

APPENDIX A -- LIST OF PARTIES FILING PLEADINGS

Bechtel & Cole, Chartered
Benns, David
Beschta, Thomas F.
Bill, Howard G.
Birach Broadcasting Corporation
Bishop, Ronald K.
Breeze Broadcasting Co., Ltd.
Carman, Ruth Payne
Community Broadcasters Association
Damsky, Heidi
Danbeth Communications, Inc.
Davis Television Duluth, LLC and Davis Television Topeka, LLC
Ferrigno, Michael R.
Grant, William B.
Heidelberg-Stone Broadcasting Company
Homewood Radio Co., LLC
Island Broadcasting Company, Inc.
Johnston, Colon
KERM, Inc.
KM Communications, Inc.
Lamprecht, J. Thomas
Latin Communications Group Television, Inc.
Lawson, James W.
Liberty Productions, LP
Marmet, Barbara D. and Frederick Broadcasting LLC
Miller, J. McCarthy and Biltmore Forest Broadcasting FM, Inc.
Monroe-Stephens Broadcasting, Inc.
Montgomery Communications, Inc.
National Translator Association
Orion Communications, Ltd.
Powell, Michael J.
Rio Grande Broadcasting Company
Riverbank Restaurants, Inc.
Runnels, Dewey Matthew
Sisk, Olvie E.
Snyder Hill Broadcasting, Inc.

APPENDIX B

SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, a Final Regulatory Flexibility Analysis (FRFA) was incorporated in Appendix B of the *First Report and Order*¹ in this proceeding. The Commission's Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) in this *Memorandum Opinion and Order* reflects revised or additional information to that contained in the FRFA. This Supplemental FRFA is thus limited to matters raised in response to the *First Report and Order* that are granted on reconsideration in the *Memorandum Opinion and Order*. This Supplemental FRFA conforms to the RFA, as amended by the Contract with America Advancement Act of 1996.²

A. Need For and Objectives of Action: The actions taken in this *Memorandum Opinion and Order* are in response to petitions for reconsideration or clarification of the rules and policies adopted in the *First Report and Order* to implement provisions of the Balanced Budget Act of 1997 expanding the Commission's competitive bidding authority to include the broadcast services and the Instructional Television Fixed Service (ITFS). The petitions are denied, with the following exceptions. The rule changes adopted in the *Memorandum Opinion and Order* grant in part the petitions objecting to the decision in the *First Report and Order* to apply the general auction anti-collusion rule to broadcast service auctions. In response to petitions challenging various aspects of the "new entrant" bidding credit adopted in the *First Report and Order* for utilization in broadcast service auctions, we refine the standards for applicants to qualify for this bidding credit so as to better promote our goal of disseminating broadcast licenses among a wide variety of applicants. We also amend our rules with regard to the filing of petitions to deny against the long-form applications filed by winning bidders in the secondary broadcast services and in ITFS so as to allow a longer time period for the filing of such petitions. Finally, on our own motion, we amend our rules to clarify that certain ownership disclosure requirements set forth in the general Part 1 auction rules will not apply to applicants seeking consent to assign or transfer control of broadcast construction permits or licenses, as broadcast licensees and permittees are already subject to significant ownership disclosure requirements pursuant to existing broadcast rules and policies.

B. Significant Issues Raised by Public in Response to Final Regulatory Flexibility Analysis:

No petitions or comments were received in response to the FRFA. Small business-related issues were, however, raised indirectly by some petitioners. For example, a few petitioners contended that application of the anti-collusion rule, which by its terms precludes settlement or other resolution of mutual exclusivities after the filing of short-form applications, would adversely and disproportionately impact low power television (LPTV) and television and FM translator applicants (many of whom are small businesses). Other petitioners challenged various aspects, including eligibility standards, of the new entrant bidding credit benefitting winning bidders in broadcast auctions who have no, or very few, other media interests (and who would likely be small businesses). One petitioner argued that the filing period for petitions to deny against translator (television and FM) long-form applications should not be shortened, as provided in the *First Report and Order* and as authorized by the 1997 Balanced Budget Act.

C. Description and Estimate of the Number of Small Entities Involved:

¹ 13 FCC Rcd 15920 (1998). Certain abbreviated references used in the *Memorandum Opinion and Order* are also used in this Appendix.

² Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA); see generally 5 U.S.C. §§ 601 *et seq.* Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

1. Definition of a "Small Business"

Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. § 601(6). The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

In the FRFA, we utilized the definition of "small business" promulgated by the SBA, even though, as discussed in detail in the FRFA, we tentatively believed that the SBA's definition of "small business" overstated the number of radio and television broadcast stations that were small businesses and was not particularly suitable for our purposes. No petitions or comments were received concerning the Commission's use of the SBA's small business definition for the purposes of the FRFA, and we will therefore continue to employ such definition for this Supplemental FRFA.

2. Issues in Applying the Definition of a "Small Business"

As discussed below, we could not precisely apply the foregoing definition of "small business" in developing our estimates of the number of small entities affected by the revised application and selection procedures adopted in the *First Report and Order* for the broadcast services and for ITFS. Our estimates reflect our best judgments based on the data available to us.

An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio or television station is dominant in its field of operation. Accordingly, the following estimates of the number of broadcasting stations that constitute small businesses do not exclude any radio or television station from the definition of small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. As discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which the amended application and selection procedures may apply may be overinclusive to this extent. The SBA's general size standards are developed taking into account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

With respect to applying the revenue cap, the SBA has defined "annual receipts" specifically in 13 C.F.R. § 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use in applying the SBA's definition of a small business. Thus, for purposes of estimating the number of small entities to which the rules apply, we are limited to considering the revenue data that are publicly available, and the revenue data on which we rely may not correspond completely with the SBA definition of annual receipts.

Under SBA criteria for determining annual receipts, if a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period for determining annual receipts, the annual receipts in determining size status include the receipts of both firms. 13 C.F.R. § 121.104(d)(1). The SBA defines affiliation in 13 C.F.R. § 121.103. In this context, the SBA's definition of affiliate is analogous to our attribution rules. Generally, under the SBA's definition, concerns are affiliates of each

other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both. 13 C.F.R. § 121.103(a)(1). The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. 13 C.F.R. § 121.103(a)(2). Instead of making an independent determination of whether television stations were affiliates based on SBA's definitions, we relied on the databases available to us to provide us with that information.

3. Estimates Based on Census Data

The rules and policies adopted in the *First Report and Order* will apply to the various broadcast and secondary broadcast services and to ITFS.

Television Broadcasting Stations. The SBA defines a television broadcasting station that has no more than \$10.5 million in annual receipts as a small business.³ Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.⁴ Included in this industry are commercial, religious, educational, and other television stations.⁵ Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.⁶ Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.⁷

There were 1,509 television stations operating in the nation in 1992.⁸ That number has remained fairly steady as indicated by the approximately 1,590 operating television broadcasting stations in the nation as of January 1999.⁹ For 1992,¹⁰ the number of television stations that produced less than \$10.0

³ 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833 (1996).

⁴ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

⁵ *Id.* See Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes Television Broadcasting Stations (SIC Code 4833) as:

Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

⁶ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

⁷ *Id.*; SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services) (producers of live radio and television programs).

⁸ FCC News Release No. 31327, January 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 6, Appendix A-9.

⁹ FCC News Release, "Broadcast Station Totals as of January 31, 1999" (rel. Feb. 18, 1999).

million in revenue was 1,155 establishments.¹¹ Thus, of the 1,590 television stations approximately 77%, or 1,224, of those stations are considered small businesses.¹² As of January 1999, 2136 low power television stations and 4921 television translator stations were also licensed,¹³ and we believe the vast majority of these stations are small businesses. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies.

Radio Broadcasting Stations. The SBA defines a radio broadcasting station that has no more than \$5 million in annual receipts as a small business.¹⁴ A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.¹⁵ Included in this industry are commercial, religious, educational and other radio stations.¹⁶ Radio broadcasting stations that primarily are engaged in radio broadcasting and that produce radio program materials are similarly included.¹⁷ However, radio stations that are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number.¹⁸ The 1992 census indicates that 96% (5,861 of 6,127) of radio station establishments produced less than \$5 million in revenue in 1992.¹⁹ Official Commission records indicate that 11,334 individual radio stations were operating in 1992.²⁰ As of January 1999, official Commission records indicate that 12,496 radio stations were operating.²¹ We conclude that

¹⁰ Census for communications establishments are performed every five years, during years ending with a "2" or "7." See Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 6, III.

¹¹ The amount of \$10 million was used to estimate the number of small business establishments because the relevant census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

¹² We use the 77% figure of television stations producing less than \$10 million in revenue for 1992 and apply it to the 1999 total of 1,590 television stations to arrive at stations categorized as small businesses.

¹³ FCC News Release, "Broadcast Station Totals as of January 31, 1999" (rel. Feb. 18, 1999).

¹⁴ 13 C.F.R. § 121.201, SIC 4832.

¹⁵ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 6, Appendix A-9.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The Census Bureau counts radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment.

²⁰ FCC News Release No. 31327, January 13, 1993.

²¹ FCC News Release, "Broadcast Station Totals as of January 31, 1999" (rel. Feb. 18, 1999).

a similarly high percentage (96%) of current radio broadcasting licensees are small entities.²² As of January 1999, there were also 3171 FM translator/booster stations licensed, and we believe the vast majority of these stations are small businesses. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-radio affiliated companies.

ITFS. In addition, there are presently 2032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions may be included in the definition of a small entity.²³ ITFS is a non-pay, non-commercial educational microwave service that, depending on SBA categorization, has, as small entities, entities generating either \$10.5 million or less, or \$11.0 million or less, in annual receipts.²⁴ However, we do not collect, nor are we aware of other collections of, annual revenue data for ITFS licensees. Thus, we conclude that up to 1932 of these licensees are small entities.

Pending and Future Applicants Affected by Rulemaking. The auction selection procedures set forth in the *First Report and Order* will affect: (1) any entity with a pending application for a construction permit for a new full service commercial radio or analog television broadcast station, if mutually exclusive applications have been filed; (2) any entity that files an application in the future for a new full service commercial radio or analog television station, if mutually exclusive applications are filed; (3) any entity with a pending application on file, or filing an application in the future, for a new low power television station, or a television or FM translator station, if mutually exclusive applications have been or are filed; (4) any entity that has a pending or future application to make a major change in an existing facility in any commercial broadcast or secondary broadcast service, if mutually exclusive applications have been or are filed; and (5) any entity that has filed or files in the future an application for a license for an ITFS station, if mutually exclusive applications have been filed or are filed.

We estimate that there are currently pending before the Commission the following mutually exclusive applications:

- approximately 620 mutually exclusive applications for full power commercial radio stations, and approximately 165 competing applications for full power commercial analog television stations;²⁵
- approximately 275 mutually exclusive applications for low power television stations and television translator stations, and approximately 20 competing applications for FM translator stations; and
- approximately 200 or more mutually exclusive applications for ITFS stations.

²² We use the 96% figure of radio station establishments with less than \$5 million revenue from the census data and apply it to the 12,496 individual station count to arrive at 11,996 individual stations as small businesses.

²³ See 5 U.S.C. §§ 601(3)-(5).

²⁴ See 13 C.F.R. § 121.210, SIC 4833, 4841 and 4899.

²⁵ These numbers of pending applications do not include situations where both commercial and noncommercial applicants have filed competing applications for nonreserved, or "commercial," channels. As described in the *First Report and Order*, resolution of these cases will be addressed in our noncommercial proceeding (MM Docket No. 95-31).

Although applicants for broadcast construction permits have been required to demonstrate sufficient financing to construct and initially operate the proposed broadcast station, we do not require the filing of financial information specifically concerning the entity seeking a construction permit, such as the entity's annual revenues. Thus, we have no data on file as to whether entities with pending permit applications, which are subject to the new competitive bidding selection procedures adopted for the broadcast services, meet the SBA's definition of a small business concern. However, we conclude that, given the smaller size of the markets at issue in the pending applications, most of the entities with pending applications for a permit to construct a new primary or secondary broadcast station are small entities, as defined by the SBA rules.

In addition to the pending applicants that may be affected by the auction procedures adopted for the broadcast services, any entity that applies for a construction permit for a new broadcast station in the future will be subject to these competitive bidding selection procedures if mutually exclusive applications are filed. It is not possible, at this time, to estimate the number of markets for which mutually exclusive applications will be received, nor the number of entities that in the future may seek a construction permit for a new broadcast station. Given the fact that fewer new stations (particularly fewer analog television stations) will be licensed in the future and that these stations generally will be located in smaller, more rural areas, we conclude that most of the entities applying for these stations will be small entities, as defined by the SBA rules.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:

The *First Report and Order* adopted a number of rules that included reporting, recordkeeping and compliance requirements. These requirements were described in detail in the FRFA, and generally remain unchanged by the rule amendments adopted in this *Memorandum Opinion and Order*. The rules adopted in this *Memorandum Opinion and Order* do amend the applicability of the general auction anti-collusion rule (see 47 C.F.R. § 1.2105(c)) so that mutually exclusive applicants in the secondary broadcast services may discuss settlement or other means of resolving their mutual exclusivities following the short-form application filing deadline. The *Memorandum Opinion and Order* also amends our rules to clarify that certain ownership disclosure requirements set forth in Section 1.2112(a) of the general Part 1 auction rules will not apply to applicants seeking consent to assign or transfer control of broadcast construction permits or licenses.

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

The FRFA described in considerable detail the steps taken in the *First Report and Order* to minimize significant economic impact on small entities and the alternatives considered. The rule amendments adopted in this *Memorandum Opinion and Order* should also serve to minimize the adverse impact of our broadcast auction rules on small entities. First, the *Memorandum Opinion and Order* amends the applicability of the general auction anti-collusion rule so that competing LPTV, television and FM translator, and ITFS applicants will have an opportunity to settle or otherwise resolve their mutual exclusivities following the short-form application filing deadline (and thereby avoid the need to go to auction). However, due to the importance of the anti-collusion rule in preventing collusive conduct and enhancing the competitiveness of the auction process and the post-auction market structure, we decline to extend this exception to the anti-collusion rule to competing applicants for full service AM, FM and television broadcast construction permits.

As urged by several petitioners, the *Memorandum Opinion and Order* refines in various ways the eligibility standards for the new entrant bidding credit, which provides a tiered credit for broadcast auction winning bidders with no, or very few, other mass media interests. To guard against manipulation of the eligibility standards for the new entrant credit, the *Memorandum Opinion and Order* amends these eligibility standards to be consistent with the Commission's well-established broadcast attribution standards.

To aid specifically those prospective bidders whose only existing media interests are in the secondary broadcast services (and who are very likely small businesses), the *Memorandum Opinion and Order* determines that interests held by a winning bidder in existing LPTV and television and FM translator stations should not be counted among the bidder's other media interests in determining its eligibility for a bidding credit. And to better limit eligibility for the bidding credit to true "new entrants," the *Memorandum Opinion and Order* additionally refines the standards for determining whether a winning bidder's proposed broadcast station and the bidder's existing mass media facilities (if any) serve the "same area," thereby rendering the bidder ineligible for a bidding credit. We decline, however, as one petitioner urged, to increase the size of the bidding credit, either generally or specifically for applicants in the petitioner's position (*i.e.*, for FM applicants who successfully petitioned for the allotment of the FM channel being auctioned). The *First Report and Order* expressly determined not to adopt a bidding credit or other special measure for applicants who successfully petitioned for the allotment when a newly-allotted FM channel is auctioned, and we see no reason to alter this decision. The 35% and 25% levels of the new entrant bidding credit are also consistent with the schedule of bidding credits set forth in the general auction designated entity rules. We moreover intend, 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. 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, the Commission will then have the opportunity to consider such revisions.

The *Memorandum Opinion and Order* also lengthens from 10 to 15 days the period for the filing of petitions to deny against the long-form applications filed by winning bidders in the secondary broadcast services and in ITFS. One petitioner supported this change, arguing that translator (television and FM) applicants and licensees in particular needed this additional time to file petitions to deny.

Finally, on our own motion, the *Memorandum Opinion and Order* reduces the burden on all broadcast applicants (including small businesses) seeking consent to assign or transfer control of broadcast construction permits or licenses by clarifying that the ownership disclosure requirements set forth in Section 1.2112(a) of the general auction rules are not applicable to such transactions. We believe that requiring submission of this ownership information is repetitive and unnecessary, given the significant ownership disclosure requirements imposed by existing broadcast rules and policies.

F. Report to Congress: The Commission will send a copy of the *Memorandum Opinion and Order*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. See 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Memorandum Opinion and Order*, including the Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Memorandum Opinion and Order* and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register. See 5 U.S.C. § 604(b).

APPENDIX C

Parts 73 and 74 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 73 - RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

2. Section 73.5002 is amended by revising paragraphs (c) and (d) to read as follows:

§ 73.5002 Bidding application and certification procedures; prohibition of collusion.

* * * * *

(c) Applicants in all broadcast service or ITFS auctions will be subject to the provisions of 47 CFR 1.2105(b) regarding the modification and dismissal of their short-form applications. Notwithstanding the general applicability of Section 1.2105(b) to broadcast and ITFS auctions, the following applicants will be permitted to resolve their mutual exclusivities by making amendments to their engineering submissions following the filing of their short-form applications:

(1) applicants for all broadcast services and ITFS who file major modification applications that are mutually exclusive with each other;

(2) applicants for all broadcast services and ITFS who file major modification and new station applications that are mutually exclusive with each other; or

(3) applicants for the secondary broadcast services and ITFS who file applications for new stations that are mutually exclusive with each other.

(d) The prohibition of collusion set forth in 47 CFR 1.2105(c), which becomes effective upon the filing of short-form applications, shall apply to all broadcast service or ITFS auctions. Notwithstanding the general applicability of Section 1.2105(c) to broadcast and ITFS auctions, the following applicants will be permitted to resolve their mutual exclusivities by means of engineering solutions or settlements during a limited period after the filing of short-form applications, as further specified by Commission public notices:

(1) applicants for all broadcast services and ITFS who file major modification applications that are mutually exclusive with each other;

(2) applicants for all broadcast services and ITFS who file major modification and new station applications that are mutually exclusive with each other; or

(3) applicants for the secondary broadcast services and ITFS who file applications for new stations that are mutually exclusive with each other.

3. Section 73.5006 is amended by revising paragraphs (b) and (c) to read as follows:

§ 73.5006 Filing of petitions to deny against long-form applications.

* * * * *

(b) Within ten (10) days following the issuance of a public notice announcing that a long-form application for an AM, FM or television construction permit has been accepted for filing, petitions to deny that application may be filed. Within fifteen (15) days following the issuance of a public notice announcing that a long-form application for a low power television, television translator or FM translator construction permit or ITFS license has been accepted for filing, petitions to deny that application may be filed. Any

such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. In the AM, FM and television broadcast services, the time for filing such oppositions shall be five (5) days from the filing date for petitions to deny, and the time for filing replies shall be five (5) days from the filing date for oppositions. In the low power television, television translator and FM translator broadcast services and in ITFS, the time for filing such oppositions shall be fifteen (15) days from the filing date for petitions to deny, and the time for filing replies shall be ten (10) days from the filing date for oppositions.

* * * * *

4. Section 73.5007 is revised to read as follows:

§ 73.5007 Designated entity provisions.

New entrant bidding credit. A winning bidder that qualifies as a "new entrant" may use a bidding credit to lower the cost of its winning bid on any broadcast construction permit. Any winning bidder claiming new entrant status must have de facto, as well as de jure, control of the entity utilizing the bidding credit.

(a) A thirty-five (35) percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have no attributable interest in any other media of mass communications, as defined in 47 CFR 73.5008. A twenty-five (25) percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have an attributable interest in no more than three mass media facilities. No bidding credit will be given if any of the commonly owned mass media facilities serve the same area as the proposed broadcast or secondary broadcast station, or if the winning bidder, and/or any individual or entity with an attributable interest in the winning bidder, have attributable interests in more than three mass media facilities. Attributable interests held by a winning bidder in existing low power television, television translator or FM translator facilities will not be counted among the bidder's other mass media interests in determining eligibility for a bidding credit.

(b) The new entrant bidding credit is not available to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have an attributable interest in any existing media of mass communications in the same area as the proposed broadcast or secondary broadcast facility.

(1) Any existing media of mass communications will be considered in the "same area" as a proposed broadcast or secondary broadcast facility if the relevant defined service areas of the existing mass media facilities partially overlap, or are partially overlapped by, the proposed broadcast or secondary broadcast facility's relevant contour.

(2) For purposes of determining whether any existing media of mass communications is in the "same area" as a proposed broadcast or secondary broadcast facility, the relevant defined service areas of the existing mass media facilities shall be as follows:

- (i) AM broadcast station--principal community contour (see 47 CFR 73.3555(a)(4)(i));
- (ii) FM broadcast station--principal community contour (see 47 CFR 73.3555(a)(4)(i));
- (iii) Television broadcast station--television duopoly contour (see 47 CFR 73.3555(b));
- (iv) Cable television system--the franchised community of a cable system;
- (v) Daily newspaper--community of publication; and
- (vi) Multipoint Distribution Service station--protected service area (see 47 CFR 21.902(d))

or 21.933).

(3) For purposes of determining whether a proposed broadcast or secondary broadcast facility is in the "same area" as an existing mass media facility, the relevant contours of the proposed broadcast or secondary broadcast facility shall be as follows:

- (i) AM broadcast station--principal community contour (see 47 CFR 73.3555(a)(4)(i));
- (ii) FM broadcast station--principal community contour (see 47 CFR 73.3555(a)(4)(i));
- (iii) FM translator station--predicted, protected contour (see 47 CFR 74.1204(a));
- (iv) Television broadcast station--television duopoly contour (see 47 CFR 73.3555(b)); and
- (v) Low power television or television translator station--predicted, protected contour (see 47 CFR 74.707(a)).

(c) Unjust enrichment. If a licensee or permittee that utilizes a new entrant bidding credit under this subsection seeks to assign or transfer control of its license or construction permit to an entity not meeting the eligibility criteria for the bidding credit, the licensee or permittee must reimburse the U.S. 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 originally granted, as a condition of Commission approval of the assignment or transfer. If a licensee or permittee that utilizes a new entrant bidding credit seeks to assign or transfer control of a license or construction permit to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten-year U.S. Treasury obligations applicable on the date the construction permit was originally granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. The amount of the reimbursement payments will be reduced over time. An assignment or transfer in the first two years after issuance of the construction permit to the winning bidder will result in a forfeiture of one hundred (100) percent of the value of the bidding credit; during year three, of seventy-five (75) percent of the value of the bidding credit; in year four, of fifty (50) percent; in year five, twenty-five (25) percent; and thereafter, no payment. If a licensee or permittee who utilized a new entrant bidding credit in obtaining a broadcast license or construction permit acquires within this five-year reimbursement period an additional broadcast facility or facilities, such that the licensee or permittee would not have been eligible for the new entrant credit, the licensee or permittee will generally not be required to reimburse the U.S. Government for the amount of the bidding credit.

5. Section 73.5008 is amended by revising paragraphs (b) and (c) to read as follows:

§ 73.5008 Definitions applicable for designated entity provisions.

* * * * *

(b) A medium of mass communications means a daily newspaper; a cable television system; or a license or construction permit for a television broadcast station, an AM or FM broadcast station, a direct broadcast satellite transponder, or a Multipoint Distribution Service station.

(c) An attributable interest in a winning bidder or in a medium of mass communications shall be determined in accordance with 47 CFR 73.3555 and Note 2 of that section.

6. Section 73.5009 is revised to read as follows:

§ 73.5009 Assignment or transfer of control.

The reporting requirement contained in 47 CFR 1.2111(a) shall apply to 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.

PART 74 - EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

7. The authority citation for part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307, and 554.

8. Section 74.912 is revised to read as follows:

§ 74.912 Petitions to deny.

(a) Petitions to deny against the long-form applications filed by winning bidders in ITFS auctions must be filed in accordance with 47 CFR 73.5006. Petitions to deny against applications for transfers of control of ITFS licensees, or for assignments of ITFS station licenses, must be filed not later than 30 days after issuance of a public notice of the acceptance for filing of the transfer or assignment application. In the case of applications for renewal of license, petitions to deny may be filed after the issuance of a public notice of acceptance for filing of the applications and up until the first day of the last full calendar month of the expiring license term. Any party in interest may file a petition to deny any notification regarding a low power ITFS signal booster station, within the 60 day period provided for in 47 CFR 74.985(e).

(b) The applicant or notifier may file an opposition to any petition to deny, and the petitioner a reply to such opposition in which allegations of fact or denials thereof shall be supported by affidavit of a person or persons with personal knowledge thereof. Except with regard to petitions to deny against the long-form applications of ITFS auction winners, the times for filing such oppositions and replies shall be those provided in § 1.45 of this chapter.

STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

I earlier recused myself from participating in an adjudicatory licensing proceeding involving the license for a new FM station in Biltmore Forest, North Carolina. However, I declined a request to recuse myself from participating in the general rulemaking proceeding that developed the auction rules that are the subject of the petitions for reconsideration addressed in this order.¹ Out of an abundance of caution, and although no party has made a further recusal request, I recuse myself from participating in paragraphs 23-26 of this Memorandum Opinion and Order. These paragraphs address a discrete issue raised in a petition for reconsideration filed by one of the applicants for the Biltmore Forest license that relates solely and specifically to the Biltmore Forest proceeding.

¹See *Statement of Chairman William E. Kennard Regarding Request For Recusal*, 13 FCC Rcd at 16052.