expensive allotments that an entity acquires in an auction, and suggests that entities seeking the NEBC be required to comply with the ownership restrictions at least 12 months prior to the auction. MEI offers no explanation as to why such measures are needed to either preserve or advance the integrity of the current designated entity policies. To the extent that MEI advocates a fundamental overhaul of specific NEBC requirements, and their application in the broadcast auction processes in general, its requests are beyond the scope of this rulemaking proceeding. Nor are we persuaded that a different approach is warranted at this time. We find that the existing NEBC procedures best complement broadcast auctions, and provide the optimum means for new entrants to successfully participate in broadcast service auctions, in accordance with Section 309(j) of the Act.

51. *Definition of contour overlap for "same area" determination.* Under Section 73.5007(b) of the Rules,[160] a winning bidder is not eligible for the NEBC if it, or any party with an attributable interest in the winning bidder, has an attributable interest in any existing media facility in the "same area" as the proposed new facility. The existing and proposed facilities are considered in the "same area" if specified service contours of the two facilities overlap. In the FM service, in the pre-auction Form 175 application, an applicant may submit a set of "preferred site coordinates" as an alternative to the reference coordinates for the vacant FM allotment upon which it intends to bid. The Commission recognized that an applicant's ability to protect its preferred site could be an important factor in establishing the monetary value of a vacant FM allotment and a key consideration in its bidding strategy. Accordingly, the Commission provided that the preferred site coordinates specified by prospective auction participants would be entered into the Commission's database and protected from subsequent filings.

52. As described in the *Rural NPRM*, we sought to clarify that, for purposes of defining the "same area" restriction for the NEBC, the contour of the proposed FM facility would be identified by "*the maximum class facilities at the FM allotment site*."[161] In that way, applicants could not attempt to avoid the overlap of contours which defines "same area," and thereby qualify for the bidding credit, by specifying preferred site coordinates in their Form 175 application. Commenter H&D supported this rule clarification.[162] We adopt this proposal, which will provide certainty to applicants and help safeguard the diversity and competition goals on which the NEBC is based by eliminating the potential for applicant manipulation of our "new entrant" standards.

53. H&D requested further clarification regarding the description of the contour of the proposed FM facility, contending that it remains unclear whether the Commission intended that the identified language ("the maximum class facilities at the FM allotment site") means the perfectly circular standard 70 dBμ contour distance for the class of station, or the 70 dBμ contour as calculated pursuant to Section 73.313 of the Rules for a class standard facility at the allotment site coordinates.[163] The distinction between "circular" and "calculated" is a significant one, contends H&D, particularly in the mountainous areas of the western United States. Normally, the Commission does not evaluate specific terrain data in allotment proceedings. Instead, the Commission assumes that a station's city grade coverage contour is a circle with a defined radius based on maximum class facilities from the pertinent allotment site.[164] As in allotment proceedings, we will base this proposed FM facility contour standard on

[160] 47 C.F.R. § 73.5007(b).

[161] *Rural NPRM*, 24 FCC Rcd at 5257 (emphasis in original).

[162] H&D Comments at 14.

[163] 47 C.F.R. § 73.313.

[164] *See, e.g., Woodstock and Broadway, Virginia*, Memorandum Opinion and Order, 3 FCC Rcd 6398, 6399 (1988).

an assumption of uniform terrain, which results in a perfectly circular standard 70 dBμ contour.[165] We clarify Section 73.5007(b)(3) of the Rules accordingly.

54. *Pro forma assignments and transfers of control.* To prevent unjust enrichment by parties that acquire permits through the use of a NEBC, Section 73.5007(c) of the Rules requires reimbursement to the Commission of all or part of the credit upon a subsequent assignment or transfer, if the proposed assignee or transferee is not eligible for the same percentage of bidding credit.[166] The rule is routinely applied to "long form" assignment or transfer of control applications filed on FCC Forms 314 and 315. The rule as written, however, does not distinguish between *pro forma* and non-*pro forma* assignments or transfers of control. In the *Rural NPRM* the Commission raised the question and invited comment as to whether the unjust enrichment analysis should also apply to assignments or transfers that are *pro forma* in nature and filed on Form 316.[167] *Pro forma* assignments and transfers of control may be either voluntary[168] or involuntary.[169] The Commission tentatively concluded that the unjust enrichment provisions should apply in the context of *pro forma* assignment and transfer of control applications, thus eliminating any applicant confusion on the issue.

55. Notwithstanding the disagreement of the one commenter who briefly addressed this issue,[170] we find it appropriate generally to apply the unjust enrichment provisions contained in Section 73.5007(c) of the Rules to *pro forma* applications to assign or transfer broadcast licenses and permits pursuant to Section 73.3540(f) of the Rules. We believe that this policy will help preserve the integrity of the designated entity measures adopted in the *Broadcast Auction First Report and Order.*[171] The NEBC and unjust enrichment rule provisions are formulated in terms of parties with attributable interests.[172] A *pro forma* assignment or transfer can include new parties, including parties with attributable interest

[165] As a related clarification, since the facilities of "existing" FM stations are established, the principal community contours of existing FM stations are defined by their authorized or licensed facilities and the prediction methodology of 47 C.F.R. § 73.313.

[166] 47 C.F.R. § 73.5007(c).

[167] *Rural NPRM*, 24 FCC Rcd at 5257. As a general rule, transactions for assignments or transfers of control that are either involuntary or that do not involve a substantial change in ownership or control may file *pro forma* applications. *See generally* 47 C.F.R. §§ 73.3540(f), 73.3541.

[168] *See* 47 C.F.R. § 73.3540(f) (providing illustrative examples of voluntary assignments and transfers of control that do not involve a substantial change in ownership).

[169] *See id.* § 73.3541 (setting forth procedures following the death or legal disability of an individual permittee or licensee, a member of a partnership, or a person directly or indirectly in control of an entity which is a permittee or licensee).

[170] Munbilla Broadcasting Services, LLC Comments at 14.

[171] *See Broadcast Auction First Report and Order*, 13 FCC Rcd at 15992-96.

[172] *See* 47 C.F.R. § 73.5007(a) (35 percent bidding credit given to winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, has no other attributable interests; 25 percent bidding credit given to winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, has an attributable interest in no more than three mass media facilities). *See also* 47 C.F.R. § 73.5008(c) (an attributable interest in a winning bidder or in a medium of mass communications shall be determined in accordance with 47 C.F.R. § 73.3555 and Note 2).

holdings that would nullify or diminish the eligibility of the assignee or transferee for the bidding credit. This is especially the case in transactions eligible for *pro forma* treatment involving corporate reorganizations where a new attributable interest holder with other media interests is added.[173]

56. Moreover, such an unjust enrichment analysis allows for consistency in the application of the rule. It further ensures that applicants do not use the summary *pro forma* assignment and transfer procedures to circumvent the unjust enrichment requirements. We clarify, however, that we will only apply the unjust enrichment analysis to voluntary *pro forma* transactions, and not to involuntary *pro forma* transactions.[174] Notwithstanding this decision, we will continue to address, on a case-by-case basis, any conduct engaged in by auction participants with the evident intention of manipulating the eligibility standards for, or frustrating the purpose of, the NEBC.[175] We find it appropriate to make such a change in our existing bidding credit reimbursement methodology at this time, and we therefore adopt the unjust enrichment analysis recommended in the *Rural NPRM*.

H. Clarify Maximum New Entrant Bidding Credit Eligibility.

57. *Background.* As described in the *Rural NPRM*, applicants to participate in broadcast auctions are required to establish their qualifications for the NEBC on their short-form applications (FCC Form 175), "Application to Participate in an FCC Auction."[176] Applicants meeting the eligibility criteria set forth in Section 73.5007 of the Rules qualify for a bidding credit representing the amount by which a winning bidder's gross bid is discounted.[177] The size of a NEBC depends on the number of ownership interests in other media of mass communications that are attributable to the bidder-entity and its attributable interest-holders.[178] In accordance with Section 73.5008(c) of the Rules, when determining an applicant's eligibility for the NEBC, the interests of the applicant, and of any individuals or entities with an attributable interest in the applicant, in other media of mass communications are considered.[179]

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[173] *See, e.g.*, 47 C.F.R. § 73.3540(f)(4).

[174] The rules require that the personal representative notify the Commission within 30 days of death or disability and to request assignment or transfer to a successor in interest, such as a court-appointed receiver, executor, guardian or trustee. Given both the involuntary nature of the triggering event and the temporary nature of the license transfer to a fiduciary, we find that it is inappropriate to apply an unjust enrichment to an involuntary *pro forma* transaction. Rather, in involuntary situations, the unjust enrichment analysis will apply to the subsequent "long form" assignment or transfer to the person or entity legally qualified to succeed to the broadcast interests at issue. *See* 47 C.F.R. § 73.3541(b).

[175] *See Broadcast Auction MO&O*, 14 FCC Rcd at 8767-68.

[176] *See* 47 C.F.R. §§ 1.2105, 73.5007, 73.5008. All applicants, including those seeking a new entrant bidding credit, must provide certifications under penalty of perjury in FCC Form 175.

[177] *Id.* § 73.5007.

[178] *See id.* at 73.5007. In the *New Entrant Bidding Credit Reconsideration Order*, the Commission further refined the eligibility standards for the NEBC, judging it appropriate to attribute the media interests held by very substantial investors in, or creditors of, a bidder claiming new entrant status. Specifically, the attributable mass media interests held by an individual or entity with an equity and/or debt interest in a bidder shall be attributed to that bidder for purposes of determining its eligibility for the credit, if the equity and debt interests, in the aggregate, exceed 33 percent of the total asset value of the bidder, even if such an interest is non-voting. *New Entrant Bidding Credit Reconsideration Order*, 14 FCC Rcd at 12543.

[179] 47 C.F.R. § 73.5008(c).

58. The Form 175 is the applicant's sole opportunity to claim bidding credit eligibility. Accordingly, an auction applicant's attributable interests, and therefore its maximum NEBC eligibility, are determined as of the Form 175 filing deadline. Consequently, bidders cannot qualify for a bidding credit, nor increase the size of a previously claimed bidding credit, based upon ownership or positional changes occurring after the Form 175 filing deadline.[180]

59. In broadcast auctions, the Bureaus routinely announce by Public Notice that events occurring after the Form 175 filing deadline, such as the acquisition of additional attributable interests in media of mass communications, may cause diminishment or loss of the bidding credit as originally claimed on Form 175.[181] The *Rural NPRM* noted that, notwithstanding clear announcements of this policy in broadcast auction Public Notices, certain parties have, for example, acquired attributable interests after the Form 175 filing deadline and argued that their NEBC eligibility is maintained or "frozen" as of the Form 175 application filing.[182] Therefore, to prevent applicant confusion, in the *Rural NPRM* the Commission proposed to amend Section 73.5007(a) of the Rules to codify the current policy, and state explicitly that the NEBC eligibility set forth in an applicant's Form 175 application is the maximum NEBC eligibility for that auction, and that such bidding credit may be reduced or lost upon post-filing changes.[183]

60. *Discussion.* Commenters addressing this issue supported the Commission's proposal to codify the current policy and clarify Section 73.5007(a).[184] We therefore modify Section 73.5007(a) of the Rules to state unequivocally that: (1) an applicant must specify its eligibility for the NEBC in its Form 175 application; (2) the NEBC specified in an applicant's Form 175 establishes that applicant's maximum NEBC eligibility for that auction; (3) any post-Form 175 filing ("post-filing") change in the applicant's circumstances underlying its NEBC eligibility claim, or that of any attributable interest-holder in the applicant, must be reported immediately to the Commission, and no later than five business days after the change occurs;[185] and (4) any such post-filing change may cause a reduction or elimination of the

[180] *See Liberty Productions, a Limited Partnership*, Memorandum Opinion and Order, 16 FCC Rcd 12061, 12079, *stay denied*, 16 FCC Rcd 18966 (2001), *aff'd sub nom. Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155 (D.C. Cir.), *cert denied*, 540 U.S. 981 (2003) ("*Liberty Productions*") (subsequent changes can reduce or eliminate the NEBC that the applicant originally claimed in its Form 175 application).

[181] *See, e.g., Auction of FM Broadcast Construction Permits Scheduled for September 1, 2009; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 79*, DA 09-810, Public Notice, 24 FCC Rcd 4448, 4463 (MB/WTB 2009) ("*Auction 79 Procedures Public Notice*"). Similarly, the broadcast auction Public Notices unambiguously state that an applicant cannot qualify for a bidding credit, nor upgrade a previously claimed bidding credit, based upon ownership or positional changes occurring after the Form 175 filing deadline.

[182] *See, e.g., Matinee Radio, LLC*, Letter, 20 FCC Rcd 13713 (MB 2005), *review pending*. In an attempt to preserve their maximum NEBC eligibility, and despite having acquired attributable interests that nullify their new entrant status, these parties sought to factually distinguish precedent such as *Liberty Productions*.

[183] *Rural Radio NPRM*, 24 FCC Rcd 5257-58.

[184] H&D Comments at 14.

[185] *See Procedural Amendments to Commission Part 1 Competitive Bidding Rules*, Order, FCC 10-4, at 5 (rel. Jan. 7, 2010) ("*Procedural Amendments*") (under amended 47 C.F.R. § 1.2105(b)(4), amendments or modifications required to maintain the accuracy and completeness of information furnished in pending auction applications "shall be made as promptly as possible, and in no case more than five business days after applicants become aware of the

(continued...)

NEBC claimed in the applicant's Form 175 application, if the change would cause the applicant not to qualify for the originally claimed NEBC under the eligibility provisions of Section 73.5007 of the Rules, and the change occurred prior to grant of the construction permit to the applicant. Under no circumstances will a post-filing change increase an applicant's NEBC eligibility for that auction.

61. The rules governing NEBC eligibility state that attributable interests shall be determined in accordance with Section 73.3555 and Note 2 to that section.[186] Section 73.3555 and Note 2 set forth numerous means by which interests are attributed to individuals and entities.[187] We emphasize that all of these bases for attribution will be considered to affect NEBC eligibility when they occur after the Form 175 filing deadline. For example, for NEBC purposes, we do not distinguish between attribution triggered by the post-filing procuring of a creditor with attributable interests (as was the case in *Liberty*),[188] and attribution triggered by an applicant's attributable interest holders themselves acquiring additional media interests subsequent to the Form 175 filing. We therefore reiterate that *any* change occurring subsequent to the short form filing deadline could serve as the basis for reducing or eliminating the applicant's previously claimed NEBC eligibility.[189] This policy codification clearly notifies broadcast auction applicants of the NEBC eligibility consequences of their other business dealings.

62. By auction Public Notices, bidders are also instructed that any change affecting eligibility for the NEBC, insofar as it results in the reduction or loss of the credit originally claimed on the Form 175 application, must be reported immediately, and no later than five business days after the change occurs.[190] Given the significance of this information in an auctions context, in the *Rural NPRM* we proposed to adjust the standard reporting timeframe and codify this immediate reporting requirement. Our experience shows that few bidders actually incur changes that result in adjustments to their bidding credit status. The vast majority of those that do have promptly reported the change. Bidders are advised through Public Notices that the Commission will post pertinent auction information throughout the entire auction event. The past practice has been to post such announcements for auction participants, including messages conveying a change in a bidder's bidding credit eligibility.[191] In such cases, the Commission then makes

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(Continued from previous page)
need to make any amendment or modification, or five business days after the reportable event occurs, whichever is later.").

[186] *See* 47 C.F.R. §§ 73.5007-5008.

[187] *Id.*, § 73.3555 and Note 2.

[188] *See supra* notes 180 and 182.

[189] It remains the case that an applicant may not qualify for a previously unclaimed NEBC, nor upgrade a previously claimed bidding credit, based on changes occurring after the short form filing deadline. *Liberty*, 16 FCC Rcd at 12077.

[190] *See, e.g., Auction 79 Procedures Public Notice,* 24 FCC Rcd at 4463; "*Auction of FM Broadcast Construction Permits- 77 Bidders Qualified to Participate in Auction 79,*" Public Notice, 24 FCC Rcd 10782, 10791 (MB/WTB Aug. 19, 2009) ("*Auction 79 Qualified Bidders Public Notice*"). In Public Notices, the Bureaus also remind bidders of their responsibility to maintain the accuracy and completeness of information furnished in their pending Form 175 applications. *See, e.g., Auction 79 Qualified Bidders Public Notice,* 24 FCC Rcd at 10791 (Applicants are responsible for maintaining the accuracy and completeness of information furnished in their Form 175 and exhibits).

[191] *See, e.g.,* http://auctionresults.fcc.gov/Auction_37/Announcements/37_007.005 (announcing a bidder's change of NEBC eligibility in Auction 37); http://auctionresults.fcc.gov/Auction_53/Announcements/53_005.004 (announcing a bidder's withdrawal of its small business bidding credit in Auction 53).

the appropriate adjustments concerning the NEBC status in the computation of down and final payment amounts due from any affected winning bidder. Therefore, and in keeping with the rule amendments we recently adopted in *Procedural Amendments*,[192] we codify the practice that any changes affecting NEBC eligibility must be reported immediately, and in any event no later than five business days after the change occurs, and we amend Section 73.5007(a) of the Rules accordingly. This codification, again, clearly notifies auction applicants of their reporting obligations, and provides clarity and transparency in the auction processes, both to the affected applicant itself and to those auction participants bidding against that applicant.

63. Finally, we restate that we will continue to make final determinations regarding an applicant's eligibility to hold a construction permit, including its eligibility for the NEBC, when we are ready to grant the post-auction long form construction permit application. In the event that an applicant's eligibility for the NEBC changes between the final payment deadline and the date on which we grant the construction permit application, the applicant would be required to make any additional payment prior to the issuance of the construction permit authorization.[193]

III. FURTHER NOTICE OF PROPOSED RULE MAKING

A. Implement a Tribal Bidding Credit.

64. *Background.* As noted above, some commenters have urged the Commission to adopt some form of tribal bidding credit. Specifically, H&D notes that tribal applicants applying the priority to add an allotment to the Table of FM Allotments might still lose at auction, suggesting for this reason that the Tribal Priority be limited to non-tabled services.[194] In response to this suggestion, NPM/NCAI countered that the remedy for the problem H&D posed was not to eliminate the priority for commercial FM auctions, but rather to implement a bidding credit for qualified tribal applicants.[195]

65. *Discussion.* In the *Rural NPRM*, the Commission noted that there are more than 4.1 million Native Americans and Alaska Natives living in the United States, with 563 federally recognized Tribes.[196] The Commission further noted that, at the present time, there are approximately 41 full-power NCE FM radio stations in the United States licensed to Tribes or affiliated groups, with another 31

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[192] *See supra* note 185.

[193] *See Implementation of the Commercial Spectrum Enhancement Act and the Modernization of the Commission's Competitive Bidding Rules and Procedures*, Report and Order, 21 FCC Rcd 891, 909 n.84 (2006).

[194] H&D Comments at 4.

[195] NPM/NCAI Joint Reply Comments at 5-6.

[196] *Rural NPRM*, 24 FCC Rcd at 5247-48 and n.29 ("'The term "Indian Tribe[s]" or "Federally-Recognized Indian Tribes" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community which is acknowledged by the federal government to constitute a government-to-government relationship with the United States and eligible for the programs and services established by the United States for Indians. *See The Federally Recognized Indian Tribe List Act of 1994* (Indian Tribe Act), Pub. L. 103-454. 108 Stat. 4791 (1994) (the Secretary of the Interior is required to publish in the Federal Register an annual list of all Indian Tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians).' [*Tribal Policy Statement*, 16 FCC Rcd at 4080]").

construction permits for full-power NCE FM stations having been granted to such Tribes or affiliates.[197] Given the paucity of tribal-owned radio stations, it might be expected that the vast majority of tribal applicants for commercial facilities would qualify for new entrant bidding credits, negating the need for a special tribal bidding credit over and above the new entrant bidding credits. Moreover, the Commission has previously rejected the implementation of "finder's" or "pioneer's" bidding credits for applicants that add allotments to the FM Table of Allotments,[198] finding that such applicants were not among the categories specifically designated by Congress when it granted the Commission competitive bidding authority.[199]

66. We nevertheless believe it appropriate to consider various proposals for a special bidding credit for tribal applicants. While not forwarding any one such proposal as a rule at this time, we seek comment to assist our consideration as to whether to offer such a new bidding credit, either in lieu of or in addition to the existing NEBCs. In this regard, two of the commenters in this proceeding have already made suggestions along these lines. MEI suggests that tribal applicants be granted the "maximum permissible bidding credit provided they do not own any other commercial facility with overlapping principal community contours."[200] In other words, MEI appears to suggest that the Commission establish a 35 percent bidding credit for tribal applicants, as long as they own no commercial facilities in the "same area" as the proposed new facility.[201] BFIT, as noted above, also suggests "the equivalent of a new entrant credit," rather than a Section 307(b) priority.[202] We would also consider whether to give tribal applicants the option to claim either the appropriate 25 or 35 percent new entrant bidding credit or, as long as the conditions posed by MEI are met, a 25 or 35 percent tribal bidding credit. Still another alternative to be considered would be to offer a choice of either the appropriate new entrant bidding credit or a lesser credit, perhaps 15 or 20 percent, to tribal applicants who are not new entrants. In all of the above cases, we would consider whether to limit the tribal bidding credit to allotments added using the Tribal Priority, and further, whether to limit the credit to the Tribe(s) or entity adding the allotment to the Table of Allotments.[203] Should a qualifying bidder be able to employ a tribal bidding credit in addition to a new entrant bidding credit (at least for qualifying tribal allotments) rather than in lieu of the new entrant credit? Additionally, applicants using new entrant bidding credits are subject to the unjust enrichment provisions of our Rules,[204] which require that all or a portion of the bidding credit be reimbursed if the authorization is assigned or transferred within five years of issuance to a party not qualifying for the

[197] *Rural NPRM*, 24 FCC Rcd at 5248.

[198] 47 C.F.R. § 73.202(b).

[199] *See Broadcast Auction First Report and Order*, 13 FCC Rcd at 15996-97.

[200] MEI Comments at 7.

[201] 47 C.F.R. § 73.5007(b) (defining "same area" for purposes of new entrant bidding credit).

[202] BFIT Comments at 8.

[203] In other words, should the bidding credit be available to otherwise qualifying applicants that did not participate in the Tribal allotment reservation process?

[204] 47 C.F.R. § 73.5007(c) (a licensee or permittee using a new entrant bidding credit, and assigning or transferring control of the authorization to an entity not meeting the eligibility criteria for the bidding credit, must reimburse the U.S. Government 100 percent of the bidding credit if the authorization is assigned or transferred in the first two years after issuance; 75 percent in the third year; 50 percent in the fourth year; and 25 percent in the fifth year).

credit. What impact would a tribal bidding credit have on the unjust enrichment rules, and what adjustments (if any) should the Commission make to those rules to accommodate a tribal bidding credit? We seek comment on these proposals, or any other proposals forwarded by commenters for a potential tribal bidding credit.

B. Extend the Tribal Priority to Non-Landed Tribes.

67. *Background.* NPM/NCAI point out in their Joint Reply Comments that, while there are 563 Tribes in the United States, there are only 312 reservations, with some Tribes occupying more than one reservation.[205] The Tribal Priority as adopted in the *First R&O* is by its terms limited to what NPM/NCAI term "landed" Tribes. They urge that we seek comment on ways in which "landless" Tribes may nonetheless avail themselves of the Tribal Priority.

68. *Discussion.* NPM/NCAI recognize that the Tribal Priority proposed in the *Rural NPRM* was principally designed to enable Tribes to fulfill their obligations, as inherently sovereign Nations, to aid the development, and perpetuate the language and culture of their members. It was not proposed merely to give Tribes a blanket priority over other applicants for facilities that may not provide service targeted at Tribal citizens or communities.[206] Thus, any application of the Tribal Priority to non-landed Tribes must take into account the policies underlying the Tribal Priority. NPM/NCAI, by way of example, state that federal agencies such as the Census Bureau and the Department of Housing and Urban Development utilize "service areas rather than strict definitions of Tribal Lands."[207] Service areas include such categories as American Indian reservations, Off-reservation trust lands, and Oklahoma tribal statistical areas, as well as tribal subdivisions and Census Designated Places on such lands.[208] They further suggest that provision could be made for tribal applicants to show that the proposed principal community contour serves the functional equivalent of tribal lands, using factors such as Native American population density, cultural links between the community of license and the Tribe or Tribes, or other factors.

69. We therefore consider, without proposing a specific rule, whether and how Tribes without tribal lands as defined herein and in the *Rural NPRM* can qualify for the Tribal Priority. For example, we consider whether a threshold tribal population, or tribal population density, could be taken into account in determining whether a tribal applicant meets the tribal coverage and community of license criteria of the Tribal Priority. We would also consider whether historical or contemporary cultural links could be taken into account in making the tribal coverage and community determinations. Should the fact that a currently landless Tribe or Tribes previously occupied the coverage area or proposed community of license be taken into account? Are there other factors that should be considered? We invite comment on these issues, and seek suggestions as to whether and how we might institute such a procedure.

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[205] NPM/NCAI Joint Reply Comments at 10.

[206] *Rural NPRM*, 24 FCC Rcd at 5248-49; NPM/NCAI Joint Reply Comments at 11 n.33.

[207] *Id.* at 11 and n.32.

[208] *Id.*

IV. ADMINISTRATIVE MATTERS

A. First Report and Order.

1. Final Regulatory Flexibility Analysis.

70. As required by the Regulatory Flexibility Act of 1980 ("RFA"),[209] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *First R&O*. The FRFA is set forth in Appendix B.

2. Final Paperwork Reduction Act of 1995 Analysis.

71. This *First R&O* adopts new or revised information collection requirements, subject to the Paperwork Reduction Act of 1995 ("PRA").[210] These information collection requirements will be submitted to the Office of Management and Budget ("OMB") for review under Section 3507(d) of the PRA. The Commission will publish a separate notice in the Federal Register inviting comment on the new or revised information collection requirement(s) adopted in this document. The requirement(s) will not go into effect until OMB has approved it and the Commission has published a notice announcing the effective date of the information collection requirement(s). In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."[211]

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

3. Congressional Review Act.

73. The Commission will send a copy of this *First Report and Order* in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.[212]

B. Further Notice of Proposed Rule Making

1. Filing Requirements.

74. *Ex Parte Rules.* This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Commission's Rules.[213]

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[209] *See* 5 U.S.C. § 604. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

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

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

[212] *See* 5 U.S.C. § 801(a)(1)(A).

[213] *Id.* § 1.1206(b), as revised.

Ex parte presentations are permissible if disclosed in accordance with Commission Rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[214] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

75. *Comments and Reply Comments.* Pursuant to Sections 1.415 and 1.419 of the Commission's Rules,[215] interested parties must file comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System ("ECFS"); (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[216]

76. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cbg/ecfs, or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the Websites for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

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

78. People with Disabilities: Contact the FCC to request materials in accessible formats (Braille, large print, electronic files, audio format, etc.) by e-mail at FCC504@fcc.gov, or call the Consumer & Governmental Affairs Bureau at 202-418-0531 (voice), 202-418-7365 (TTY).

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[214] *See id.* at § 1.1206(b)(2).

[215] *Id.* §§ 1.415, 1.419.

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

79. *Additional Information*. For additional information on this proceeding, contact Thomas S. Nessinger, Thomas.Nessinger@fcc.gov, of the Media Bureau, Audio Division, (202) 418-2700. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact Brian Millin at (202) 418-7426 (voice), (202) 418-7365 (TTY), or via e-mail at Brian.Millin@fcc.gov.

2. Initial Regulatory Flexibility Analysis.

80. The Regulatory Flexibility Act of 1980, as amended ("RFA"), requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

81. With respect to this *Further Notice of Proposed Rule Making* ("*FNPRM*"), an Initial Regulatory Flexibility Analysis ("IRFA") under the Regulatory Flexibility Act[217] is contained in Appendix A. Written public comments are requested in the IFRA, and must be filed in accordance with the same filing deadlines as comments on the *FNPRM*, with a distinct heading designating them as responses to the IRFA. The Commission will send a copy of this *FNPRM*, including the IRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, a copy of this *FNPRM* and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the *Federal Register*.

3. Paperwork Reduction Act Analysis.

82. The *FNPRM* contains potential information collection requirements subject to the Paperwork Reduction Act of 1995 ("PRA"), Public Law 104-13. OMB, the general public, and other Federal agencies are invited to comment on the potential new and modified information collection requirements contained in this *FNPRM*. If the information collection requirements are adopted, the Commission will submit the appropriate documents to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA and OMB, the general public, and other Federal agencies will again be invited to comment on the new and modified information collection requirements adopted by the Commission. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), the FCC seeks specific comment on how it might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

[217] *See* 5 U.S.C. § 603.

83. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees." Written comments on possible new and modified information collections must be submitted on or before 60 days after date of publication in the *Federal Register*. In addition to filing comments with the Secretary, a copy of any Paperwork Reduction Act comments on the information collection(s) contained herein should be submitted to Cathy Williams, Federal Communications Commission, Room 1-C823, 445 12th Street, SW, Washington, DC 20554, or via the Internet to Cathy.Williams@fcc.gov, and to Nicholas Fraser, OMB Desk Officer, Room 10234 NEOB, 725 17th Street, N.W., Washington, DC 20503 via the Internet to Nicholas_A._Fraser@omb.eop.gov or by fax to 202-395-5167.

84. For additional information concerning the information collection(s) contained in this document, contact Cathy Williams at 202-418-2918, or via the Internet at Cathy.Williams@fcc.gov.

IV. ORDERING CLAUSES

85. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 303, 307, and 309(j), that this *First Report and Order* IS ADOPTED.

86. IT IS FURTHER ORDERED, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 303, 307, and 309(j), that this *Further Notice of Proposed Rulemaking* IS ADOPTED.

87. IT IS FURTHER ORDERED that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 548, the Commission's Rules ARE HEREBY AMENDED as set forth in Appendix E.

88. IT IS FURTHER ORDERED that the rules adopted herein WILL BECOME EFFECTIVE 30 days after the date of publication in the *Federal Register*, except for Sections 73.3571(k), 73.7000, 73.7002(b), and 73.7002(c), which contain new or modified information collection requirements that require approval by the Office of Management and Budget ("OMB") under the Paperwork Reduction Act (PRA), and which WILL BECOME EFFECTIVE after the Commission publishes a notice in the *Federal Register* announcing such approval and the relevant effective date.

89. IT IS FURTHER ORDERED that the Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, and shall cause it to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *Further Notice of Proposed Rulemaking* ("*FNPRM*"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *FNPRM* provided in paragraph 75. The Commission will send a copy of this entire *FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the *FNPRM* and the IRFA (or summaries thereof) will be published in the Federal Register.[3]

2. **Need For, and Objectives of, the Proposed Rules.** This further rulemaking proceeding is initiated to obtain comments concerning commenters' request that the Commission consider providing a bidding credit to Native American Indian Tribes and Alaska Native Villages ("Tribes") and entities owned by Tribes, and also to obtain comments concerning a commenter's proposal to provide a Tribal Priority, as adopted in the *First R&O* in this proceeding, to Tribes that do not possess their own tribal lands. The Commission has put out for consideration several proposals for a potential tribal bidding credit: to grant Tribes the maximum permissible 35 percent bidding credit provided they do not own any other facility in the "same area" as the proposed new facility;[4] to give Tribes the option to claim either the appropriate 25 or 35 percent new entrant bidding credit or, as long as the applicant owns no stations in the same area as the proposed new station, a 25 or 35 percent tribal bidding credit; or to offer Tribes a choice of either the appropriate new entrant bidding credit or a lesser credit, perhaps 15 or 20 percent, to tribal applicants who are not new entrants. In all of the above cases, the Commission also considers whether to limit the tribal bidding credit, in FM auctions, to allotments added using the Tribal Priority, and further, whether to limit the credit to the Tribe(s) or entity adding the allotment to the Table of Allotments.[5] The Commission also considers herein whether a tribal bidding credit should be available in addition to a new entrant bidding credit (at least for qualifying tribal FM allotments) or in lieu of the new entrant bidding credit. The Commission believes these proposals, if adopted, will provide opportunities for Tribes and tribal entities proposing new FM allotments better to compete at auction for those allotments.

3. The Commission is also considering, without proposing a specific rule, whether and how Tribes without tribal lands can qualify for the Tribal Priority. The proposals offered for consideration by commenters are (1) whether an applicant or proponent is deemed to provide tribal area coverage if it covers a certain threshold tribal population or population density, (2) whether historical or contemporary cultural links between a Tribe and land or population covered should be taken into account in making the

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id.* § 603(a).

[4] 47 C.F.R. § 73.5007(b) (defining "same area" for purposes of new entrant bidding credit).

[5] In other words, should the bidding credit be available to otherwise qualifying applicants that did not participate in the Tribal allotment reservation process?

tribal coverage and community of license determinations, and (3) whether the fact that a currently landless Tribe or Tribes previously occupied the coverage area or proposed community of license should be taken into account. The Commission considers these proposals, and seeks comment and suggestions as to other ways to extend the benefits of the Tribal Priority to those Tribes that do not have reservations or other tribal lands, allowing such "landless" Tribes to acquire radio stations to achieve the goals of aiding tribal development, and perpetuating tribal language and culture.

4. **Legal Basis.** The authority for this proposed rulemaking is contained in Sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 307, and 309(j).

5. **Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.** The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.[6] The RFA generally defines the term "small entity" as encompassing the terms "small business," "small organization," and "small governmental entity."[7] In addition, the term "small Business" has the same meaning as the term "small business concern" under the Small Business Act.[8] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[9]

6. **Radio Stations.** The proposed rules and policies potentially will apply to all AM and FM radio broadcasting applicants, and proponents for new FM allotments, who qualify for the Tribal Priority adopted in the *First R&O* in this proceeding. The "Radio Stations" Economic Census category "comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources."[10] The SBA has established a small business size standard for this category, which is: such firms having $7 million or less in annual receipts.[11] **According to BIA Advisory Services, L.L.C., MEDIA Access Pro Database on March 17, 2009, 10,884 (95%) of 11,404 commercial radio stations have revenue of $6 million or less.** Therefore, the majority of such entities are small entities. We note, however, that in assessing whether a business concern qualifies as small under the above size standard, business affiliations must be included.[12] In addition, to be determined to be a "small business," the entity may not

[6] *Id.* § 603(b)(3).

[7] *Id.* § 601(6).

[8] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[9] 15 U.S.C. § 632.

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

[11] 13 C.F.R. § 121.201, NAICS code 515112 (updated for inflation in 2008).

[12] "Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists." 13 C.F.R. § 121.103(a)(1) (an SBA regulation).

be dominant in its field of operation.[13] We note that it is difficult at times to assess these criteria in the context of media entities, and our estimate of small businesses may therefore be over-inclusive.

7. **Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.** The proposed rule and procedural changes may, in some cases, impose different reporting requirements on existing and potential radio licensees and permittees, insofar as they would require or allow eertain applicants to file new technical and population coverage information on or after filing the short form application (FCC 175) or in the noncommercial educational long form application (FCC 340). However, the information to be filed is already familiar to broadeasters, and the information requested to claim the Tribal Priority is similar to current Section 307(b) showings, so any additional burdens would be minimal.

8. To the extent that other applicants would be disadvantaged by Tribes qualifying for the Tribal Priority, the Commission believes that such burdens would be offset by the fact that the Tribal Priority is designed to redress inequities in the number of tribal radio licensees, compared to the population of tribal citizens in the United States and the fact that some of these citizens were deprived of their original tribal lands. The Tribal Priority, then, not only helps the Commission to meet its goals of ownership and program diversity, but also furthers the federal government's obligations toward Tribes to assist them in promulgating tribal languages and cultures, and to support tribal self-government.

9. **Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.** The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[14]

10. In the *Further Notice of Proposed Rulemaking*, the Commission seeks to provide additional opportunities for participation by Tribes in broadcast auctions, especially FM auctions, and to open up the Tribal Priority to those Tribes who do not currently have tribal lands, and who therefore cannot qualify under the Tribal Priority's tribal coverage criterion. The Commission is open to consideration of alternatives to the proposals under consideration, as set forth herein, including but not limited to alternatives that will minimize the burden on broadcasters, most of whom are small businesses. There may be unique circumstances these entities may face, and we will consider appropriate action for small broadcasters when preparing a *Report and Order* in this matter.

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

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

[14] 5 U.S.C. § 603(b).

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rule Making* ("*Rural NPRM*") to this proceeding.[2] The Commission sought written public comment on the proposals in the *Rural NPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

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

2. This *First Report and Order* ("*First R&O*") adopts rule changes and procedures to codify or clarify certain allotment, assignment, auction, and technical procedures. The rules adopted by this *First R&O* also create a new Tribal Priority to assist Native American Tribes and Alaska Native Villages ("Tribes") or tribal consortia, or entities controlled by Tribes, in obtaining radio broadcast stations designed to serve their tribal communities.

3. We turn first to the Tribal Priority. 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 Tribes. Tribal lands comprise 55.7 million acres, or 2.3 percent of the area of the United States (exclusive of the State of Alaska).[4] Roughly one-third of the 4.1 million American Indian and Alaska Native population of the United States lives in tribal lands, yet only 41 radio stations currently are licensed to Tribes or affiliated groups, representing less than one-third of one percent of the more than 14,000 radio stations in the United States. This service disparity belies the goal of fair distribution of radio service mandated by Section 307(b) of the Communications Act of 1934, as amended, as well as the Commission's commitment to promoting diversity of station ownership and programming. The Commission also noted its historic trust relationship with Tribes, and the federal policy goals of assisting Tribes in promoting tribal culture and self-government.

4. To remedy these problems, the Commission concluded that Tribes seeking new radio stations to serve their citizens should receive a priority in the award of allotments and construction permits. To qualify for the Tribal Priority, an applicant must demonstrate that it meets all of the following eligibility criteria: (1) the applicant is either a federally recognized Tribe or tribal consortium, or an entity 51 percent or more of which is owned or controlled by a Tribe or Tribes, at least part of whose tribal lands (as defined in note 30 of the *Rural NPRM*)[5] are covered by the principal community contour of the proposed facility. Although the 51 or greater percent need not consist of a single Tribe, the

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

[2] 24 FCC Rcd 5239 (2009).

[3] *See* 5 U.S.C. § 604.

[4] NPM/NCAI Joint Reply Comments at 4.

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

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; (2) at least 50 percent of the daytime principal community contour[6] of the proposed facilities covers tribal lands; (3) the proposed community of license must be located on tribal lands; and (4) the applicant proposes first aural, second aural, or first local tribal-owned transmission service at the proposed community of license, in the case of proposed commercial facilities, or at least first local tribal-owned noncommercial educational transmission service, in the case of proposed NCE facilities. In the event that two or more applicants claiming the Tribal Priority are mutually exclusive, the one providing the highest level of service to the greatest population will prevail. The Tribal Priority ranks between the current Priority (1) and co-equal Priorities (2) and (3) in the case of commercial applicants.[7] Thus, the Tribal Priority will not take precedence over a proposal to provide first reception service to a greater than *de minimis* population, but will take precedence over the provision of second local reception service, or over a proposal for first local non-tribal owned transmission service. Likewise, an NCE applicant qualifying for the Tribal Priority will take precedence over all mutually exclusive applications, except those that propose *bona fide* first reception service to a greater than *de minimis* population.

5. The Tribal Priority will be applied only at the allotment stage of the commercial FM licensing procedures, to commercial AM applications filed during an AM filing window, as part of the threshold Section 307(b) analysis, and to applications filed in an NCE FM filing window as the first part of the fair distribution analysis. NCE applicants must also meet all NCE eligibility and licensing requirements.[8] Holding period restrictions, commencing with the award of a construction permit until the completion of four years of on-air operation, will apply to any authorization or allotment awarded pursuant to the Tribal Priority. In the case of an AM or NCE FM authorization awarded to a tribal applicant, the permittee/licensee will be prohibited during this period from making any change that would lower tribal ownership below the 51 percent threshold, a change of community of license, or a technical change that would cause less than 50 percent of the principal community contour to cover tribal lands. However, gradual changes in the composition of an NCE board that do not change the nature of the organization or break continuity of control will not violate the four-year holding period restrictions. In the case of a commercial FM allotment, the restrictions will apply only to any proposed change of community of license or technical change as described above. The winner at auction of an FM allotment added to the Table of Allotments[9] under a Tribal Priority, whether Tribal or non-Tribal, must still provide broadcast service primarily to tribal lands for the entire four-year holding period.

6. Additionally, in the *First R&O* the Commission requires that applicants receiving dispositive preferences for AM facilities under Section 307(b) of the Communications Act of 1934, as amended ("Section 307(b)") be prohibited from substantially downgrading the facilities on which the Section 307(b) award was based. This prohibition was designed to provide basic fairness in the award of a dispositive preference to one proposal in a group of several mutually exclusive proposals. That is, it would be unfair to allow one member of a mutually exclusive group to be awarded a construction permit without auction, based on the superior population coverage in its proposal, only then to allow it to

[6] The principal community contour is set forth in 47 C.F.R. §§ 73.24(i), 73.315(a), and 73.515.

[7] *See FM Assignment Policies*, 90 FCC2d at 91-93.

[8] *See id.* §§ 73.503, 73.561.

[9] *Id.* § 73.202.

downgrade its proposal to the point where it would no longer be significantly different from the other mutually exclusive proposals.

7. The *First R&O* also establishes procedures by which applicants in AM auction filing windows must submit technical proposals that meet minimum technical eligibility criteria. The Commission noted the number of incomplete or technically defective proposals filed in AM auction filing windows. Such proposals undermine the accuracy and reliability of our mutual exclusivity and Section 307(b) determinations, and frustrate the staff's ability to manage the window filing process efficiently. Moreover, such defective applications preclude the filing of meritorious modification applications by existing facilities, which must protect the prior-filed defective applications. In short, allowing the filing of technically defective proposals places a strain on the Commission's resources and, consequently, delays consideration of meritorious proposals and provision of new service to the public.

8. Likewise, the *First R&O* contains two other proposals designed to streamline the AM auction process and speed new service to the public: the grant of delegated authority to the Media Bureau to allow AM auction filing window applicants to submit settlements or technical resolutions that do not resolve all the mutual exclusivities in a mutually exclusive group, as long as the proposal results in one "singleton" application from the group; and the grant of delegated authority to the Media Bureau and Wireless Telecommunications Bureau to cap the number of AM applications that may be filed during a filing window. The Commission also grants the Media and Wireless Telecommunications Bureaus delegated authority to extend the deadline for filing post-auction long-form applications, as appropriate, thus providing successful auction applicants with greater flexibility in preparing such applications.

9. Finally, in the *First R&O* the Commission clarifies certain aspects of the rules governing the new entrant bidding credit ("NEBC"): that for purposes of determining whether an auctioned allotment is in the "same area" as an applicant's other media properties, we will use the maximum class facilities at the allotment site, rather than applicant specified preferred coordinates; that unjust enrichment payments by assignors who used the NEBC in paying for their permit apply even to *pro forma* assignments or transfers filed on FCC Form 316; and that an applicant's maximum NEBC eligibility is established as of the deadline for filing short-form applications, but that the eligibility may be lost or diminished based on post-filing changes in the applicant's situation. In clarifying these rules and policies, the Commission will provide greater certainty to applicants, reducing any confusion and, therefore, burden when preparing and filing auction applications.

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

10. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

11. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.[10] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," small organization," and "small government jurisdiction."[11] In addition, the term "small business" has the same

[10] 5 U.S.C. § 603(b)(3).

[11] *Id.* § 601(6).

meaning as the term "small business concern" under the Small Business Act.[12] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[13]

12. The subject rules and policies potentially will apply to all AM and FM radio broadcasting licensees and potential licensees. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[14] Included in this industry are commercial, religious, educational, and other radio stations.[15] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[16] However, radio stations that are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number.[17] The SBA has established a small business size standard for this eategory, which is: firms having $7 million or less in annual receipts.[18] According to BIA Advisory Services, L.L.C., MEDIA Access Pro Database on March 17, 2009, 10,884 (95%) of 11,404 commercial radio stations have revenue of $6 million or less. Therefore, the majority of such entities are small entities. We note, however, that many radio stations are affiliated with mueh larger corporations having much higher revenue. Our estimate, therefore, likely overstates the number of small entities that might be affected by any ultimate changes to the rules and forms.

D. Description of Projected Reporting, Record Keeping and other Compliance Requirements

13. As described, certain rules and procedures will change, although the changes will not result in substantial increases in burdens on applicants. Questions will be added to FCC Forms 340, 314, and 315 to establish Section 307(b) eligibility for the Tribal Priority or compliance with holding period restrictions in the event of an assignment or transfer. Questions will also be added to FCC Form 316 based on the Commission's conclusion that the new entrant bidding credit unjust enrichment rules apply to *pro forma* assignment and transfer applications. These are largely self-identification questions or questions regarding the duration of on-air operation, requiring minimal calculation. In certain cases (AM auction filing window applications and FM allotment proceedings), Section 307(b) information is already required, thus the information needed to be collected from applicants claiming the Tribal Priority is of the same character as that already collected, resulting in little or no increase in burden on such applicants. The remaining procedural changes in the *First R&O* are either changes in Commission procedures, requiring no input from applicants, or more stringent regulation of existing requirements. For example, AM auction filing window applicants need not submit more technical information than is already

[12] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[13] 15 U.S.C. § 632.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] 13 C.F.R. § 121.201, NAICS code 515112 (updated for inflation in 2008).

collected; the procedural change merely adds consequences when that information does not meet certain already extant technical standards.

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

14. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[19]

15. The Tribal Priority adopted in the *First R&O* was modified from the original proposal specified in the *Rural NPRM*, based on comments in the record and on the Commission's evaluation of the legal ramifications of the priority, especially with regard to the Commission's government-to-government relationship with Tribes. As adopted, the Tribal Priority can disadvantage certain applicants whose applications or proposals are mutually exclusive with those of applicants qualifying for the Tribal Priority. However, after due consideration, the Commission believes that the priority is necessary to redress an imbalance in the number of Native American broadcasters vis-à-vis native populations and lands, and to further the Commission's interests in promoting diversity of ownership and programming, in assisting Tribes to promulgate tribal language and culture, and in helping to promote self-government by Tribes. Thus, the Commission has determined that the Tribal Priority as adopted is the least burdensome method to achieve its policy goals, consonant with constitutional and other legal requirements.

16. With regard to the adopted rule limiting the downgrade of AM facilities awarded based on service proposals, initially the Commission proposed a standard allowing no reduction in population served, much as is done with NCE selectees. However, after consideration, and recognizing the technical complexity of the AM service and the burden such a rigid standard would impose on applicants, most of whom are small businesses, the Commission instead adopted the more flexible "equivalency" standard, which allows a variance of up to 20 percent of the population initially proposed to be served.

17. Likewise, in adopting the rule requiring that AM technical proposals be technically eligible for auction processing at time of filing, the Commission considered seeking further technical information from applicants. Moreover, as proposed the rule would not have allowed curative amendments. However, upon consideration of the record, the Commission opted not to require additional technical information from applicants, declining to increase the burden on such parties, and also mitigated the firm requirements of the proposed rule by allowing one opportunity for curative amendments.

18. The remaining proposals adopted in the *First R&O* fall into one of two categories: grant of delegated authority to modify certain rules on an as-needed basis, or codification or clarification of existing policies and rules. In the first category, the new authority granted the Commission to place a "cap" on AM filing window applications may deprive certain applicants of the ability to file all the applications they wish. However, application caps will deter speculation, eliminating superfluous applications and enabling faster processing of applications overall. Caps will cause applicants to focus on those facilities that they value most, and in conjunction with the requirement of technically eligible applications will encourage the filing of better and more quickly grantable applications, streamlining the

[19] 5 U.S.C. § 603(c)(1)-(c)(4)

AM auction and award process. Given that, in the most recent AM auction filing window, less than six percent of the applieants filed ten or more applications (accounting for approximately 40 percent of all technical proposals filed), a reasonable application cap will burden only that small percentage of potential applicants whose multiple applications take up disproportionate amounts of Commission time and resources, slowing down the auction process and impeding the authorization of new AM service to the public. The grant of delegated authority to the Media and Wireless Telecommunications Bureaus to extend post-auction filing deadlines will only benefit applicants: it gives the Bureaus the flexibility to provide additional time for parties that need it, while those who wish their applications to be considered sooner may file when they like. In these cases, because of the significant benefits to regulated parties and minimal to no burdens, it was not deemed necessary to consider other options.

19. With regard to the adopted codifications and clarifications of existing rules, these also present no burden on applicants requiring consideration of less burdensome alternatives. The codification of the policy, used in prior auctions, allowing non-universal settlements that result in at least one singleton application from an MX Group, speeds auctions by simplifying MX groups, and expedites provision of new service by the singleton applicants. Similarly, the clarification of policies regarding new entrant bidding credit eligibility and the new entrant bidding credit unjust enrichment rule does not place any additional burdens on applicants or other parties. Rather, clarifying these policies will benefit applicants, permittees, and licensees by adding certainty to auction and post-auction procedures. As such, consideration of less burdensome alternatives was unnecessary.

F. Report to Congress

20. The Commission will send a copy of the *First R&O*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[20] In addition, the Commission will send a copy of the *First R&O*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *First R&O* and FRFA (or summaries thereof) will also be published in the Federal Register.[21]

[20] *See id.* § 801(a)(1)(A).

[21] *See id.* § 604(b).

APPENDIX C

Comments Filed in Response to Rural NPRM

Cameron University
Positive Alternative Radio, Inc.
Calvary Chapel of Twin Falls, Inc.
Booth, Freret, Imlay & Tepper, P.C.
Creative Educational Media Corp., Inc.
Amador S. Bustos and Bustos Media Holdings, L.L.C.
Priority Radio, Inc.
Vir James, P.C.
Hatfield & Dawson Consulting Engineers
Sacred Heart University, Inc.
American Media Services, LLC
Miller Communications, Inc., Kaskaskia Broadcasting, Inc., Virden Broadcasting Corp., Delta Radio LLC, Contemporary Communications LLC, South Seas Broadcasting Inc., the Georgia-Carolina Radiocasting Companies, WTUZ Radio Inc., Charisma Radio Corp., K95.5, Inc., Payne 5 Communications, LLC, Best Broadcasting, Inc., FM 105, Inc., Chirillo Electronics, Inc., Eastern Shore Radio, Inc., Guadalupe Media, Ltd.
Communications Technologies, Inc.
National Association of Broadcasters
Educational Media Foundation
du Treil, Lundin & Rackley, Inc.
Glades Media Company, LLP
Native Public Media and National Congress of American Indians
Frank G. McCoy
William B. Clay
Brantley Broadcast Associates
Mullaney Engineering, Inc.
Munbilla Broadcasting Services, LLC
Cox Radio, Inc.
Prometheus Radio Project and National Federation of Community Broadcasters
Media Technology Ventures, LLC
Radio One, Inc., Minority Media and Telecommunications Council, Ace Radio Corporation, Auburn Network, Inc., Cherry Creek Radio LLC, Chisholm Trail Broadcasting Co., Communications Technologies, Inc., Radio K-T, Inc., Great South Wireless, LLC, Brantley Broadcast Associates, LLC, RAMS, Broadcast One, Inc., Skytower Communications-E'town, Inc., Heritage Communications, Inc., Anderson Associates, Holladay Broadcasting of Louisiana, Alatron Corp., Inc., Scott Communications, Inc., Alexander Broadcasting Company, LLC, Jackson Radio, LLC, Main Line Broadcasting, LLC, Radiotechniques Engineering LLC, Signal Ventures LLC, SMAHH Communications, Inc., Wagon Wheel Broadcasting, LLC, WRNJ, Inc., Dot Com Plus LLC, Independence Broadcast Services, Provident Broadcasting Company, Inc., Radio Training Network, Inc., Sacred Heart University, Inc., Hancock Broadcasting Corporation
Cherokee Nation
Carl T. Jones Corporation
Robert A. Lynch and Romar Communications, Inc.
Jorgenson Broadcast Brokerage, Inc.
Donald Manro
Charles Sumner

Craig Kuehn
Thomas D. Bentley
Allen VanPliet
Jeff W. Bressler
Robert Feuer
Katie Finnigan
Christian McLaughlin
Don A. Sevilla
Craig Blomberg
Noel Yates
Nancy Bodily
Nancy Fullmer
Michael Niemann
Mark Woodward
David Kunian
Timothy Stone
Joe Shedlock
Bexley Public Radio Foundation
Scott Sanders
Jeff Shaw
Leigh Robartes
Jesse Drew
Jim Buchanan
Catholic Radio Association
Erubiel Valladares Carranza
Polnet Communications, Ltd. and Johnson Communications, Inc.

APPENDIX D

Reply Comments Filed in Response to Rural NPRM

du Treil, Lundin & Rackley, Inc.
Booth, Freret, Imlay & Tepper, P.C.
Brantley Broadcast Associates
Media Technology Ventures, LLC
Educational Media Foundation
Cherokee Nation
William B. Clay
Radio One, Inc., Minority Media and Telecommunications Council, Ace Radio Corporation, Auburn Network, Inc., Cherry Creek Radio LLC, Chisholm Trail Broadcasting Co., Communications Technologies, Inc., Radio K-T, Inc., Great South Wireless, LLC, Brantley Broadcast Associates, LLC, RAMS, Broadcast One, Inc., Skytower Communications-E'town, Inc., Heritage Communications, Inc., Anderson Associates, Holladay Broadcasting of Louisiana, Alatron Corp., Inc., Scott Communications, Inc., Alexander Broadcasting Company, LLC, Jackson Radio, LLC, Main Line Broadcasting, LLC, Radiotechniques Engineering LLC, Signal Ventures LLC, SMAHH Communications, Inc., Wagon Wheel Broadcasting, LLC, WRNJ, Inc., Dot Com Plus LLC, Independence Broadcast Services, Provident Broadcasting Company, Inc., Radio Training Network, Inc., Sacred Heart University, Inc., Hancock Broadcasting Corporation
Native Public Media and National Congress of American Indians
National Association of Broadcasters