F.R. § 73.5007. The *First Report and Order* defined mass media facilities very broadly to include full service AM, FM and television stations; LPTV and television and FM translator stations; Multipoint Distribution Service (MDS) stations; cable television systems; direct broadcast satellite transponders; and daily newspapers. 47 C.F.R. § 73.5008(b). Such facilities would be regarded as serving the same area as the proposed broadcast or secondary broadcast station, if certain defined areas wholly encompassed, or were encompassed by, the proposed broadcast or secondary broadcast facility's relevant contour. *See* 47 C.F.R. § 73.5007.

69. As explained in the *First Report and Order*, this new entrant bidding credit was closely modeled on the diversification preference previously given in lotteries for LPTV, television translator and MDS licenses.[108] In particular, the types of media of mass communications considered relevant in determining eligibility for the new entrant bidding credit, and the standards for determining whether such other mass media facilities served the same area as the broadcast stations proposed by winning bidders, were adopted from the Commission's existing random selection diversification preference. Perhaps more importantly, the new entrant bidding credit also reflected the existing lottery standards in considering as relevant for determining eligibility only "recognizable" (*i.e.*, controlling) interests held by a winning bidder, and/or its owners, in these other media of mass communications.[109] Finally, the definition of the "owners" of a winning bidder set forth in the *First Report and Order* reflected the definition in the

[107] According to the *First Report and Order*, the "owners" of a winning bidder included: the winning bidder, in the case of a sole proprietor; any partner, including limited or "silent" partners, in the case of a partnership; the beneficiaries, in the case of a trust; any member, in the case of a nonstock corporation or unincorporated association with members; any member of the governing board (including executive boards, boards of regents, commissions, or similar governmental bodies where each member has one vote), in the case of nonstock corporation or unincorporated association without members; and owners of voting shares, in the case of stock corporations. 47 U.S.C. § 73.5008(c).

[108] In these lotteries, a minority preference was provided to applicants who were members of minority groups, and a diversification preference was available to applicants with no, or very few, other media interests. Under the diversification preference, applicants whose owners in the aggregate held more than 50% of the ownership interests in no other media of mass communications received a two-to-one lottery preference, and applicants whose owners in the aggregate held more than 50% of the ownership interests in one, two or three other media of mass communications received a one and a half to one lottery preference. *See* 47 C.F.R. § 1.1622(b). No lottery preference was available to applicants holding more than 50% of the ownership interests in mass media facilities serving the same area as the applicant's proposed LPTV, television translator or MDS station. *See* 47 C.F.R. § 1.1622(e).

[109] This "recognizable" interest standard utilized in LPTV lotteries differed from the standards developed under the Commission's general broadcast rules and policies for attributing the media interests of applicants, permittees and licensees to determine compliance with our broadcast multiple ownership rules.

existing random selection preference rules. We note that such definition was unique to the Commission's lottery preference rules and differed from the approach taken in the Commission's general broadcast attribution rules and policies.[110]

70. ***Pleadings***. No petitioners object to the concept of a bidding credit designed to promote the diversification of ownership of broadcast facilities. Nor do any petitioners generally object to the adoption of a tiered new entrant bidding credit benefitting winning bidders in broadcast auctions who have no, or very few, other media interests. Several petitioners, however, object to various specific aspects of the above-described new entrant bidding credit. Specifically, petitioners contend that the Commission should not count LPTV and television and FM translator interests among an applicant's other mass media interests in determining a bidder's eligibility for a bidding credit.[111] These petitioners point out that low power and translator stations have only secondary status and limited coverage areas, and are not subject to any of the Commission's broadcast multiple ownership rules. Other petitioners question the standards adopted in the *First Report and Order* for determining whether an applicant's proposed broadcast station and an existing station serve the "same area," thereby rendering the applicant ineligible for a bidding credit.[112] These petitioners in particular object to the requirement that a proposed and an existing station would be regarded as in the "same area" only if the relevant contour of the existing station wholly encompasses, or is encompassed by, the proposed station's relevant contour. As an alternative, one petitioner suggests a more restrictive rule that would render an applicant ineligible for a bidding credit if there is partial overlap of the relevant contours of the applicant's existing and proposed stations.[113] Other petitioners argue that the new entrant bidding credit rules are ambiguous and open to manipulation and abuse.[114] Specifically, these petitioners contend that the concept of a "recognizable" interest in other media of mass communications and the term "owners" of a winning bidder are ambiguous and insufficiently defined, and are consistent with neither the broadcast attribution rules nor the attribution rules utilized in previous wireless service auctions. One petitioner in particular emphasizes that, in adopting these concepts from the LPTV random selection rules, the Commission abandoned in part its established standards for "ownership" under the broadcast attribution rules. This petitioner generally favors returning to the standards employed in the broadcast attribution rules for determining whether other media interests held by auction applicants should be cognizable in determining an applicant's eligibility for a new entrant bidding credit.[115]

71. ***Discussion***. After careful consideration of the various petitions and of the Commission's goals in adopting the new entrant bidding credit, we conclude that the eligibility standards for the credit

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[110] Under the random selection preference rules, for instance, the "owners" of a lottery applicant that was a partnership would include the holder of *any* partnership interest, even a limited partnership interest that would be regarded as "insulated" (and hence nonattributable) under the general broadcast attribution rules. *See supra* note 107.

[111] *See* Petitions of Community Broadcasters Association at 1-4; Montgomery Communications, Inc. at 5-7.

[112] *See* Petitions of J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 1-3; DanBeth Communications, Inc. at 3.

[113] *See* Petition of J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 2.

[114] *See* Petitions of KERM, Inc. at 7-10; DanBeth Communications, Inc. at 2.

[115] *See* Petition of KERM, Inc. at 7-9.

should be amended to be consistent with our general broadcast attribution standards, by which we define what constitutes a "cognizable interest" in applying the broadcast multiple ownership rules.[116] Specifically, the "owners" of a winning bidder will be redefined to include those individuals or entities who have an attributable interest in that winning bidder.[117] Thus, to determine whose other media interests will be counted in establishing whether a winning bidder qualifies for the bidding credit, we will consider the other media interests held by the winning bidder and by any entity or individual with an attributable interest in the winning bidder.[118] Similarly, the interests of the winning bidder (and of any individuals or entities with an attributable interest in the winning bidder) in other media of mass communications will be attributable for purposes of the new entrant bidding credit to the same extent that such other media interests are considered attributable for purposes of the broadcast multiple ownership rules.[119] We realize that the broadcast multiple ownership attribution rules are the subject of a pending rulemaking and revisions to those attribution rules could be made in the near future. *See Further Notice of Proposed Rulemaking* in MM Docket Nos. 94-150, 92-51 and 87-154, 11 FCC Rcd 19895 (1996) (*Attribution Further NPRM*). For purposes of applying the general broadcast attribution rules to determine eligibility for the new entrant bidding credit in any future auction, we will apply those attribution rules as they exist at the time of the short-form filing deadline for that auction.[120]

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[116] *See Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *on recon.*, 58 RR 2d 604 (1985), *on further recon.*, 1 FCC Rcd 802 (1986); *Notice of Proposed Rulemaking*, 10 FCC Rcd 3606 (1995); *Further Notice of Proposed Rulemaking*, 11 FCC Rcd 19895 (1996).

[117] We also clarify that any winning bidder asserting new entrant status must, of course, have *de facto* as well as *de jure* control of the entity claiming the bidding credit.

[118] Under the traditional broadcast attribution rules, these entities or individuals with an attributable interest in a bidder would include all officers and directors of a corporate bidder; an owner of 5% or more of the voting stock of a corporate bidder; all partners and limited partners of a partnership bidder, unless the limited partners were sufficiently insulated; and all members of a limited liability company unless insulated. *See* 47 C.F.R. § 73.3555 Note 2. The spouse or other close family members of an individual bidder would not automatically be regarded as having an attributable interest in the bidder, but the Commission would decide attribution issues in this context based on the factors traditionally considered to be relevant. *See Clarification of Commission Policies Regarding Spousal Attribution*, 7 FCC Rcd 1920 (1992).

[119] Thus, for example, if a winning bidder for a broadcast construction permit is an officer or director of, or has a 5% or greater voting stock interest in, the corporate licensee of an existing television station, then that interest will be attributable to the winning bidder for the purpose of determining its eligibility for a new entrant bidding credit. Similarly, if a winning bidder is a general or limited partner in a partnership that is the licensee of an existing FM station, such interest will be attributable to the winning bidder unless the bidder's limited partnership interest is properly insulated.

[120] If, for example, the Commission were to adopt its proposal to attribute television Local Marketing Agreements (LMAs) and time brokerage agreements on the same principles that already apply to radio LMAs, then the time brokerage of another television station in the same market for more than 15% of the brokered television station's weekly broadcast hours would be held attributable. *See Attribution Further NPRM*, 11 FCC Rcd at 19908. Accordingly, if a winning bidder provided more than 15% of the programming of another television or radio station via an LMA or time brokerage agreement, such an agreement would be regarded as an attributable media interest of that winning bidder for purposes of determining eligibility for the new entrant bidding credit. We note that one petitioner specifically supports attributing time brokerage agreements for purposes of determining a winning bidder's qualifications for the new entrant bidding credit. *See* Petition of KERM, Inc. at 9.

72. We believe that utilizing our well-established broadcast attribution rules to determine eligibility for the new entrant bidding credit in broadcast service auctions will best promote the goals of the bidding credit. As we have previously explained, our broadcast attribution rules "seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions." *Attribution Further NPRM*, 11 FCC Rcd at 19896. Because the interests defined as attributable under our general multiple ownership attribution rules have already been judged to give their holders "a realistic potential" to affect the programming or other core functions of broadcast licensees, we conclude that such interests should also be cognizable in determining whether a winning bidder in a broadcast auction should be given a bidding credit as a true "new entrant."[121] Given that the multiple ownership rules are designed to promote diversity in programming sources and viewpoints for the broadcast services,[122] which is one of the purposes of the new entrant bidding credit, we find that the same attribution rules should be applied in both contexts.

73. Moreover, utilization of the general broadcast attribution rules in the context of the new entrant bidding credit should result in a more clear and consistent application of the eligibility standards for the bidding credit. Our broadcast attribution rules are well established, and the broadcast industry has considerable familiarity with applying these rules and policies.[123] We decline, as one petitioner suggests, to utilize these traditional broadcast attribution standards in combination with the differing spousal and kinship attribution standards set forth in Section 1.2110 of the general auction rules, 47 C.F.R. § 1.2110.[124] We believe that attempting to apply a combination of differing sets of attribution rules would create needless confusion for both the broadcast industry and Commission staff, and would likely result in inconsistent application of the eligibility standards for the new entrant bidding credit. Furthermore, Section 1.2110 sets forth attribution standards for measuring business size for the purpose of small business bidding credits in wireless service auctions, and, thus, does not encompass the interests implicated by the new entrant bidding credit. We accordingly conclude that utilizing the general broadcast attribution standards, rather than the Section 1.2110 standards, would be more appropriate for determining eligibility for the new entrant bidding credit in broadcast service auctions.

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[121] For example, a 5% or greater voting stock interest in a corporate broadcast licensee has been deemed cognizable under the broadcast multiple ownership rules, as giving the holder a realistic potential to affect the programming or other core decisions of the licensee, while an insulated limited partnership interest has not been deemed cognizable because such a limited partner would not be materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership licensee. However, under the attribution standards applicable to the LPTV lottery preferences and to the new entrant bidding credit, as originally adopted, the opposite result would be reached, as a voting stock interest of even 49% would not be deemed "recognizable," while a fully insulated limited partnership interest would be cognizable. We believe that these standards previously developed for a random selection system in the secondary broadcast services are not the most appropriate for determining eligibility for a bidding credit in auctions of all broadcast services.

[122] *See Multiple Ownership Rules*, 22 FCC 2d 306, 307 (1970), *recon. granted in part*, 28 FCC 2d 662 (1971) (multiple ownership rules have twofold objective of fostering maximum competition in broadcasting and promoting "diversification of programming sources and viewpoints").

[123] Even if the Commission does, in its pending rulemaking, ultimately amend the broadcast attribution rules, the proposed amendments do not represent a wholesale revision of our long-standing attribution rules.

[124] *See* Petition of KERM, Inc. at 8-10.

74. In addition to attributing mass media interests for purposes of the new entrant bidding credit to the same extent that such media interests are considered attributable for purposes of the broadcast multiple ownership rules (*see supra* ¶ 71), we will also consider, in a further order in this proceeding, whether to attribute the mass media interests of any individual or entity who holds a significant equity and/or debt interest in a winning bidder claiming new entrant status, even if such an interest is non-voting.[125] Specifically, this further order will consider the appropriateness of attributing the media interests (if any) held by very substantial investors in a bidder claiming a credit as a new entrant, and, if so, the threshold at which a non-voting equity and/or debt interest in a new entrant should be regarded as attributable. These determinations will be made based on our further review of the record in the pending broadcast attribution proceeding, which, *inter alia*, requested detailed comment on similar equity/debt issues.[126] We expect the order addressing this specific attribution issue to be completed expeditiously, without delaying the commencement of broadcast service auctions.

75. In light of our decision to utilize the general broadcast attribution rules to determine which other media interests of a winning bidder are cognizable for the purpose of qualifying for the new entrant bidding credit, we also believe it is appropriate to reconsider the types of media of mass communications that are relevant in this regard. Specifically, we agree with petitioners that the attributable interests held by a winning bidder in existing LPTV and television and FM translator stations should *not* be counted among the bidder's other mass media interests in determining its eligibility for a new entrant bidding credit in any broadcast or secondary broadcast service auction. Low power television and translator stations are not subject to any of the Commission's broadcast multiple ownership rules, which, as explained above, are intended to promote diversification goals similar to the new entrant bidding credit. Given the secondary status, limited coverage areas and restricted power of LPTV and translator stations, the Commission has never imposed a limit on the number of LPTV stations or translators that a person or entity may own nationally or in any local market. For these same reasons, the Commission, in applying the diversification factor in traditional comparative broadcast licensing proceedings, gave little consideration to the existing interests held by competing applicants in LPTV facilities.[127] We will accordingly amend our new entrant bidding credit rules, as urged by petitioners, so that any interests held by winning bidders in existing LPTV and translator stations are not counted toward the bidders' other mass media interests in determining eligibility for a bidding credit in any broadcast or secondary broadcast service auction.

76. We note that the Commission recently issued a notice of proposed rulemaking concerning the creation of a low power radio service.[128] In this notice, the Commission proposed one class of low power FM that would be a primary service (the "LP1000" service) and that would be subject to strict multiple ownership restrictions. *See Low Power Radio NPRM*, FCC 99-6 at ¶¶ 57, 60. If the Commission were

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[125] Under our current general broadcast attribution rules, non-voting interests of any size (even those over 50%) are generally not attributable. *See* 47 C.F.R. § 73.3555 Note 2.

[126] *See Attribution Further NPRM*, 11 FCC Rcd at 19900-08.

[127] *See, e.g., Global Information Technologies, Inc.*, 8 FCC Rcd 4024, 4029 (1993) (in examining weight to be accorded to LPTV interests in comparative broadcast proceedings, Commission has assessed a diversification demerit of only minimal to slight weight, due to "secondary nature of the LPTV service, its inherently limited coverage potential, [and] its minor significance in the media marketplace").

[128] *Notice of Proposed Rulemaking, Creation of a Low Power Radio Service*, FCC 99-6 (rel. Feb. 3, 1999) (*Low Power Radio NPRM*).

ultimately to approve such a new primary radio service, we believe, consistent with our discussion above, that stations in this service should be counted in determining eligibility for a new entrant bidding credit in any broadcast or secondary broadcast service auction.[129]

77. We will, moreover, as urged by petitioners, refine the standards for determining whether an applicant's proposed broadcast station and that applicant's existing station(s) serve the "same area," thereby rendering the applicant ineligible for a bidding credit. The current standard that a proposed and an existing station are regarded as in the "same area" only if the relevant contour of the existing station wholly encompasses, or is wholly encompassed by, the proposed station's relevant contour, was adopted from the LPTV random selection rules. The "wholly encompass" standard, as set forth in our previous lottery rules, prevented licensees of existing full service broadcast stations from obtaining a preference in LPTV lotteries because the relevant contour of an existing full service station would be likely to wholly encompass the contour of an LPTV station proposed for that same market, as low power facilities have fairly small service contours. However, utilization of this standard in broadcast service auctions would not, in many instances, prevent an existing broadcaster from obtaining a bidding credit because it would be relatively unlikely that, for example, the relevant contour of an existing FM station would *wholly* encompass, or be *wholly* encompassed by, the relevant contour of a full service television (or AM or FM) station proposed to serve that same market. As the overlap between the contours of existing and proposed full service broadcast stations serving the same general market would usually be only partial, an auction applicant with a full service broadcast station could nonetheless qualify for a bidding credit in an auction for another full service broadcast facility in that same market. We believe that this outcome resulting from utilization of the "wholly encompass" standard does not serve the purpose of the bidding credit, which is to promote the entry of truly new entities into the broadcast industry. Accordingly, after further reflection, we will amend the standard for determining whether an existing and proposed station serve the "same area" to a partial overlap standard. Specifically, if there is any overlap between the relevant contours of an applicant's existing and proposed stations, then those stations will be regarded as in the "same area," and the applicant will not be eligible for a new entrant bidding credit. We believe that this partial overlap standard will better limit eligibility for the bidding credit to those true new entrants who have no other media interests serving the same area in which the applicant intends to bid.

78. With regard to which contours are considered relevant for determining whether existing or proposed full service television and radio stations are in the "same area" as other mass media facilities, we believe the contours utilized in the radio and television multiple ownership (*i.e.*, duopoly) rule are appropriate. As discussed above, the broadcast multiple ownership rules are intended to promote diversification goals similar to the new entrant bidding credit's purpose of "disseminating licenses among a wide variety of applicants." 47 U.S.C. § 309(j)(3)(B). Broadcast licensees, permittees and applicants are also generally familiar with the broadcast multiple ownership rules, and should accordingly be familiar with utilizing the television and radio station contours specified in those rules. As specifically supported by one petitioner,[130] we will therefore amend the new entrant bidding credit rule to specify the contours set forth in 47 C.F.R. § 73.3555(a) & (b) as the relevant contours for determining whether an existing or

[129] To the extent necessary, we also clarify that, for the purpose of determining eligibility for the new entrant bidding credit, a proposed or existing station that is the subject of a mutually exclusive application will not be counted toward a bidder's other mass media interests. Thus, for example, if a full service broadcast station filed a modification application that is mutually exclusive with another modification application, or with an application for a new facility, the existing station the applicant is seeking to modify will not be considered in determining the applicant's eligibility for a new entrant bidding credit.

[130] *See* Petition of J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 2-3.

proposed radio or television station is in the "same area" as another mass media facility.[131]

79. With regard to the contour specified in the television duopoly rule specifically, the current rule prohibits common ownership of two television stations with overlapping Grade B contours. *See* 47 C.F.R. § 73.3555(b). The Commission has, however, in a pending rulemaking, tentatively concluded to revise the duopoly rule to allow common ownership of television stations that are in separate Designated Market Areas and whose Grade A contours do not overlap.[132] If the Commission does in the future alter the contour used in the television duopoly rule, then the full service television contour utilized for purposes of the new entrant bidding credit will be changed to be consistent with the duopoly rule.

80. We finally decline, as one petitioner urges, to "consider the adoption of more significant bidding credits or other advantages to those in [the petitioner's] position."[133] *See supra* ¶ 9. To the extent Ferrigno is contending that a separate or greater bidding credit is warranted for an FM applicant who successfully petitioned for the allotment of the channel being auctioned, we deny the reconsideration petition on the grounds clearly set forth in the *First Report and Order*.[134] We also decline to increase the size of the new entrant bidding credit generally. We note that the 35% and 25% tiers established for the new entrant bidding credit are the two highest tiers in the designated entity schedule set forth in the *Third Report and Order* for small business bidding credits generally, and, in the absence of any persuasive showing to the contrary, we are not inclined to increase the credit amount at this time. We intend, however, as stated in the *First Report and Order*, to release a further report and order considering designated entity issues in the broadcast services, following the completion of certain pending evidentiary studies. *See* 13 FCC Rcd at 15995. If, at that time, revisions in our new entrant bidding credit, such as increasing the size of the credit, appear necessary to further the underlying objectives of the bidding credit, we will then have the opportunity to consider such revisions.

81. On our own motion, we also clarify that the new entrant bidding credit will not be applied in any ITFS auction. As adopted in the *First Report and Order*, the new entrant bidding credit may be used by a qualified winning bidder "to lower the cost of its winning bid on any *broadcast* construction permit." 47 C.F.R. § 73.5007 (emphasis added). Eligibility for the new entrant bidding credit, moreover, is determined by the extent of a bidder's interests in various "media of mass communications," which do not, as defined in Section 73.5008, include ITFS stations.

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[131] *See* 47 C.F.R. § 73.3555(a)(4) (specifying predicted or measured 5 mV/m groundwave contour for AM stations and predicted 3.16 mV/m contour for FM stations) and § 73.3555(b) (specifying Grade B contour for television stations).

[132] *See Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21655, 21681 (1996).

[133] Petition of Michael R. Ferrigno at 2.

[134] Several commenters in this proceeding urged the Commission to adopt a "pioneer's" or "finder's" preference for the applicant who successfully petitioned for the allotment when a newly-allotted FM channel is auctioned. We declined in the *First Report and Order* to adopt a bidding credit or other special measure for this category of entities, which was not among the entities specifically designated by Congress in our competitive bidding authority. We also noted that the grant of a bidding credit to an FM applicant who petitioned for the allotment of a channel being auctioned was analogous to the pioneer preferences that Congress had specifically eliminated. *First Report and Order*, 13 FCC Rcd at 15996-97.

82. We continue to believe that the new entrant bidding credit should not be applied in ITFS auctions, given the nature and purpose of that service. As explained in the *First Report and Order*, ITFS is a point-to-point or point-to-multipoint microwave service whose channels are allocated to educational organizations and are intended primarily for the transmission of instructional, cultural and other types of educational materials to enrolled students at accredited schools. *See* 13 FCC Rcd at 15999. Because ITFS is not a general interest consumer medium like the broadcast services, the goals underlying the new entrant bidding credit appear inapplicable to ITFS. Rather than applying a bidding credit designed to further our long-standing commitment to promoting the diversification of ownership of broadcast facilities, we believe that any bidding credit or other special measures adopted for ITFS auctions should reflect the nature and purpose of this instructional service.[135] We expect to consider what, if any, special measures would be appropriate for ITFS auctions in our further report and order in this proceeding on designated entities.[136]

6. Unjust Enrichment

83. ***Background***. To fulfill the statutory obligations to prevent unjust enrichment and to ensure that the new entrant bidding credit had the intended effect of aiding eligible entities to participate in broadcast auctions,[137] the *First Report and Order* followed the general Part 1 auction rules in requiring, under certain circumstances, reimbursement of bidding credits utilized to obtain broadcast licenses. *See* 47 C.F.R. §§ 1.2111(d)(1) & (2); 73.5007.[138] However, if a permittee or licensee who utilized a new entrant bidding credit to obtain a broadcast license simply acquires within the five-year reimbursement period an additional broadcast facility or facilities, such that the licensee would not have been eligible for the new entrant credit, the licensee will not be required to reimburse the government for the amount of the bidding credit. To require reimbursement in such a situation would, according to the *First Report and Order*, discourage new entrants from attempting to obtain another broadcast facility and would, in effect, punish the most successful new entrants into the broadcast industry. The *First Report and Order* concluded that such a result would be contrary to the basic purpose of the new entrant bidding credit, which was to encourage new entities to not only enter, but to remain and succeed, in the broadcast industry. *See* 13 FCC Rcd at 15998.

84. ***Pleadings***. One petitioner asserts that the Commission must limit the ability of licensees to

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[135] For example, we note that, under the point system previously used to award ITFS licenses, locally-based educational entities received the highest number of points because we believed that such entities were the best authorities for evaluating the educational needs and academic standards of their communities and for producing programming to meet those needs. *See Second Report and Order* in MM Docket No. 83-253, 101 FCC 2d 50, 56 (1985).

[136] *See First Report and Order*, 13 FCC Rcd at 15995 (anticipating release of further report and order on designated entities following completion of Commission's pending *Adarand* studies).

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

[138] Specifically, a broadcast licensee, or the holder of a construction permit, who utilized a new entrant bidding credit will be required to reimburse the government for the amount of the bidding credit, plus interest based on the rate for ten-year U.S. Treasury obligations applicable on the date the construction permit was granted, as a condition of Commission approval of the assignment or transfer of that license or construction permit, if the licensee or permittee seeks to assign or transfer control of the license or construction permit to an entity that does not meet the eligibility criteria for the bidding credit. The amount of this repayment will be reduced over a five-year period.

relinquish ownership of a broadcast station during the term of an auction so as to qualify for a new entrant bidding credit, and then to reacquire without penalty that same station after the auction is concluded. KERM, Inc. argues that, as adopted, the Commission's unjust enrichment provisions -- which allow a winning bidder who utilized a bidding credit to obtain an additional broadcast facility without being subject to unjust enrichment reimbursement requirements -- would fail to prevent such an abuse of the auction process. Specifically, this petitioner contends that the ability of a winning bidder in a broadcast auction to acquire additional facilities without jeopardizing entitlement to a bidding credit should be limited either to facilities outside the service area of the station that has been acquired through the auction, or else to stations not previously owned by the winning bidder.[139]

85. ***Discussion.*** We deny this petition for reconsideration, as we do not believe that the specific conduct described by KERM, Inc. is sufficiently likely to occur to an extent warranting intervention by the Commission at this time. As we have stated previously, the Commission does not, as a general matter, assume that our permittees, licensees and applicants will fail to comply with our rules.[140] The Commission cannot, moreover, anticipate in advance every possible way in which a small number of prospective bidders may conceive to try to manipulate our broadcast auction rules in general and any special measures, such as bidding credits, in particular. Given our past experience with conducting auctions, we are confident that this number of bidders should be quite limited. Accordingly, we believe it appropriate to address, on a case-by-case basis, any conduct engaged in by auction participants with the evident intention of manipulating the eligibility standards for, or frustrating the purpose of, the new entrant bidding credit. We will be diligent in taking appropriate enforcement action against any auction participant who has been shown, through the petition to deny process or other means, to have manipulated our auction rules or otherwise abused our processes. Although we will not attempt, at this time, to adopt specific rules or sanctions against the very particular conduct described by the petitioner, we will, after gaining experience with conducting broadcast auctions and implementing the new entrant bidding credit, consider whether the adoption of specific prohibitions or sanctions against particular types of manipulative or abusive conduct are warranted.[141]

III. PROCEDURAL MATTERS AND ORDERING CLAUSES

86. The Supplemental Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix B.

87. Accordingly, IT IS ORDERED, That the above-referenced reconsideration petitions ARE GRANTED IN PART AND DENIED IN PART, and the Motion for Stay, filed October 9, 1998 by Barbara D. Marmet and Frederick Broadcasting, LLC, IS DISMISSED.

88. IT IS FURTHER ORDERED, That pursuant to the authority in Sections 4(i) and (j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), 309(l) and 403 of the Communications Act

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[139] *See* Petition of KERM, Inc. at 4, 11.

[140] *See, e.g., News International, PLC*, 97 FCC 2d 349, 356-358 (1984) (Commission refused to infer that licensee would not abide by representations made to it).

[141] As noted above, the Commission expects to release a further report and order on designated entities following the completion of certain pending evidentiary studies. If warranted, the Commission could address at that time any reform of our unjust enrichment rules deemed necessary to prevent manipulation of our new entrant bidding credit.

of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), 309(l) and 403, this *Memorandum Opinion and Order* IS ADOPTED, and Part 73 and Part 74 of the Commission's Rules ARE AMENDED as set forth in the attached Appendix C.

89. IT IS FURTHER ORDERED, That the rule amendments set forth in Appendix C WILL BECOME EFFECTIVE 60 days after their publication in the Federal Register, and the information collection contained in these rules will become effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

90. IT IS FURTHER ORDERED, That the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Memorandum Opinion and Order*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary