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

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In the Matter of)	
)	
Policies to Promote Rural Radio Service and to)	MB Docket No. 09-52
Streamline Allotment and)	RM-11528
Assignment Procedures)	

**FIRST REPORT AND ORDER
AND
FURTHER NOTICE OF PROPOSED RULE MAKING**

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

Reply Comment Date: [90 days after date of publication in the Federal Register]

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

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I. INTRODUCTION

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

¹ 24 FCC Rcd 5239 (2009) (“*Rural NPRM*”).

² 47 U.S.C. § 307(b) (“Section 307(b)”).

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

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

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

II. DISCUSSION

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

4. *Background.* In the *Rural NPRM*, the Commission noted the marked disparity in the Native American and Alaskan Native population of the United States, compared to the number of radio stations licensed to, or providing significant signal coverage to, lands occupied by members of federally recognized American Indian Tribes and Alaska Native Villages.³ The Commission also emphasized the historic federal trust relationship between itself and the Tribes, as part of the relationship between the United States government and the sovereign nations that are Tribes.⁴ More specifically, the Commission noted that Tribes have an obligation to “maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life,” within their jurisdictions,⁵ and that the Commission has a longstanding policy of promoting tribal self-sufficiency and economic development, as well as providing adequate access to communications services to Tribes.⁶

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

⁴ *Id.* at 5248-49.

⁵ S.Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879) (quoted in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 102 S.Ct. 894, 903, 71 L.Ed.2d 21 (1981)).

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

5. Accordingly, the Commission tentatively concluded that it would be in the public interest to provide Tribes with a Section 307(b) priority when proposing FM allotments, and filing AM and noncommercial educational ("NCE") FM filing window applications. As set forth in the *Rural NPRM*, an applicant would qualify for the Tribal Priority if: (1) the applicant is either a federally recognized Tribe or tribal consortium, a member of a Tribe, or an entity more than 70 percent owned or controlled by members of a Tribe or Tribes; (2) at least 50 percent of the daytime principal community contour of the proposed facilities covers tribal lands;⁷ (3) the applicant proposed a first (Priority (1)) or second (Priority (2)) aural (reception) service to more than a *de minimis* population, or proposed a first local transmission service (Priority (3)) at the proposed community of license; and (4) the proposed community of license is located on tribal lands.⁸ The Commission further proposed that such a Tribal Priority rank between the current Priority (1) and co-equal Priorities (2) and (3).⁹ In other words, the Tribal Priority would not take precedence over a proposal to provide first reception service to a greater than *de minimis* population, but would take precedence over the provision of second local reception service or, more importantly, over a proposal for first local transmission service. The proposed Tribal Priority would apply only at the allotment stage of the commercial FM licensing procedures; as part of the threshold Section 307(b) analysis with respect to commercial or NCE AM applications filed during an AM filing window; and as the first part of the fair distribution analysis of applications filed in an NCE FM filing window, before application of the "first or second reserved channel NCE service" criterion set forth in Section 73.7002(b) of the Commission's Rules (the "Rules").¹⁰ NCE applicants also would be required to meet all NCE eligibility and licensing requirements.¹¹ Certain "holding period" restrictions, commencing with the award of a construction permit until the completion of four years of on-air operation, would apply to any station or allotment awarded pursuant to the Tribal Priority. In the case of an AM or NCE FM construction permit awarded pursuant to a Tribal Priority, the permittee/licensee would be prohibited during this period from making any change in ownership that would lower tribal ownership below the 70 percent threshold, changing the station's community of license, or implementing a facility modification that would cause the principal community contour to cover less than 50 percent of tribal lands. In the case of a commercial FM allotment, the restriction would apply only to any proposed change of community of license or technical change as described in the preceding sentence. However, even a non-tribal owner that is awarded a permit would still be required to provide broadcast service primarily to tribal lands for four years.¹²

6. The Commission sought comment as to the various components of the Tribal Priority as proposed, e.g., the percentage of tribal member ownership of business entities and the percentage of tribal lands to be covered to qualify for the priority. The Commission also sought comment on the

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

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

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

¹⁰ 47 C.F.R. § 73.7002(b).

¹¹ See *id.* §§ 73.503, 73.561.

¹² *Rural NPRM*, 24 FCC Rcd at 5249.

constitutionality of providing such a priority to members of discrete groups such as Tribes, although it also cited case law suggesting that adoption of the Tribal Priority would not trigger the strict scrutiny analysis set forth in *Adarand Constructors, Inc. v. Pena*.¹³

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

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

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

¹⁴ 47 U.S.C. § 307(b).

¹⁵ As used here, "tribal lands" means both "reservations" and "near reservation" lands. "Reservations" is defined as any federally recognized Indian tribe's reservation, pueblo or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlements Act (85 Stat. 688), and Indian allotments. 47 C.F.R. § 54.400(e). "Near reservation" is defined as "those areas or communities adjacent or contiguous to reservations which are designated by the Department of Interior's Commission of Indian Affairs upon recommendation of the Local Bureau of Indian Affairs Superintendent, which recommendation shall be based upon consultation with the tribal governing body of those reservations, as locales appropriate for the extension of financial assistance and/or social services on the basis of such general criteria as: Number of Indian people native to the reservation residing in the area; a written designation by the tribal governing body that members of their tribe and family members who are Indian residing in the area, are socially, culturally and economically affiliated with their tribe and reservation; geographical proximity of the area to the reservation and administrative feasibility of providing an adequate level of services to the area." *Id.* Thus, "tribal lands" includes American Indian Reservations and Trust Lands, Tribal Jurisdiction Statistical Areas, Tribal Designated Statistical Areas, Hawaiian Homelands, and Alaska Native Village Statistical Areas, as well as the communities situated on such lands.

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

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

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

languages, and traditions,”¹⁹ Tribes have a vital role to play in serving the needs and interests of their local communities. A resolution submitted to the Commission by the National Congress of American Indians, for example, provides that tribal-owned stations have the potential to “support several fundamental missions of Tribal entities within their communities, which include increasing the deployment of services, strengthening local programming, providing public safety, obtaining diversity of viewpoint, creating cultural preservation and language revitalization, and prov[id]ing a modern technological outlet to engage community members, especially youth, in the positive development of their values, identity, and quality of life.”²⁰ Despite this, only 41 radio stations currently are licensed to federally-recognized Indian tribes or affiliated groups, representing less than one-third of one percent of the more than 14,000 radio stations in the United States.²¹ We conclude that the establishment of an allocation priority for the provision of radio service to tribal lands by Indian tribal government-owned stations will advance our Section 307(b) goals and serve the public interest by enabling Indian tribal governments to provide radio service tailored to the needs and interests of their local communities that they are uniquely capable of providing.²²

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

¹⁹ NPM/NCAI Joint Comments at 7.

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

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

²² See *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 352 (D.C.Cir. 1989) (“The FCC has broad discretion under section 307(b) to determine the public interest, and nothing in the Communications Act prevents the FCC from defining the term ‘community’ differently in different contexts, or from adopting an interpretation that strays considerably from political boundaries.”) (citations omitted).

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

²⁴ *Id.*

10. Further, we conclude that the establishment of a Tribal Priority will promote the policies and purposes of the Communications Act favoring diversity of media voices.²⁵ As set forth above, Indian tribal governments are uniquely capable of providing radio service tailored to the culture, language and heritage of their local communities, yet they account for only a tiny percentage of the radio station licenses in this country. By broadening the opportunities for Indian tribal governments to obtain Commission licenses and provide new and diverse programming to often-underserved communities, “we seek to strengthen the diverse and robust marketplace of ideas that is essential to our democracy.”²⁶

11. Turning to the constitutionality of a Tribal Priority, of the eleven commenters addressing this issue,²⁷ three argue that it constitutes, or might constitute, an illegal race-based preference. This includes Booth, Freret, Imlay & Tepper, P.C. (“BFIT”), which provides no support for its argument.²⁸ BFIT further argues that the Tribal Priority is designed to privilege a specific group, rather than serving the Section 307(b) goal of fairly distributed service.²⁹ Additionally, BFIT states that such a priority would wreak technical “havoc” in the AM service due to nighttime mutual exclusivity.³⁰ Instead, BFIT argues that Tribes should receive a bidding credit akin to those awarded to new entrants.³¹ Catholic Radio Association (“CRA”) opposes the Tribal Priority, likening it to one given to “any identity group – whether tribal, Catholic, or (fill in the blank with any ethnic or faith group).”³² CRA further contends that it is fallacious to assume that allowing such a priority would increase programming diversity.³³ CRA

²⁵ It is well established that the Commission’s public interest mandate encompasses the goal of fostering viewpoint diversity. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990) (“*Metro Broadcasting*”), reversed on other grounds, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 409 (1969). See also *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 663-64 (1994) (“[I]t has long been a basic tenet of national communications policy that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,” quoting *Midwest Video*, 406 U.S. 649, 668 n.27 (plurality opinion) and *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). Section 257(b) of the 1996 Act also directs the Commission to “promote the policies and purposes of this Act favoring diversity of media voices” in carrying out its Section 257 responsibilities. 47 U.S.C. § 257(b). And Section 309(j) directs the Commission to promote the dissemination of broadcast licenses to a wide variety of applicants as part of a broad policy of fostering economic opportunity. 47 U.S.C. § 309(j)(4)(D). Section 309(j)(4)(D) requires the Commission to “consider the use of tax certificates, bidding preferences, and other procedures” to achieve its goals.

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

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

²⁸ BFIT Comments at 7-8.

²⁹ *Id.* at 8.

³⁰ BFIT Reply Comments at 4.

³¹ BFIT Comments at 8.

³² CRA Comments at 6.

³³ *Id.* at 6-7.

concludes that the Tribal Priority is only valid if the applicant's proposal would solely serve members of a Tribe and not other populations.³⁴ Jorgenson Broadcast Brokerage, Inc. ("JBB") merely questions the constitutionality of the proposed Tribal Priority, without analysis.³⁵

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

³⁴ *Id.*

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

³⁶ 417 U.S. 535 (1974) ("*Morton*").

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

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

³⁹ *Morton*, 417 U.S. at 551-52.

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

tailored to the needs and interests of their local communities. Furthermore, as discussed above, we find that Indian tribal governments are uniquely situated to provide such service to tribal lands. Accordingly, we believe that the Tribal Priority is consistent with the Equal Protection Clause of the Fifth Amendment.

13. While BFIT is correct in stating that Section 307(b) is designed to provide fair distribution of radio service, the Tribal Priority we establish in this *First R&O* promotes this goal for the reasons discussed above. As proposed, the Tribal Priority also ties the preference to the needs of tribal communities by requiring that, to qualify for the priority, commercial applicants must propose either a first or second aural service, or a first local transmission service at a community located on tribal lands.⁴¹ As discussed above, however, Tribes are uniquely situated to provide programming meeting their members' needs. The existence of a non-tribal commercial station or stations at a community located on tribal lands should not, in our view, preclude the establishment of a first local transmission service owned by a Tribe or Tribes.⁴² Thus, we modify the service criterion for the Tribal Priority to require that a qualifying commercial applicant propose first or second aural (reception) service, or a first local tribal-owned commercial transmission service at the proposed community. Currently, there are only a handful of tribal-owned radio stations operating on a commercial basis. We recognize that the cost, complexity and uncertainty of participating in the Commission's FM allotment and radio auctions processes have deterred tribal participation. We believe that it is important to provide a robust and meaningful opportunity for Tribes to pursue commercial licensing opportunities and to determine, over time, how commercial stations can best serve tribal needs. Thus, a commercial tribal-owned applicant may qualify for a Tribal Priority, notwithstanding the fact that a tribal-owned NCE station is licensed at the same community. We reiterate, as the Commission proposed in the *Rural NPRM*, that the Tribal Priority will not take precedence over a *bona fide* proposal to provide first reception service to a significant population, but will rank higher than a competing proposal to provide second reception service or a first local non-tribal-owned transmission service.⁴³

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

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

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

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

⁴⁴ *Id.*

⁴⁵ *Id.* at 5248-49.

stations will not increase program diversity with regard to Tribes. Our experience and the record suggest otherwise.⁴⁶

15. Commenter Frank McCoy (“McCoy”) states that the proposed Tribal Priority is “unnecessary,” due to what he perceives as a surfeit of FM spectrum in tribal areas of the western United States.⁴⁷ McCoy offers his consulting services to Tribes on a *pro bono* basis, to assist in finding available channels; to the extent spectrum is not available, McCoy suggests we waive spacing requirements to permit such allotments and assignments.⁴⁸ In reply NPM/NCAI point out – correctly, in our estimation – that the principal impediment to new radio service to tribal lands is not a lack of technical knowledge. Rather, Tribes often find themselves unable to compete on an even playing field with other applicants for new service, especially when tribal lands lie near to urbanized or suburban areas.⁴⁹ While McCoy’s intentions are laudable, we continue to believe that structural changes are needed.

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

17. We recognize, as the Commission did in the *Rural NPRM*,⁵² the risks inherent in applying a Section 307(b) preference at the allotment stage for auctionable non-reserved band spectrum. We believe, however, that the fact that such allotments would be required to place a majority of their principal community contours over tribal lands would make these allotments most attractive to tribal applicants. Moreover, should a non-tribal applicant win the allotment at auction, market forces would tend to favor

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

⁴⁷ McCoy Comments at 13-14.

⁴⁸ *Id.*

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

⁵⁰ H&D Comments at 3-4.

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

⁵² *Rural NPRM*, 24 FCC Rcd at 5249.

programming appealing to the tribal audience even if not originated by Tribes or qualifying entities. NPM/NCAI urge that, in order to address the concerns raised by H&D (and as suggested by MEI and BFIT), we propose a tribal-specific bidding credit, separate from and additional to our current new entrant bidding credits, as a way of helping to ensure tribal ownership of facilities added to the Table of Allotments by qualifying Tribes or tribal-owned entities. We discuss the possibility of adding a tribal bidding credit in the *FNPRM*, below.

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

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

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

21. NPM/NCAI would require, in addition to the eligibility criteria set forth in the *Rural NPRM*, that qualifying individuals be enrolled with federally recognized Tribes or tribal consortia, and

⁵³ NPM/NCAI Joint Comments at 11.

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

⁵⁵ See *Rural NPRM*, 24 FCC Rcd at 5248 n.30 ("To the extent that tribal lands are 'checkerboarded' with fee lands, we will use the outer boundaries of such lands to delineate the coverage area, and will not deduct fee lands not owned by members of Tribes from the coverage percentage.").

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

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

23. If two or more mutually exclusive proposals from tribal NCE applicants qualify for a Tribal Priority, proposing first local tribal-owned NCE service at the same community, the tentative selectee will be the applicant proposing service to the greatest population on tribal lands. The goals of the

⁵⁶ *Id.*

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

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

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

⁶⁰ See *supra* note 42.

⁶¹ See *supra* para. 13.

Tribal Priority would not be served if the priority were to be negated any time mutually exclusive tribal NCE applicants propose the same community on tribal lands. We will not require the 5,000-person differential that exists in the current NCE analysis, but we add the “on tribal lands” requirement so as to award the permit to the applicant most successfully meeting the Tribal Priority’s goal of providing service to underserved tribal communities. Moreover, we will make this comparison even if the mutually exclusive tribal applicants propose first local NCE service at different communities, unlike the usual Priority (3) analysis, under which the most populous community receives a dispositive Section 307(b) preference.⁶² We believe the goals of the Tribal Priority are better served by selecting a smaller community that provides greater reception service than by choosing a more remote, but slightly larger, community. Thus, we will apply the foregoing comparison between mutually exclusive NCE applicants claiming the Tribal Priority, whether they propose the same or different communities of license. For the same reason, mutually exclusive applicants claiming the Tribal Priority for commercial facilities, and proposing first local transmission service at the same community or at different communities, will be compared based on service to the greatest population on tribal lands.

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

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

⁶² See *Blanchard, Louisiana and Stephens, Arkansas*, Report and Order, 10 FCC Rcd 9828, 9829 (1995) (when comparing first local service proposals for two well-served communities, the Commission bases its decision on a straight population comparison between the communities, even when the population differential is as small as 38 persons).

⁶³ CN Comments at 5-6.

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

⁶⁵ *Id.* at 4079-81.

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

governments are primarily concerned with the needs of all tribal citizens. As explained by NPM and NCAI:

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

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

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

27. Accordingly, we adopt the Tribal Priority as proposed in the *Rural NPRM* with the following modifications: (1) we will allow assignments or transfers of permits or licenses obtained using the Tribal Priority during the four-year holding period, provided that the assignee/transferee also qualifies for the Tribal priority in all respects;⁷² (2) with regard to NCE permittees or licensees who obtained their authorization using the Tribal Priority, we will permit gradual changes in the governing board during the

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

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

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

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

⁷¹ *Id.* at 5248-49 and n.30.

⁷² See *supra* para. 18.

four-year holding period, as long as the 51 percent tribal control threshold is maintained;⁷³ (3) eligibility to claim the Tribal Priority is limited to Tribes, tribal consortia, or entities 51 percent or more owned or controlled by a Tribe or Tribes;⁷⁴ (4) with regard to entities 51 percent or more owned or controlled by Tribes, the 51 or greater percent need not consist of a single Tribe, but the qualifying entity must be 51 percent or more owned or controlled by Tribes at least a portion of whose tribal lands lie within the facility's principal community contour;⁷⁵ (5) the requirement of principal community coverage of 50 percent or more of tribal lands does not require that those lands belong to the same Tribe;⁷⁶ (6) to qualify for the priority, a tribal commercial applicant must propose first or second aural (reception) service or first local commercial tribal-owned transmission service at the proposed community of license;⁷⁷ and (7) to qualify for the priority, a tribal NCE applicant must propose a first local NCE tribal-owned transmission service at the proposed community of license.⁷⁸ As did Prometheus/NFCB, NPM/NCAI request that the Tribal Priority be implemented immediately. However, NPM/NCAI also request that we promulgate an FNPRM addressed to two issues: (1) the implementation of a bidding credit to be employed by qualifying Tribal applicants in auctions, and (2) a mechanism for non-landed Tribes to make a showing qualifying them for the Tribal Priority. These issues are addressed at paragraph 64, below.

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

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

29. *Discussion.* For the reasons set forth below, based on an examination of the record, we adopt a modified version of our proposal to limit the downgrading of proposed AM facilities that receive

⁷³ *Id.*

⁷⁴ *See supra* para. 26.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See supra* para. 13.

⁷⁸ *See supra* paras. 22-23.

⁷⁹ *Rural NPRM*, 24 FCC Rcd at 5250.

⁸⁰ 47 C.F.R. § 73.7005(b).

a dispositive Section 307(b) preference. We believe that this limitation will protect the integrity of the application process while adequately addressing the challenges faced by AM broadcasters. Eight commenters addressed this issue, voicing varying degrees of concern. H&D urges the Commission to provide some level of flexibility for new AM stations that have received a dispositive Section 307(b) preference, and notes that if applicants must operate facilities “substantially as proposed” then the Commission should provide a bright-line definition of this phrase, to provide certainty for applicants and Commission staff.⁸¹ Several commenters call the proposal “impractical,” stating that post-grant transmitter site modifications (and resulting changes in coverage) are often necessary for business, technical, and environmental reasons.⁸² MEI states that such an approach in the NCE context has proved to be “overly burdensome,” while BFIT and AMS each contend that adoption of the proposal would result in a reduction in the number of new AM stations licensed from each auction filing window.⁸³ As an alternative, AMS, MEI and Educational Media Foundation (“EMF”) suggest that we allow winning applicants to change sites and coverage areas so long as they continue to serve substantially the same number of underserved persons who would have received service under the initial proposal, such that the modified coverage area would be essentially equivalent from a Section 307(b) perspective.⁸⁴

30. We continue to believe that certain procedural safeguards are necessary to protect the integrity of our Section 307(b) analyses. However, we agree with commenters that, given the realities faced by licensees and permittees in securing and maintaining transmitter sites, allowing a certain level of flexibility in implementing AM proposals will help expedite the commencement of new service and reduce the possibility of unbuildable construction permits. Thus, to the extent underserved populations (under Priority (1), Priority (2), and potentially Priority (4)) or service totals (under Priority (4)) are relevant to our analysis, we will adopt the “equivalency” proposal described above: an AM licensee or permittee receiving a dispositive Section 307(b) preference may modify its facilities so long as it continues to provide the same priority service to substantially the same number of persons who would have received such service under the initial proposal, even if the population is not the same population that would have received service under the initial proposal.⁸⁵ As used here, “substantially” means that

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

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

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

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

⁸⁵ The Media Bureau bases its Section 307(b) determinations on its analysis of parties’ Section 307(b) showings, submitted in response to a public notice announcing the mutually exclusive groups among the parties that submitted
(continued...)

any proposed modification must not result in a decrease of more than 20 percent of any population figure that was a material factor in obtaining the dispositive Section 307(b) preference.⁸⁶ Moreover, a licensee or permittee that has received a dispositive preference under Priority (3) will be prohibited from changing its community of license.⁸⁷ Because we received no comments suggesting any alternative timeframes, we will impose these restrictions for a period of four years of on-air operations, consistent with our rules governing NCE FM stations. Construction permits and licenses issued to these parties will contain conditions delineating these restrictions.

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

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

32. *Background.* In the *Rural NPRM*, the Commission observed that our current auction processing rules limit technical review of basic engineering data filed with AM short-form applications “only to the extent necessary to determine the mutually exclusive groups of applications.”⁹¹ This practice,

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FCC Forms 175 for a particular auction. The dispositive Section 307(b) preference is established in the Media Bureau’s decision announcing such a preference within a mutually exclusive group.

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

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

⁸⁸ See MEI Comments at 7.

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

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

⁹¹ *Rural NPRM*, 24 FCC Rcd at 5251. See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15996-97 (1998) (“*Broadcast Auction First Report and Order*”), on recon., (continued...)

stated the Commission, has contributed to the filing of patently defective applications, which potentially undermine the accuracy and reliability of mutual exclusivity and Section 307(b) determinations, and frustrate the staff's ability to manage the window filing process efficiently.⁹² The Commission further stated that it believed that such defective applications may preclude the filing of meritorious modification applications by existing facilities, which must protect the prior-filed defective applications. It noted that in AM Auction No. 84, the Media Bureau appropriately determined that of the 1,311 tech box proposals filed, 188 were ineligible for further processing. Moreover, applicants failed to submit long-form applications for 91 of the 321 Form 175 singleton proposals. Finally, the staff found technical deficiencies in 68 of the 230 singleton long-form applications.⁹³

33. Given the high percentage of defective filings, the Commission tentatively concluded that Section 73.3571(h)(1)(ii) should be modified to require that applicants in future AM broadcast auctions must, at the time of filing, meet the following basic technical eligibility criteria: (1) community of license coverage (day); (2) community of license coverage (night);⁹⁴ (3) daytime protection of existing AM facilities and prior-filed proposed AM facilities; and (4) nighttime protection of existing AM facilities and prior-filed proposed AM facilities.⁹⁵ It also tentatively concluded that the rules should be modified to prohibit the amendment of applications that, at time of filing, are technically ineligible to proceed with auction processing, and prohibit applicants that propose such technically ineligible applications from participating in the auction process. The Commission stated that the proposal would preclude attempts to amend or correct data submitted in Form 175 or the tech box, including proposals to change community of license before an applicant has been awarded a construction permit.⁹⁶

34. *Discussion.* Based on our examination of the record, we adopt the basic technical eligibility criteria proposed in the *Rural NPRM*, but we will provide applicants with a one-time opportunity to amend their short-form applications to conform to our rules pursuant to the procedures set forth below. The commenters addressing this issue were largely supportive of the proposal, agreeing with the Commission's determination that requiring compliance with basic technical rules would deter patently defective, frivolous, and speculative filings.⁹⁷ EMF states that defective applications unnecessarily

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Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999) ("*Broadcast Auction MO&O*"), on further recon., Memorandum Opinion and Order, 14 FCC Rcd 14521 (1999). The basic engineering information, sometimes referred to as the "tech box," is a subset of the information required for the Form 301 long-form application submitted in conjunction with Form 175. This short-form procedure is employed in the auctionable AM, FM, FM translator, TV translator, and LPTV services, where mutual exclusivity is determined by analysis of engineering data.

⁹² *Rural NPRM*, 24 FCC Rcd at 5251.

⁹³ *Id.*

⁹⁴ 47 C.F.R. § 73.24(i).

⁹⁵ *Id.* §§ 73.37, 73.182.

⁹⁶ *Rural NPRM*, 24 FCC Rcd at 5252.

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

impact potential minor changes of existing stations and can have serious adverse public interest consequences.⁹⁸ H&D notes that defective proposals create larger and more cumbersome mutually exclusive groups (“MX Groups”), and complicate engineering solutions and settlements.⁹⁹ It further observes that dismissal of a technically flawed application could split one large MX group into two or more smaller MX groups, thus allowing the Commission to award additional construction permits.¹⁰⁰

35. Lynch emphasizes that “basic technical eligibility criteria” should include compliance with community coverage standards, and daytime and nighttime interference protection of existing stations and prior-filed proposals.¹⁰¹ MEI states that applications with proposed daytime facilities that would result in prohibited contour overlap to outstanding authorizations or prior-filed pending domestic applications should be considered patently defective if the “linear distance of said objectionable overlap exceeds more than 25 percent of the distance to the pertinent interference contour. . . .”¹⁰² It further states that nighttime proposals that “enter 50 percent RSS exclusion of those same types of stations should be considered patently defective.”¹⁰³ On the other hand, MEI asserts that AM applications being processed as “singletons” or as “auction winners” that propose a change in city of license prior to grant of the initial permit should be “routinely permitted to do so,” maintaining that these types of applications are not subject to 307(b) analysis and thus “should be permitted to improve [their proposals] or even cure a lack of principal community coverage in this way.”¹⁰⁴ It maintains that to prohibit such changes “simply denies additional radio service to the public.”¹⁰⁵

36. While generally supportive of the proposal, several commenters cautioned that subjecting applicants to what they consider the functional equivalent of the former FM “hard look” doctrine¹⁰⁶ is impractical, because uncertainties created by the Commission’s purported use of unpublished technical policies, the differences between the Commission’s computer programs and those used by consulting

⁹⁸ EMF Comments at 10.

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

¹⁰⁰ *Id.*

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

¹⁰² MEI Comments at 9.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 9-10.

¹⁰⁵ *Id.* at 10.

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

engineers,¹⁰⁷ and issues surrounding protection of international stations often necessitate the filing of modifications.¹⁰⁸ JBB states that retaining the “30-day letter” policy¹⁰⁹ is critical, and urges the Commission not to modify its policy regarding minor curative amendments.¹¹⁰ Other commenters echoed this sentiment, urging the Commission to retain some measure of flexibility in its pre-auction procedures.¹¹¹

37. For the reasons stated above, and as supported by the majority of commenters responding to this issue, we adopt the proposed rule changes set forth in the *Rural NPRM*. As discussed above, there are four “basic technical eligibility criteria” that must be met at the time of filing.¹¹² However, to alleviate concerns raised by some commenters, we will provide applicants with a one-time opportunity to file curative amendments to their short-form applications. Specifically, if the staff review shows that an application does not meet one or more of the four eligibility criteria, it will be deemed “technically ineligible for filing” and will be included on a Public Notice (the “Technically Ineligible Notice”). The Technically Ineligible Notice will list defective applications identified by the staff during their initial review of the application, will identify which of the four defects that the applicant must correct, and will set the deadline for doing so. Only applicants whose applications are included in the Technically Ineligible Notice may file curative amendments.¹¹³ Applicants cannot modify any part of a proposal not directly related to an identified deficiency in their curative amendments. Specifically, applicants may only modify the AM technical parameters of the short-form application, such as power, class (within the limits set forth in Section 73.21 of the Rules),¹¹⁴ antenna site or other antenna data. Amendments seeking

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

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

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

¹¹⁰ JBB Comments at 4.

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

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

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

¹¹⁴ 47 C.F.R. § 73.21.

to change a proposed community of license or frequency will not be accepted. We emphasize that by this rule change we do not intend to disturb our determination that full technical review of applications will not occur until winning bidders file long-form applications after an auction.¹¹⁵ We further note that this opportunity to cure is not a settlement opportunity under Section 73.5002(d) of our Rules, and will occur prior to the disclosure by the Commission of any information on applications submitted during the short-form filing window.¹¹⁶ We believe that this approach will accomplish our administrative goals without depriving applicants of needed flexibility. If we find that many MX groups are being delayed significantly because of the dismissal/amendment process, or if it appears that many applicants are attempting to use this process to gain an unfair advantage over those applicants initially filing technically acceptable applications, the Commission may revisit the issue prior to subsequent AM windows.

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

38. *Background.* In the *Rural NPRM*, the Commission noted that the broadcast anti-collusion rules apply generally upon the filing of a short-form application.¹¹⁷ However, Section 73.5002(d) of the Rules provides applicants in certain MX Groups a limited opportunity to communicate during specified settlement periods in order to resolve conflicts by means of technical amendment or settlement.¹¹⁸ This exception to the anti-collusion rules applies only to those MX Groups that include either (1) at least one AM major modification; (2) at least one NCE application; or (3) applications for new stations in the secondary broadcast services. Currently, the rule neither prohibits the Commission from accepting non-universal technical amendments or settlement proposals – which reduce the number of applicants in a group but do not completely resolve the mutual exclusivities of that group – nor requires it to do so.¹¹⁹ In two previous AM auctions, the Media Bureau specifically accepted non-universal technical amendments and settlement proposals in the “interest of expediting new service to the public,”¹²⁰ provided that the filing would result in the grant of at least one singleton application.

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

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

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

¹¹⁷ *Rural NPRM*, 24 FCC Rcd at 5252.

¹¹⁸ 47 C.F.R. § 73.5002(d).

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

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

40. *Discussion.* Based on our examination of the record, we codify the permissibility of non-universal engineering solutions and settlement proposals as proposed in the *Rural NPRM*. Each of the five comments filed on this issue supported this proposal.¹²¹ These commenters agreed that this approach was successful in the October 2007 NCE FM filing window,¹²² and would facilitate settlements.¹²³ MEI states that this processing policy could break large MX Groups into smaller groups and result in a greater number of grants.¹²⁴ EMF suggests that we allow applicants to file settlements as soon as applications are on file, rather than only during designated windows.¹²⁵ H&D proposes that the Commission codify the policy employed in the October 2007 NCE FM filing window, which allowed an applicant to file an amendment as long as at least one application becomes a singleton.¹²⁶ Likewise, CRA states that the Commission should permit technical amendments that would produce any singleton regardless of whether the amendment produces singleton status for the amending applicant.¹²⁷

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

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

¹²² H&D Comments at 6.

¹²³ CRA Comments at 7-8.

¹²⁴ MEI Comments at 10.

¹²⁵ EMF Comments at 10-11.

¹²⁶ H&D Comments at 6-7.

¹²⁷ CRA Comments at 8.

¹²⁸ NPM/NCAI Joint Comments at 14.

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

42. *Background.* The Commission observed in the *Rural NPRM* that the Rules currently do not limit the number of AM Tech Box applications¹²⁹ that may be filed with the (non-feeable) FCC Form 175 during an AM short-form filing window.¹³⁰ It noted that an increasing number of applicants had availed themselves of the opportunity to file multiple technical submissions, and questioned whether a significant percentage of AM short-form filing window applications were merely speculative.¹³¹ Accordingly, the Commission sought comment on whether (1) to delegate to the Bureaus authority to limit, in an AM short-form filing window, the number of tech box submissions that an applicant could file with Form 175 and, if so, the appropriate limitation on this delegation; and (2) to apply Commission attribution standards to determine the number of filings submitted by any party, to guard against the use of affiliates or even sham entities to circumvent such a cap. The Commission also sought comment on how application caps could impact small business entities, and whether caps would be a useful mechanism to balance the Commission's competing interests in promoting new and expanded broadcast services and its statutory obligation to prevent abuses of its licensing procedures.¹³²

43. *Discussion.* Based on examination of the record, we adopt our proposal to delegate authority to the Bureaus to limit the number of Tech Box submissions that an applicant may file with Form 175 in an AM short-form filing window. Commenters focused principally on application caps rather than the delegated authority issue. Eight commenters favored specific AM auction application caps, ranging from five to ten applications. BFIT and NPM/NCAI state that a five-application cap would reduce the number of applications filed by speculators.¹³³ Lynch states that a five-application cap would diversify broadcast ownership and maximize opportunities for new entrants.¹³⁴ H&D,¹³⁵ JBB,¹³⁶ and Vir James¹³⁷ each support adoption of a ten-application cap. MEI supports an application cap, but only to applications that are located within 25 miles of another application by the same entity.¹³⁸ Only H&D

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

¹³⁰ *Rural NPRM* at 5253 and n.55.

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

¹³² *Rural NPRM* at 5254.

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

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

¹³⁵ H&D Comments at 8.

¹³⁶ JBB Comments at 2.

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

¹³⁸ Mullaney Comments at 10. Mullaney notes that if an applicant files only one application that turns out to be mutually exclusive with another application, it could lose the opportunity to become an AM broadcaster altogether.

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commented on the issue of attribution, suggesting that the Commission adopt the attribution standards utilized in the October 2007 NCE filing window.¹³⁹

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

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

46. We find that delegating authority to the Bureaus to impose application caps in AM short-form filing windows will help to prevent speculative applications. This will decrease the likelihood of mutually exclusive applications, which will in turn decrease the likelihood of large, technically complex, and administratively burdensome MX Groups. By reducing the administrative burden on the Bureaus, which have limited resources, a cap also can help expedite application processing and prevent abuses of our licensing procedures. We believe the same considerations that led the Commission to impose an application cap in the 2007 NCE FM window apply equally to AM application filing windows. We anticipate that a cap on applications also will enable the Media Bureau to open AM short-form filing windows more frequently, thereby promoting – rather than restricting – new entrant opportunities.¹⁴⁴ Accordingly, we delegate authority to the Bureaus to determine, for each AM short-form window, whether to limit the number of AM applications that may be filed by an applicant and, if so, the appropriate application cap. This approach will permit tailoring of any limitations to the particular circumstances presented by future auctions. We also delegate to the Bureaus authority to adopt attribution standards to effectuate the goals of an application cap, and to ensure compliance with this restriction. We direct the Bureaus to provide notice and an opportunity for comment on a cap limit and

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It also urges the Commission to allow applicants to file amendments to a non-adjacent frequency, stating that this would be beneficial in areas where multiple frequencies are available. *Id.*

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

¹⁴⁰ EMF Comments at 11.

¹⁴¹ *Id.*

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

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

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

attribution standards prior to imposing these potential filing restrictions. In the event that the Bureaus determine that an application cap is warranted, the cap limit and attribution standards will be announced in the Public Notice establishing the dates for the Form 175 filing window. We decline, however, to impose a filing fee, as suggested by some commenters, as we believe that the application cap, coupled with the new requirement of technically acceptable submissions with applicants' short-form applications, will adequately deter speculative filings and prevent abuses of the Commission's licensing processes.

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

47. *Background.* The Commission's Rules currently provide, without exception, that each winning bidder in a broadcast auction must submit an appropriate long-form application "[w]ithin thirty (30) days following the close of bidding."¹⁴⁵ In the *Rural NPRM*, the Commission observed that this inflexible 30-day time frame has, at times, proved to be problematic. For example, some FM auctions have commenced during the first week of November, with bidding closing in mid- to late November. As a result, the long-form application filing deadline has fallen during the holiday season, creating predictable inconvenience both for applicants and their consultants.¹⁴⁶

48. *Discussion.* We adopt the Commission's tentative conclusion in the *Rural NPRM* that delegating authority to the Bureaus to extend the filing deadline for the submission of post-auction long-form applications would benefit all involved in the auction process. Most commenters addressing the issue agree that the current 30-day period does not allow time to compile the required technical data, especially during holidays.¹⁴⁷ MEI notes that giving applicants additional time to file reduces the need for filing amendments with the Commission because applicants would have more time to incorporate the required approvals (e.g., zoning and environmental) into the applications.¹⁴⁸ McCoy, however, suggests that instead of granting deadline extensions, auctions should be scheduled to avoid the holidays, stating that permitting extensions will encourage requests for extensions and engender uncertainty.¹⁴⁹ Although the Commission remains sensitive to the burdens of imposing filing deadlines at certain times of the year, we find that McCoy's proposal would unreasonably limit the Commission's ability to schedule and hold auctions. H&D and MEI, while agreeing with the need for change, favored the predictability of amending Section 73.5005 of the Rules¹⁵⁰ to include a firm, longer deadline of 60 or 90 days.¹⁵¹ We decline to

¹⁴⁵ 47 C.F.R. § 73.5005(a). See 47 U.S.C. § 309(j)(15)(A) (authorizing the Commission to "determine the timing of and deadlines for the conduct of competitive bidding under this subsection, including the timing of and deadlines for qualifying for bidding; conducting auctions; collecting, depositing, and reporting revenues; and completing licensing processes and assigning licenses.").

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

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

¹⁴⁸ MEI Comments at 12.

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

¹⁵⁰ 47 C.F.R. § 73.5005(a).

adopt this proposal, because we are not persuaded that a longer filing period is necessary as a general matter, and because this change would still not provide the flexibility to extend the deadline based on particular circumstances. For example, if we were to take H&D and MEI's suggestion and provide a firm 60-day post-auction filing deadline, we would still encounter the same problem when the 60th day fell in late December or early January.¹⁵² Given the variable dates of auctions and holidays, we believe the Commission's proposal granting the staff delegated authority, on an auction-by-auction basis, to modify the post-auction long-form filing deadline as needed provides optimal flexibility, enabling the staff to take into account any and all factors that might impact auction winners.¹⁵³ Accordingly, we will modify Section 73.5005(a) of the Rules,¹⁵⁴ as set forth in the *Rural NPRM*,¹⁵⁵ to delegate authority to the Bureaus to extend the filing deadline for the post-auction submission of long-form applications.¹⁵⁶

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

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

50. *Discussion.* In the *Rural NPRM*, the Commission proposed to clarify certain issues concerning the unjust enrichment provisions of the NEBC that had been raised during previous broadcast auctions. Very few commenters addressed these specific issues. MEI pressed the Commission to take this opportunity to revisit its implementation of the entire NEBC, calling for additional restrictions to be put in force.¹⁵⁹ For example, MEI recommends that the NEBC only be applied toward the four most

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

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

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

¹⁵⁴ 47 C.F.R. § 73.5005(a).

¹⁵⁵ *Rural NPRM*, 24 FCC Rcd at 5267.

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

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

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

¹⁵⁹ MEI Comments at 15.