

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

*Oral Argument Not Yet Scheduled*

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 08-1067**

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ALVIN LOU MEDIA, INC.,

APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE

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ON APPEAL FROM ORDERS OF THE  
FEDERAL COMMUNICATIONS COMMISSION

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## STATEMENT OF PARTIES, RULINGS AND RELATED CASES

1. Parties

All parties appearing in this Court are listed in appellant's brief.

2. Rulings Under Review

*In the matter of Powell Meredith Communications Company*, 19 FCC Rcd 12672 (2004), *reconsid. denied*, 23 FCC Rcd 619 (2008)

3. Related Cases

The orders on review have not previously been before the Court or any other court, and counsel are not aware of any related cases pending in this Court or in any other court.

## TABLE OF CONTENTS

Statement Of The Issues Presented For Review .....	1
Jurisdiction .....	2
Statutes And Regulations .....	2
Counterstatement Of The Case .....	2
Counterstatement Of The Facts.....	3
A. Background .....	3
1. The Regulatory Setting .....	3
2. The Applications And The Auction.....	7
3. Subsequent Events .....	11
B. The Rulings Before The Court.....	13
Summary Of Argument.....	15
Argument.....	17
I. Standard Of Review .....	17
II. The Appeal Should Be Dismissed Because ALM Lacks Standing. ....	18
A. As A Voluntary Non-Participant In The Auction, ALM Suffered No Injury In Fact. ....	19
B. ALM Has Failed To Demonstrate That, Even If It Was Harmed By The Orders Below, Its Injury Is Redressable .....	22
III. The Commission’s Procedures Governing Conduct Of This Auction Are Lawful. ....	23
A. The Commission’s Procedures Are Consistent With The Statutory Text.....	25

B. It Was Reasonable For The Commission To Postpone Time- Consuming Review Of Engineering Data Until After An Auction.....	29
Conclusion.....	38
Certificate Of Compliance	
Certificate of Service	
Statutory Appendix	

## TABLE OF AUTHORITIES

### Cases

<i>Achernar Broadcasting Co. v. FCC</i> , 62 F.3d 1441 (D.C. Cir. 1995).....	17
<i>Baker v. FCC</i> , 834 F.2d 181 (D.C. Cir. 1987).....	8
<i>Cellco Partnership v. FCC</i> , 357 F.3d 88 (D.C. Cir. 2004).....	18
<i>Cellular Telecomms. &amp; Internet Ass’n v. FCC</i> , 330 F.3d 502 (D.C. Cir. 2003) .....	18
* <i>Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	18
* <i>City of Angels Broadcasting, Inc. v. FCC</i> , 745 F.2d 656 (D.C.Cir. 1984).....	29
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982).....	20
* <i>DIRECTV, Inc. v. FCC</i> , 110 F.3d 829 (D.C. Cir. 1997).....	18, 20
<i>ExxonMobil Oil Corp. v. FERC</i> , 487 F.3d 945 (D.C. Cir. 2007) .....	33
<i>FCC v. Allentown Broadcasting Corp.</i> , 349 U.S. 358, 359-62 (1955).....	4
* <i>FCC v. Pottsville Broadcasting Co.</i> , 309 U.S. 134, 138 (1940).....	29
* <i>FCC v. Schreiber</i> , 381 U.S. 279 (1965).....	29
<i>Functional Music, Inc. v. FCC</i> , 274 F.2d 543 (D.C. Cir. 1958), <i>cert. denied</i> , 361 U.S. 813 (1959).....	21
<i>Graceba Total Communications, Inc. v. FCC</i> , 115 F.3d 1038 (D.C. Cir. 1997).....	21
<i>Grid Radio v. FCC</i> , 278 F.3d 1314 (D.C. Cir. 2002) .....	24
<i>Kennecot Greens Creek Mining Co. v. Mine Safety &amp; Health Admin.</i> , 476 F.3d 946 (D.C. Cir. 2007).....	33
<i>Meredith v. FCC</i> , 809 F.2d 863 (D.C. Cir. 1987).....	24
<i>Motor Veh. Mfrs. Ass’n of U.S. v. State Farm Mut. Auto Ins. Co.</i> , 463 U.S. 29 (1983).....	33
<i>National Public Radio, Inc. v. FCC</i> , 254 F.3d 226 (D.C. Cir. 2001) .....	36
* <i>NRDC v. SEC</i> , 606 F.2d 1031 (D.C.Cir.1979) .....	30
<i>Small v. FCC</i> , 161 Fed.Appx. 11 (D.C. Cir.), <i>cert. denied</i> , 546 U.S. 972 (2005).....	9
<i>Southwest Airlines, Inc. v. TSA</i> , ___ F.3d ___, ___, 2009 WL 233018 (D.C. Cir. Feb. 3, 2009) .....	30
<i>Sprint Nextel Corp. v. FCC</i> , 524 F.3d 253 (D.C. Cir. 2008) .....	36
* <i>U.S. Airwaves, Inc. v. FCC</i> , 232 F.3d 227 (D.C. Cir. 2000) .....	18, 20, 22
<i>Weinberger v. Salfi</i> , 422 U.S. 749 (1975).....	33

### Administrative Decisions

<i>Alessandro Broadcasting Co.</i> , 99 F.C.C.2d 1 (Rev. Bd. 1984).....	8
<i>Darien, Rincon, and Statesboro, Georgia</i> , 17 FCC Rcd 20485 (MMB 2002).....	8

<i>Debra D. Carrigan</i> , 100 F.C.C.2d 721 (Rev. Bd. 1985) .....	9
<i>Fireside Media</i> , 23 FCC Rcd 13138 (2008) .....	22
* <i>Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses</i> , 13 FCC Rcd 15920 (1998), <i>reconsid. denied</i> , 14 FCC Rcd 8724 (1999), <i>modified</i> , 14 FCC Rcd 12541 (1999), <i>rev. denied, mem., Orion Communications, Ltd. v. FCC</i> , 221 F.3d 196 (D.C. Cir. 2000) .....	4, 5, 10, 20, 31, 35, 37
<i>Implementation of Section 309(j)</i> , 12 FCC Rcd 22363 (1997) .....	31
* <i>Implementation of Section 309(j), Memorandum Opinion and Order</i> , 14 FCC Rcd 8724 (1999) .....	28, 29, 30
<i>In the matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants</i> , 15 FCC Rcd 7386 (2000), <i>on reconsid.</i> , 16 FCC Rcd 5074 (2001), <i>rev. denied, American Family Ass’n v. FCC</i> , 365 F.3d 1156 (D.C. Cir.), <i>cert. denied</i> , 543 U.S. 1004 (2004) .....	36
<i>Public Notice, “AM Auction Filing Window and Application Freeze,”</i> 14 FCC Rcd 19490 (MMB/WTB 1999) .....	7
<i>Public Notice, “AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction, Settlement Period Announced for Certain Mutually Exclusive Application Groups; September 16, 2005 Deadline Established for Section 307(b) Submissions,”</i> 20 FCC Rcd 10563 (2005) .....	12
<i>Public Notice, “AM Auction No. 84 Singleton Applications,”</i> 19 FCC Rcd 16655 (MB 2004) .....	12
<i>Public Notice, “AM New Station and Major Modification Auction Filing Window,”</i> 18 FCC Rcd 23016 (2003) .....	11
<i>Public Notice, Broadcast Actions</i> , Report No. 46106 (Nov. 7, 2005) .....	11
<i>Public Notice, Broadcast Applications</i> , Report No. 26104 (Nov. 3, 2005) .....	12
<i>Public Notice, Broadcast Applications</i> , Report No. 26754 (June 10, 2008) .....	12
<i>Requests for Waiver of Section 1.2109(b)</i> , 22 FCC Rcd 3969 (2007) .....	21
<i>Revision of FM Assignment Policies and Procedures</i> , 90 F.C.C.2d 88 (1982) .....	8

**Statutes and Regulations**

47 C.F.R. § 1.2106(c) .....	11
47 C.F.R. § 1.2107 .....	28
47 C.F.R. § 1.2108 .....	28
47 C.F.R. § 1.2109 .....	6, 21
47 C.F.R. § 73.3522(a)(3) .....	35, 37
47 C.F.R. § 73.3571(h)(4)(iii) .....	35, 37

47 C.F.R. § 73.3573(f)(5)(iii) .....	35, 37
47 C.F.R. § 73.5005 .....	26
47 C.F.R. § 73.5006 .....	26
47 C.F.R. § 1.2104(g)(2) .....	6
47 U.S.C. § 1.2107(b) .....	6
* 47 U.S.C. § 154(j) .....	29
47 U.S.C. § 301 .....	3
47 U.S.C. § 307(b) .....	4, 6, 7, 8, 9, 37
47 U.S.C. § 309(a) .....	28
* 47 U.S.C. § 309(i)(2) .....	27
* 47 U.S.C. § 309(j)(1) .....	3
* 47 U.S.C. § 309(j)(5) .....	16, 25, 27, 30
47 U.S.C. § 402(b)(6) .....	2
* 47 U.S.C. § 405(a) .....	36
5 U.S.C. § 706(2)(A) .....	17
Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a)(1), 111 Stat. 251, 258-59 (1997) .....	3

\* *Cases and other authorities principally relied upon are marked with asterisks.*

## GLOSSARY

AM	amplitude modulation – a technical method of radio broadcasting
ALM	Alvin Lou Media – appellant
MB	FCC Media Bureau
MMB	FCC Mass Media Bureau
PMCC	Powell Meredith Communications Co. – an applicant below that won the FCC spectrum auction at issue in this case

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BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether appellant has standing to appeal the FCC orders that are before the Court.
2. Whether the FCC's rules reserving detailed examination of an applicant's engineering proposals until after an auction are within the agency's authority and reasonable.
3. Whether the FCC's application of its auction rules in this case was reasonable.

## **JURISDICTION**

If the Court finds that appellant has standing to bring this appeal, the Court would have jurisdiction pursuant to 47 U.S.C. § 402(b)(6).

## **STATUTES AND REGULATIONS**

Pertinent statutes and regulations are set out in the Statutory Appendix to this brief.

## **COUNTERSTATEMENT OF THE CASE**

This appeal arises from a Federal Communications Commission (FCC) auction involving applicants for a permit to construct an AM radio broadcast station in the Las Vegas, Nevada area. Appellant, Alvin Lou Media, Inc. (ALM) and one other applicant ultimately were to participate in an auction for the permit. However, ALM did not submit a required initial payment, expressly refusing to participate in the auction. It was, accordingly, disqualified and did not participate in the auction. ALM's position before the Commission was that the other application could not be granted because the engineering proposal was defective and thus that application should have been dismissed by the Commission prior to any auction.

The Commission and its staff denied ALM's claim in a series of orders. The Commission pointed out that when it adopted auction rules, it had expressly considered and rejected an approach that would determine prior to an auction whether an applicant's technical proposal is grantable. The Commission had found that making such a determination with respect to the winning applicant after the auction

better serves the auction statute's purpose of promoting the development and rapid deployment of new services for the benefit of the public. It found that its existing rules and auctions procedures were sufficient to discourage unqualified applicants from participating in auctions and to preclude the ultimate grant of a license to unqualified applicants.

## **COUNTERSTATEMENT OF THE FACTS**

### ***A. BACKGROUND***

#### ***1. The Regulatory Setting***

The Federal Communications Commission grants construction permits and operating licenses for broadcast radio stations. *See* 47 U.S.C. § 301. When the Commission receives applications that are mutually exclusive (*e.g.* applications for the same or nearby frequencies whose signals would overlap), the Communications Act now requires it to choose among such applications by using a competitive bidding, or auctions, process. *See* 47 U.S.C. § 309(j)(1). The auction provisions, adopted by Congress in 1997, replaced the comparative hearings that had previously been employed. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a)(1), 111 Stat. 251, 258-59 (1997).

The Commission adopted rules in 1998 implementing those statutory provisions. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 FCC Rcd 15920 (1998) (“*Auctions First Report & Order*”), *reconsid.*

*denied*, 14 FCC Rcd 8724 (1999), *modified*, 14 FCC Rcd 12541 (1999), *rev. denied, mem., Orion Communications, Ltd. v. FCC*, 221 F.3d 196 (D.C. Cir. 2000). The Commission took two actions in that proceeding relevant to this appeal. First, it established basic procedures for processing auction applications, including a clear and considered determination to defer detailed examination of an application's engineering data until after an auction. Second, the Commission established procedures to accommodate the new auctions regime with Section 307(b) of the Communications Act, which requires the FCC to "make such distribution of licenses, frequencies, hours of operation and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. § 307(b); *see FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 359-62 (1955) (describing section 307(b) goal "to secure local means of expression").

With respect to basic auction procedures, the Commission determined that it would "examine the engineering data submitted by applicants for AM ... stations ... only to the extent necessary to determine the mutually exclusive groups of applications for auction purposes." *Auctions First Report & Order*, 13 FCC Rcd at 15978-79 ¶151. The Commission acknowledged that commenters in that rule making proceeding had differed on the issue of whether it should conduct an engineering review of applications *prior* to auction. Ultimately, however, the Commission

agreed with those commenters who emphasized that the primary purpose of filing applications prior to auction should be to determine mutual exclusivity.

The Commission concluded that the purpose of pre-auction applications was not to allow for a time-consuming, laborious determination of the ultimate grantability of all applicants' engineering proposals or other submissions – an exercise that would prove pointless for the many applicants that end up not prevailing at auction. As the Commission explained, it would “not make any determination as to the acceptability or grantability of an applicant’s technical proposal prior to the auction. Deferring technical review until the post-auction submission of long-form applications by the winning bidders will minimize the potential for delay and will promote the deployment of new broadcasting service to the public as expeditiously as possible, in keeping with our statutory objective.” *Id.* at 15979 ¶151.<sup>1</sup>

The Commission concluded not only that pre-auction scrutiny of engineering data would be overly burdensome but also that it was unnecessary. In particular, the Commission observed that the pre-auction application, known as the “short-form” application, requires applicants to certify that they “are ‘legally, technically, . . . and otherwise qualified pursuant to Section 308(b) of the Communications Act of 1934’” and emphasized that it “expect[ed] to be able to rely on applicants’

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<sup>1</sup> *See also Auctions First Report & Order*, 13 FCC Rcd at 16023 (explaining, as part of the required Regulatory Flexibility Analysis, that limiting pre-auction application processing for AM applicants to what is necessary to determine mutual exclusivity would “reduc[e] the cost to small entities of participating in these auctions ...”)

representations in this regard.” 13 FCC Rcd at 15979 ¶152. The Commission also “remind[ed] applicants that the Commission has ample tools at its disposal to discourage unqualified applicants from participating in the auction process. For example, prospective bidders should be aware that a winning bidder whose [post-auction] long-form application cannot ultimately be granted for either legal or technical reasons may be subject to default payments under the Commission’s general competitive bidding rules.” *Id. citing* 47 C.F.R. §§ 1.2104(g)(2); 1.2107(b); 1.2109. The Commission concluded that its existing rules “establish strong incentives for potential bidders to make certain of their qualifications before the auction, so that we may avoid delays in the deployment of new services to the public that would result from the disqualification of winning bidders and the reauctioning of broadcast construction permits.” *Id.*

In addition, the Commission in the *Auctions First Report & Order* concluded that its competitive bidding authority was to be “implemented in a way that accommodates our statutory duty under Section 307(b) to effect an equitable distribution of stations across the nation.” 13 FCC Rcd at 15964 ¶120. The Commission determined that it should employ a “threshold Section 307(b) analysis to determine whether particular applications are eligible for auctions.” *Id.* at 15965. Specifically, it held that with respect to AM applications, a traditional Section 307(b) analysis on the broadcast needs of any communities involved would be undertaken prior to conducting auctions of competing applications. If that determination is dispositive,

it would grant the application proposing to serve the community with the greater need if there are no competing applications for that community or, if more than one application remains for the community with the greater need, the applicants would be included in a subsequently scheduled auction. *Id.*

## ***2. The Applications and the Auction***

ALM, Powell Meredith Communications Company (“PMCC”), and Victor A. Michael (“Michael”) filed applications for new AM radio broadcast stations during a filing window in 2000 for what came to be known as Auction 32.<sup>2</sup> ALM’s application was for a new station at Spring Valley, Nevada; PMCC’s and Michael’s applications were for new stations at Las Vegas, Nevada and Cheyenne, Wyoming, respectively. ALM and PMCC’s applications were mutually exclusive with each other, and PMCC’s proposal was mutually exclusive with Michael’s Cheyenne proposal. Accordingly, the three applications were designated as a mutually exclusive group.<sup>3</sup>

In keeping with the procedures just noted, the Commission first conducted a threshold Section 307(b) determination for these applications. Because these

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<sup>2</sup> See *Public Notice*, “AM Auction Filing Window and Application Freeze,” 14 FCC Rcd 19490 (MMB/WTB 1999). Generally applications for new broadcast station construction permits may be filed only during such window periods. See also App. 110 (ALM application); App. 186 (PMCC application); App. 202 (Michael application).

<sup>3</sup> See *Public Notice*, “AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction,” 15 FCC Rcd 20449, 20455 (MMB 2000) (App. 1, 7).

mutually exclusive applications proposed to serve three different communities, the Commission directed that the applicants file amendments to their applications addressing the respective merits of their applications under Section 307(b).<sup>4</sup>

Following those submissions, the Commission's Media Bureau in April 2002 determined that ALM's Spring Valley proposal was not entitled to a Section 307(b) preference under Commission policies. App. 15.<sup>5</sup> ALM had sought a preference for its proposal over PMCC's on the basis of its claimed provision of first local transmission service to Spring Valley. *See* App. 312. Spring Valley is located within the Las Vegas Urbanized Area, and ALM's proposal would have placed a principal community signal over more than 50 percent of the Las Vegas Urbanized Area. Accordingly, under the Commission's rules, ALM was required to demonstrate that Spring Valley was sufficiently independent of Las Vegas before receiving a first local service preference.<sup>6</sup>

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<sup>4</sup> *See Mutually Exclusive Public Notice*, 15 FCC Rcd at 20451-52 (App. 3-4); *Letter to Dave Garey* (MMB Oct. 22, 2001) (App. 12). *See also* App. 311 (ALM 307(b) submission); App. 320 (PMCC 307(b) submission); App. 360 (Michael 307(b) submission).

<sup>5</sup> *See Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88 (1982), which sets forth priorities that the Commission employs in making determinations under 47 U.S.C. § 307(b). *See Baker v. FCC*, 834 F.2d 181, 183 (D.C. Cir. 1987). The priorities set forth there are also used in evaluating applicants for new AM stations. *Alessandro Broadcasting Co.*, 99 F.C.C.2d 1 (Rev. Bd. 1984).

<sup>6</sup> *See Darien, Rincon, and Statesboro, Georgia*, 17 FCC Rcd 20485, 20486 (MMB 2002) (discussing *Faye & Richard Tuck, Inc.*, 3 FCC Rcd 5374, 5377-79 (footnote continued on following page))

ALM failed to make that showing for Spring Valley, which is unincorporated and receives all its municipal services from either Las Vegas or Clark County.<sup>7</sup> Moreover the Commission found that both ALM and the Las Vegas applicant PMCC proposed essentially the same coverage areas and that any differences in areas and populations to be served between the ALM and PMCC proposals were *de minimis*. Thus, both were considered to be applications to serve the Las Vegas Urbanized Area. ALM and PMCC's Las Vegas area proposals would have served significantly greater areas and populations than Michael's Cheyenne proposal, and thus the Bureau found that Las Vegas was entitled to a dispositive Section 307(b) preference over Cheyenne. The Bureau declined to consider ALM's and Michaels' arguments that PMCC's engineering proposal did not comply with Commission technical requirements, noting that the Commission had adopted procedures in which technical submissions in the case of initial AM broadcast auction applications were considered prior to the auction only for the limited purpose of determining mutual exclusivity. App. 18.

Accordingly, the Bureau directed that ALM's and PMCC's applications proceed to auction, pursuant to the Commission's direction that "if no Section 307(b) determination is dispositive (or if more than one application remains for the com-

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*(footnote continued from preceding page)*

(1988)); *see also Small v. FCC*, 161 Fed.Appx. 11 (D.C. Cir.), *cert. denied*, 546 U.S. 972 (2005).

<sup>7</sup> App. 17, *citing Debra D. Carrigan*, 100 F.C.C.2d 721 (Rev. Bd. 1985).

munity with the greater need), the applicants must then be included in a subsequently scheduled auction.”<sup>8</sup> Michael’s application was to be dismissed upon award of a construction permit to ALM or PMCC. App.18.

ALM and Michael sought reconsideration of that ruling, and ALM additionally requested stay of the auction. App. 465, 483, 461; *see also* App. 487 (PMCC opposition to petitions). Both parties argued that the engineering portion of PMCC’s application was technically deficient and could not be granted, and that therefore it should be dismissed and PMCC not allowed to participate at auction. The Commission’s Media Bureau denied reconsideration. App. 19. It rejected the argument regarding PMCC’s engineering, noting that under the Commission’s broadcast auction procedures, technical data are submitted with AM auction applications solely to enable a mutual exclusivity determination. App. 20, *citing Auctions First Report and Order*, 13 FCC Rcd at 15975, 15976 n.159. The staff also rejected ALM’s motion to stay the auction pending resolution of its allegations regarding the PMCC application, finding that ALM had not addressed the factors necessary to grant a stay and noting, in particular, that it had not shown it would likely prevail on the merits. App. 22.

The ALM and PMCC applications proceeded to auction, which commenced December 10, 2002, and was completed December 12, 2002.<sup>9</sup> ALM refused to par-

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<sup>8</sup> *Auctions First Report and Order*, 13 FCC Rcd at 15965 ¶120.

ticipate in the auction, claiming that if it did so, “it would find its legal rights violated.” App. 559. ALM was thus determined not qualified to bid at auction because it did not make a timely upfront payment.<sup>10</sup> PMCC was the winning bidder at auction for the AM broadcast construction permit at Las Vegas. *See* 17 FCC Rcd at 25129. PMCC, the only qualified bidder for the Las Vegas permit, submitted a gross bid, equal to its timely upfront payment amount of \$50,000. PMCC timely filed its complete Form 301 long form application on January 17, 2003. App. 363. At the request of PMCC, the staff dismissed the January 17, 2003, Form 301 long form application on November 2, 2005. *See Public Notice*, Broadcast Actions, Report No. 46106 (Nov. 7, 2005).<sup>11</sup>

### ***3. Subsequent Events***

The Commission opened a new filing window for AM applicants in 2004. *Public Notice*, “AM New Station and Major Modification Auction Filing Window,” 18 FCC Rcd 23016 (2003). PMCC filed an application for a new AM station

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*(footnote continued from preceding page)*

<sup>9</sup> *Public Notice*, “New AM Broadcast Stations Auction Closes,” 17 FCC Rcd 25122 (WTB/MB 2002) (App. 89).

<sup>10</sup> 47 C.F.R. § 1.2106(c) (applicant not submitting at least the minimum upfront payment will be ineligible to bid and its application dismissed). *See Public Notice*, “Auction of Construction Permits for New AM Broadcast Stations,” 17 FCC Rcd 23665, 23675 (MB/WTB 2002) (App. 76) (ALM listed as non-qualified bidder).

<sup>11</sup> PMCC had received a \$12,500 bidding credit as a new entrant. As a result of the dismissal of its application after winning the auction, it forfeited the remaining \$37,500 of its winning bid amount.

in Paradise, Nevada, a suburb of Las Vegas, in this filing window. Although PMCC's Paradise application was determined to be mutually exclusive with other applications, it was among the mutually exclusive application groups deemed eligible for settlement, pursuant to procedures announced in *Public Notice*, "AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction, Settlement Period Announced for Certain Mutually Exclusive Application Groups; September 16, 2005 Deadline Established for Section 307(b) Submissions," 20 FCC Rcd 10563 (2005). PMCC timely filed its settlement agreements and, as the surviving applicant in the five settlements, timely filed its associated complete Form 301 application, as directed by the Commission. *See Public Notice*, Broadcast Applications, Report No. 26104 (Nov. 3, 2005). The Commission formally accepted the PMCC Paradise Form 301 application for filing on June 10, 2008. *See Public Notice*, Broadcast Applications, Report No. 26754 (June 10, 2008).

ALM did not resubmit its Spring Valley application during the 2004 AM filing window.<sup>12</sup> However, ALM petitioned to deny PMCC's Paradise, Nevada

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<sup>12</sup> There is no reason to believe that ALM could not have resubmitted essentially the same application that it submitted during the previous filing window. Since there is no filing fee for such applications, a resubmission would have been essentially cost free. ALM could not have known whether it would have faced mutually exclusive applications. As it turned out, among the more than 1100 applications filed during that window, 135 were so called "singleton" applications in which the applicants, if otherwise qualified, would have their applications granted without competitive bidding. *See Public Notice*, "AM Auction No. 84 Singleton Applications," 19 FCC Rcd 16655 (MB 2004).

Form 301 application on November 8, 2005. App 756. PMCC opposed ALM's petition, noting that under FCC rules the petition to deny was premature and could not be filed until after its application had been formally accepted by the Commission. ALM did not file a timely petition to deny following the Commission's acceptance of PMCC's Paradise Form 301 application in June 2008. The PMCC settlement agreements and the associated Paradise Form 301 application are currently under review with Commission staff, awaiting certain amendments from the applicants.

### ***B. THE RULINGS BEFORE THE COURT***

ALM sought review by the full Commission of the staff rulings requiring that it compete in the auction with PMCC. In a June 2004 order, the Commission denied ALM's application for review. *Powell Meredith Communications*, 19 FCC Rcd 12672 (2004) (App. 98). The Commission explained that the "issue of pre-auction determination of application acceptability and grantability was considered and discussed when the Commission established its broadcast auction procedures," and it ultimately decided in favor of deferring such review until after the auction. *Id.* at 12674-75 (App. 100-01). The Commission noted that it had found post-auction review a preferable procedure because it would "reduce the administrative burdens of the initial stages of the auction process, avoid unnecessary delay in the

initiation of service, and encourage applicants to participate in the process.” *Id.*, quoting *Auctions First Report & Order*, 13 FCC Rcd at 15979.<sup>13</sup>

The Commission added that its “procedures provide ample opportunity for parties to challenge the legal and technical qualifications of an applicant in a post-auction petition to deny, and winning bidders whose long-form applications cannot be granted for legal or technical reasons are subject to penalties, including default payments. Accordingly, such a challenge at this stage of the proceeding is misplaced.” 19 FCC Rcd at 12675 ¶7 (App. 101). The Commission found that the Bureau had acted correctly in considering the applications and in making its Section 307(b) determination with regard to these applicants. The Commission also found no error in the Bureau’s denial of ALM’s request to stay the auction. *Id.* at 12676 ¶¶8-9 (App. 101-02).

ALM sought reconsideration of the Commission’s order, which the agency denied primarily on the ground that, contrary to requirements in the Commission’s rules, ALM had, with one exception, failed to cite to any new facts in its petition. *See Powell Meredith Communications*, 23 FCC Rcd 619, 621 ¶5 (2008) (App. 107). As to the single piece of new material contained in ALM’s reconsideration petition, the Commission found that it was merely “additional evidence to bolster an argument that the Commission in *Powell Meredith* deemed irrelevant to its

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<sup>13</sup> Michael also filed an application for review of the staff rulings but later voluntarily dismissed that pleading as well as his application for a construction permit. App. 569.

analysis, and thus ALM's evidence does not constitute new decisional facts or changed circumstances." *Id.* ¶4 (App. 107). The Commission pointed out that it is "settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected." *Id.*

### **SUMMARY OF ARGUMENT**

Appellant ALM lacks standing to maintain this appeal because it has not and could not demonstrate injury arising from the FCC's conduct of an auction in which it voluntarily chose not to participate. No Commission rule or policy made it impossible or impractical for ALM to participate in the auction. Its refusal to do so was based on its subjective perception that it "would find its legal rights violated" by participation in the auction prior to a final determination of its claims that the agency's auction procedures were unlawful. Under this Court's precedents, ALM's voluntary choice not to participate in the auction bars it from challenging it now.

ALM has also failed to establish redressability. In a recent order, the Commission found ALM's sole owner to be without sufficient financial means to pay penalties that another company of which he is the sole owner had incurred in separate auctions. FCC rules require that applicants such as ALM demonstrate financial qualification to construct and operate a station. Based on the Commission's findings in that separate matter, ALM would appear to be unable to make such a showing and thus would likely be ineligible to receive a license for its Spring Valley station even if it prevailed in this case.

If ALM did have standing, its claims would fail on the merits. The plain text of the Communications Act supports the Commission procedures that are at issue here. Section 309(j)(5) specifically authorizes the Commission to (1) establish standards for acceptability for filing an application to enter an auction, and (2) directs the Commission not to grant the application of the auction winner unless the applicant is qualified under specific statutory provisions. The statute's plain text clearly contemplates that the Commission may establish standard for filing an application that are different from the standards for granting an application. ALM's claim that the Commission may accept only applications to participate in an auction that are also grantable is wrong. The statute imposes no such requirement. The Commission has in the past specifically rejected claims that auctions should be open only to applicants that are both qualified to bid and also qualified to be granted a license. The Commission's construction of these statutory provisions is entitled to *Chevron* deference.

The Commission has been granted substantial discretion in the Communications Act to fashion its own procedures. Its decision to postpone time-consuming review of engineering data until after an auction was reasonable. ALM does not dispute the Commission's conclusion that engaging in such review of all auction applicants would be contrary to the purpose of establishing auctions to encourage the development and rapid deployment of new services to the public. Specifically, conducting time-consuming engineering review for all applicants to an auction

would slow the auction process and unnecessarily burden the administrative process by requiring such review for many auction bidders when only one ultimately will become a licensee. Moreover, there is no obvious limitation to ALM argument, as ALM itself contends that the FCC has a statutory duty to consider the “basic qualifications” of all bidders prior to an auction. This could include character, financial or other matters, in addition to engineering issues, prior to an auction, burdening the auction process with extensive pre-auction examination of numerous applicants that will never be licensees. The Commission explained that there was no reason to expect parties would intentionally file applications with ungrantable engineering proposals and that there were sufficient penalties for those who did to discourage carelessness.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

The Court reviews FCC orders “under the deferential standard mandated by section 706 of the Administrative Procedure Act, which provides that a court must uphold the Commission’s decision unless it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1445 (D.C. Cir. 1995) (quoting 5 U.S.C. § 706(2)(A)).

“Under this ‘highly deferential’ standard of review, the court presumes the validity of agency action ... and must affirm unless the Commission failed to consider rele-

vant factors or made a clear error in judgment.” *Cellco Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004).

Insofar as this case raises a question of the meaning of provisions of the Communications Act, which the FCC has been delegated authority by Congress to implement, the Commission’s construction of ambiguous statutory terms is entitled to judicial deference. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502, 507 (D.C. Cir. 2003).

## **II. THE APPEAL SHOULD BE DISMISSED BECAUSE ALM LACKS STANDING.**

The “irreducible constitutional minimum” that ALM must show for standing to maintain this appeal is that it suffered an injury in fact, that the conduct of which it complains caused the injury, and that a favorable decision in this appeal would redress the injury. *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 231-32 (D.C. Cir. 2000). In the context of complaints arising from the Commission’s spectrum auctions, the Court has held that “[a] bidder in a government auction has a ‘right to a legally valid procurement process’; a party allegedly deprived of this right asserts a cognizable injury.” *Id.* at 232, quoting *DIRECTV, Inc. v. FCC*, 110 F.3d 829 (D.C. Cir. 1997). A disappointed bidder need not show that it would be successful if the license were auctioned anew, but it must demonstrate that it was able and ready to bid and that the decision of the Commission prevented it from doing so on an equal basis. *See id.*

***A. AS A VOLUNTARY NON-PARTICIPANT IN THE AUCTION, ALM SUFFERED NO INJURY IN FACT.***

ALM's brief offers only a pro forma, conclusory statement that it possesses standing because it "has been aggrieved by the adverse rulings of the FCC appealed in this case." Br. at 17. It is not clear that this terse, one-sentence statement even complies with the Court requirement that the opening brief for parties "in cases involving direct review of administrative actions ... must set forth the basis for the claim of standing."<sup>14</sup>

In any event, ALM cannot establish standing under the circumstances of this case because it was not a bidder in the auction at issue. Contrary to its claims below and in its brief, ALM was not actually or practically excluded from the auction. *See* App. 559-60; Br. at 13. It voluntarily chose not to participate based on its own perception that it "would find its legal rights violated" by participation in the auction prior to the Commission's final determination of its claim that the auction was unlawful because the other bidder, PMCC, should have been excluded.<sup>15</sup> Thus ALM cannot make the showing required for standing in an auction case, *i.e.*, "that it was "able and ready to bid . . . and that the [rule it challenges] prevent[ed]

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<sup>14</sup> *See Alvin Lou Media v. FCC*, No. 08-1067, Order of Dec. 16, 2008; D.C. Cir. R. 28(a)(7).

<sup>15</sup> *See* App. 559 (declaration by ALM that it would not participate in the auction because its claim that the auction was illegal must "first be brought to resolution before any such cash-bid auction can legally occur").

it from doing so on an equal basis.””” *U.S. Airwaves*, 232 F.3d at 232, quoting *DIRECTV*, 110 F.3d at 829-30.

ALM has never explained how the FCC policy that it challenged precluded it from participating in the auction on an equal basis. The policy it challenged was a procedural one that simply placed evaluation of an auction bidder’s engineering proposals after the auction took place rather than before.<sup>16</sup>

If ALM had participated in the auction and won, its complaints about the other bidder’s technical proposal would have become moot. If ALM had not won the bidding, it would have had an opportunity to challenge the winning bidder’s technical proposal after the auction and before the grant of a construction permit.<sup>17</sup> In either case, ALM also would have had an opportunity to challenge the Commission’s application of its policy decision to adopt rules deferring examination of

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<sup>16</sup> In *DIRECTV, Inc.*, the Court found a non-participant in an FCC auction to have standing to challenge certain auction rules. *See* 110 F.3d at 829-30. In that case, however, the Court found that a divestiture rule in question there, which would have required DIRECTV to divest certain holdings if it prevailed in the auction and failed to get the divestiture requirement declared unlawful, “placed DIRECTV at a substantial competitive disadvantage vis-à-vis other bidders, which did not have to take the risk that their successful bid would be but a costly misstep.” *Id.* at 830. The Court compared DIRECTV’s injury to that of a political officeholder who was found to have standing to challenge a state constitutional provision requiring him to resign his present office in order to become a candidate for another office prior to declaring his candidacy because the provision served as “a very real ‘obstacle to [the officeholders’] candidacy for higher judicial office.” *Id.*, quoting *Clements v. Fashing*, 457 U.S. 957, 962 (1982). There was no similar practical obstacle to ALM’s participation in the auction here.

<sup>17</sup> *See Auctions First Report & Order*, 13 FCC Rcd at 15985 ¶165; 47 C.F.R. § 1.2108(b).

bidders' technical qualifications until after the auction in this particular case.<sup>18</sup>

ALM's claim (Br. at 23) that "there are no protections for the 'losing' party such as ALM" is thus wrong in two respects: (1) it cannot be considered a "losing party" since it did not participate in the auction and (2) if it had participated and lost, it had the remedies noted above.<sup>19</sup> ALM had the opportunity to participate in the auction on an equal footing with other bidders. Its voluntary choice not to participate in the auction deprives it of standing because, as a non-participant in the auction, it can point to no injury in fact that it suffered as a result of the FCC's conduct of the auction.

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<sup>18</sup> See *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959) (aggrieved party may challenge agency's application of rule in a particular circumstance even if period for review of initial rule making has expired); *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040-41 (D.C. Cir. 1997) (auction winner may challenge rules that harm it when they are applied in a particular auction).

<sup>19</sup> ALM is mistaken when it claims (Br. at 23) that there are only two possible auction outcomes – "the winning bidder's long form application is granted, or it is denied, and the frequency will someday be returned to the public domain for an application to be filed in a future 'filing window.'" There is, in fact, a third option. The Commission's rules provide that if a winning bidder defaults or is disqualified after the close of an auction, the Commission may offer the permit to other highest bidders in descending order at their final bids. 47 C.F.R. § 1.2109. It is true that the Commission ordinarily reauctions spectrum in the case of a post auction default such as PMCC's dismissal of its winning application here, *see Requests for Waiver of Section 1.2109(b)*, 22 FCC Rcd 3969, 3976 ¶14 (2007), but it does not invariably do so. Since ALM chose not to participate in this auction, it is not possible to know what action the Commission might have taken in response to PMCC's default if there had been a qualified non-winning bidder remaining.

***B. ALM HAS FAILED TO DEMONSTRATE THAT,  
EVEN IF IT WAS HARMED BY THE ORDERS  
BELOW, ITS INJURY IS REDRESSABLE***

A recent Commission action relating to other auctions in which ALM's sole owner has been involved raises questions as to the redressability aspect of ALM's standing. *Cf. US Airwaves, Inc.*, 232 F.3d at 232 ("in order to show that its injury is redressable, a disappointed bidder must demonstrate that it is 'ready, willing, and able' to participate in a new auction should it prevail; but it need not demonstrate that it will participate in such an auction regardless of the circumstances then prevailing."). In an order of Aug. 22, 2008, the Commission found that Fireside Media, another company solely owned by Dave Garey, ALM's sole owner,<sup>20</sup> was so financially destitute as to merit the relief of being forgiven its entire outstanding indebtedness to the FCC, amounting to some \$108,892 in monetary penalties, arising from its withdrawal of its bids made in four separate auctions. *Fireside Media*, 23 FCC Rcd 13138 (2008). The Commission's action was in response to the applicant's request. After reviewing confidential data submitted by Fireside Media, the Commission found that "neither Mr. Garey's nor Fireside's assets, are sufficient to pay these debts and any future debts arising from Auction 37." *Id.* at 13140 ¶6.<sup>21</sup>

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<sup>20</sup> See ALM Br., Cert. of Counsel ..., at i ("Dave Garey is the sole office, director and shareholder of ALM.").

<sup>21</sup> Mr. Garey, on behalf of Fireside Media, has sought partial reconsideration of the Commission's action forgiving his \$108,892 debt. The petition requests that an additional \$8,659 that Fireside Media had already paid to the Commission also  
*(footnote continued on following page)*

The Commission requires applicants to certify that they are financially qualified to be a licensee. *See, e.g.*, App. 112 (certification section of ALM Form 175 application). Based on the Commission's findings with respect to the Fireside Media applications, it is difficult to see how ALM/Garey could continue to make a legitimate certification as to ALM's financial qualifications. Accordingly, even if it should prevail on appeal, there is a serious possibility that ALM would be ineligible for an FCC license. In that event, any injury it might be found to have incurred as a result of the Commission's action in the matter before the Court could not be redressed.

### **III. THE COMMISSION'S PROCEDURES GOVERNING CONDUCT OF THIS AUCTION ARE LAWFUL.**

Assuming *arguendo* that ALM had established standing in this case, its claim would fail on the merits. The sole argument presented in ALM's brief is that the Commission's procedures governing the conduct of spectrum auctions, established after a notice and comment rule making in 1998, are arbitrary and capricious insofar as they do not provide for review of the technical, engineering portions of

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*(footnote continued from preceding page)*

be refunded. The petition also sought to have the Commission affirm more clearly that Fireside Media "committed no illegal activity or wrongdoing," and that the Commission make certain additional "textual amendments" to the language of the order. *See* "Resubmission of Lost Original Petitions, with Urgent Request for Acceptance Out of Time: Petition for Partial Reconsideration of FCC 08-191, with Request That Petitioner Be Allowed To Make Oral Arguments Before the Individual Commissioners," (Oct. 6, 2008). The Commission has not yet acted on that petition.

applications that are subject to auction until after an auction is conducted and a winner is determined. Contrary to the claims in ALM's brief, this decade-old procedure – which has been followed myriad times over the years and never before challenged – is consistent with the Communications Act's auction provisions. It does not conflict with any relevant agency precedent. It is clear. Its purpose was fully explained when adopted and again in the orders below.

It is plain that ALM disagrees with the agency's approach, but ALM has failed to raise any serious questions as to the lawfulness of the procedures in question, much less to demonstrate that they are unreasonable or outside the FCC's general statutory authority to adopt procedures for the conduct of its business or its specific authority to administer spectrum auctions.

ALM's argument amounts to a broad challenge to the Commission's auction procedures themselves, rather than to the application of those procedures in this proceeding. Such broad and fundamentally policy-based challenges are more appropriately presented in a petition to the agency for rule making. *See Grid Radio v. FCC*, 278 F.3d 1314, 1320 (D.C. Cir. 2002) (“The Commission need not reevaluate well-worn policy arguments each time it implements an existing rule in a narrow adjudicatory proceeding against an acknowledged rule-breaker,” for “[t]o hold otherwise would obligate the Commission to ‘examine an entire range of policy questions that are not unique ... and are more appropriately considered in a rule-making.’” *See also Meredith v. FCC*, 809 F.2d 863, 873 (D.C. Cir. 1987) (“An

agency is not required to reconsider the merits of a rule each time it seeks to apply it.”). In any event, even if ALM’s arguments are properly raised in this setting, they are meritless.

***A. THE COMMISSION’S PROCEDURES ARE CONSISTENT WITH THE STATUTORY TEXT.***

Section 309(j)(5) of the Communications Act, 47 U.S.C. § 309(j)(5), governs “bidder and licensee qualification” in FCC spectrum auctions. The statute grants the Commission authority to establish (1) standards of acceptability for filing an application to enter an auction for a permit, and (2) directs the Commission not to grant the application of a winning bidder unless the applicant is qualified as provided in specified statutory provisions. Specifically, the section provides:

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder’s application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

The statute’s plain text clearly contemplates that the Commission may establish standards of acceptability for filing an application that are different from the statutory standards for granting an application. The first sentence governs mere

“participat[ion]” in an auction, and establishes only the requirement that the applicant provide information necessary to determine whether the application is “acceptable for filing.” *Id.* The second sentence, by contrast, addresses a separate inquiry, namely whether a “license shall be granted.” *Id.* By the statute’s plain terms, the requirement of a Commission “determin[ation] that the applicant is qualified” applies only to that, later inquiry. *Id.*

ALM either ignores or misunderstands this provision of the Act when it claims (Br. at 18) that if an application could not be granted without a hearing it is “always unacceptable for filing,” and the Commission must “reject that application without it being included in an auction proceeding with other applications whose basic qualifications are *prima facie* not defective.” The relevant statutory provisions impose no such requirement.

Similarly, ALM repeatedly refers to the Commission’s statutory obligation to dismiss, or to conduct an evidentiary hearing, before granting an application if an the applicant “lacks the basic qualifications.” Br. at 18; *see also* Br. at 8, 21. However, there is nothing in the procedure at issue here that in any way violates that obligation. An auction winner must file a full long-form application following the auction that is subject to Commission review, and petitions to deny that application may be filed before there is any grant of a construction permit. 47 C.F.R. §§ 73.5005 - 73.5006. The process at issue here simply defers consideration of whether an applicant’s engineering proposal complies with Commission rules until

after the auction is completed and a winner determined. ALM's contention that this process would lead to the Commission's ultimate grant of a construction permit to an applicant whose engineering did not comply with Commission rules is mistaken.

The first two sentences of Section 309(j)(5) are by themselves dispositive here, but there is additional textual evidence supporting the Commission's position. Section 309(j)(5) calls for procedures "consistent" with those authorized in 47 U.S.C. § 309(i)(2) for making a grantability determination. *See* 47 U.S.C. § 309(j)(5) (directing Commission to develop procedures "for the resolution of any substantial and material issues of fact concerning qualification" that are "consistent with the procedures authorized by subsection (i)(2)"). The first sentence of Section 309(i)(2), which applied to the old system of assigning licenses by lottery, states the requirement for a grantability determination, but it does not require the determination until after a lottery has been held and an applicant has been selected. Specifically, under that provision, the requirement that the Commission evaluate "qualifications" applies only to "an applicant selected" by lottery, *i.e.*, not to an applicant that merely participates. 47 U.S.C. § 309(i)(2) (emphasis added).

If there were any remaining uncertainty on the issue whether the FCC is required to make grantability determinations with respect to any applicant, without regard to whether that applicant is a selected applicant, Section 309(i)(2)(c) removes it. That provision says that the Commission "may, by rule, and notwith-

standing any other provision of law-omit the [309(a) grantability] determination with respect to any application other than the one selected pursuant to [the lottery under 309(i)(1)].” This provision – part of Section 309(i)(2) and thus explicitly cross-referenced in Section 309(j)(5) – makes no sense if ALM is correct in contending that grantability under Section 309(a) is a threshold determination that must be made in the case of every applicant allowed to bid at the auction.

In a 1999 order reconsidering the *Auctions First Report & Order*, the Commission directly addressed, and rejected, arguments that were essentially the same as ALM’s here, rejecting, “as contrary to the terms of Section 309(j) and the intent of our competitive bidding authority” any claim that auctions should be open only to applicants that are both qualified to bid and also qualified to be granted a license. *Implementation of Section 309(j), Memorandum Opinion and Order*, 14 FCC Rcd 8724, 8751 ¶ 55 (1999)(“*Auctions Reconsideration*”). The Commission observed that “Section 309(j)(1) and Section 309(j)(5) do require that licenses be granted via competitive bidding only to qualified applicants,” and noted that its “procedures ensure this outcome by requiring winning bidders to submit long-form applications that are subject to petitions to deny. *See* 47 C.F.R. §§ 1.2107, 1.2108, 73.5005, 73.5006.” *Id.* However, the Commission added, “[t]hese statutory provisions do not ... require that every auction participant demonstrate its qualifications to be a licensee (rather than to be qualified to bid).” *Id.* The Commission concluded:

Auction authority was, like lottery authority, granted to avoid the costs and delays of comparative hearings, and the language in Section 309(i) is comparable to Section 309(j)(1) in that both prescribe requirements that must be met before the Commission can award a license, not before it conducts a lottery or auction. Thus, we conclude that the Commission has clear statutory authority to continue, with respect to broadcast service auctions, its established practice of determining qualifications to be a licensee only with respect to winning bidders.

*Id.* The Commission's construction of these statutory provisions is entitled to judicial deference. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 507 (D.C. Cir. 2003).

***B. IT WAS REASONABLE FOR THE COMMISSION TO  
POSTPONE TIME-CONSUMING REVIEW OF  
ENGINEERING DATA UNTIL AFTER AN AUCTION.***

In addition to the particular provisions of Section 309 applicable here, the FCC generally has broad discretion in conducting its proceedings. Section 4(j) of the Communications Act, 47 U.S.C. § 154(j), provides that “[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.” It is well-settled that under this statutory provision the Commission “enjoys wide discretion in fashioning its own procedures.” *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 664 (D.C. Cir. 1984); *see FCC v. Schreiber*, 381 U.S. 279, 289 (1965); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)(under Section 4(j), “the subordinate questions of procedure in ascertaining the public interest ... were explicitly and by implication left to the Commission’s own devising.”); *NRDC v. SEC*, 606 F.2d

1031, 1056 (D.C. Cir.1979) (“An agency is allowed to be master of its own house, lest effective agency decisionmaking not occur in *any* proceeding ....”). It was well within the Commission’s general discretion to adopt orderly procedures to sequence the acceptability for filing and grantability inquiries in the way it has.

In addition to conflicting with the statute’s text and structure, the Commission has explained that procedures like those advanced by ALM “would be contrary to the purpose of Section 309(j), which is intended to, *inter alia*, encourage the development and rapid deployment of new services for the public without administrative or judicial delays and to recover for the public a portion of the value of the public spectrum resource available for commercial use. *See* 47 U.S.C. § 309(j)(3)(A) & (C).” *Auctions Reconsideration*, 14 FCC Rcd at 8752 ¶56. Congress vested the Commission with wide discretion to make these kinds of judgments about what showing is required before an application may be accepted for filing. It is significant that the Act provides that no “person shall be permitted to participate in [an auction] unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder’s application is acceptable for filing.” 47 U.S.C. § 309(j)(5) (emphasis added). As this Court recently noted when considering parallel statutory language (the presence of conditions “as determined” by an agency), such formulations “fairly exude[] deference.” *Southwest Airlines, Inc. v. TSA*, \_\_\_ F.3d \_\_\_, \_\_\_, 2009 WL 233018, at \*4 (D.C. Cir. Feb. 3, 2009).

In light of its wide discretion to adopt sensible auction procedures, it was clearly not an abuse of discretion for the Commission to defer until after the auction an examination of the engineering portion of the winning bidder's application. The Commission explained in 1997 when it proposed limiting pre-auction analysis of all auction applications to a determination of mutual exclusivity that it "would save considerable Commission resources," noting that pre-auction processing of technical data could slow the auction process. *Implementation of Section 309(j)*, 12 FCC Rcd 22363, 22391 (1997). The Commission ultimately decided that it would "not make any determination as to the acceptability or grantability of an applicant's technical proposal prior to the auction," concluding that limiting pre-auction analysis would "reduce the administrative burdens of the initial stages of the auction process, avoid unnecessary delay in the initiation of service, and encourage applicants to participate in the process." *Auctions First Report & Order*, 13 FCC Rcd at 15979 ¶151, quoting *Implementation of Section 309(j), Second Report and Order*, 9 FCC Rcd 2348, 2376 (1994).

In its brief, ALM does not challenge or even address the Commission's conclusions in this regard. Faced with processing hundreds of applications for auctions, it was reasonable for the Commission to conclude that the administrative burden of detailed analysis of engineering data for all of these applications prior to auction, as opposed to engaging in such review of only the auction winner after the auction is completed, was a sensible approach. Moreover, apart from the adminis-

trative burden, the prospect of wrangling among applicants over such issues prior to an auction is ample justification for the Commission's conclusion that limiting pre-auction review would avoid unnecessary delay and encourage participation by more applicants. As the Commission observed, returning an application with technical deficiencies would inevitably lead to petitions for reconsideration of that action (and possibly attempts to secure judicial review) that would delay or place a contingent cloud over an auction. *See Second Report & Order*, 9 FCC Rcd at 22392 ¶70.

In addition, there is no obvious limitation under ALM's theory that would confine pre-auction examination of applicant qualifications to technical matters. Indeed, ALM contends that the Commission has a statutory duty to determine generally whether an applicant possesses "basic qualifications" prior to an auction. Br. at 18. This could include character, financial or other qualifying issues. Such an examination of the qualifications of all bidders prior to an auction, only one of which would become a prospective Commission permittee, would defeat much of the efficiency benefits of auctions that Congress sought in amending the statute to replace the prior comparative hearings with an auction process.

ALM's claim (Br. at 16) that the Commission's procedures made the proceedings here a "farce" is baseless. Even if ALM is contending that in the circumstances of this particular case the public interest would have been better served if the Commission had examined PMCC's engineering showing prior to the auction,

such an argument does not demonstrate that the agency's procedures are arbitrary and capricious or cannot be applied here. The fact that a rule may not produce perfect results in every case does not demonstrate that it is arbitrary and capricious. The "standard of review under the arbitrary and capricious test is only reasonableness, not perfection." *See Motor Veh. Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)(requiring the agency to 'articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made')." *Kennecot Greens Creek Mining Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 954 (D.C. Cir. 2007); *see also ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 955 (D.C. Cir. 2007) ("We need not decide whether the Commission has adopted the best possible policy as long as the agency has acted within the scope of its discretion and reasonably explained its actions."). Moreover, a rule that generally applicable regulations can apply to "those, and only those, who are in the factual position which generated the concern" behind adoption of the regulations must be rejected because it would undermine agencies' ability to adopt bright-line rules and lead to extraordinary administrative uncertainty. *Weinberger v. Salfi*, 422 U.S. 749, 776-77 (1975).

In any event, even in the circumstances of this particular case, the Commission's procedures appear likely to result in new stations in both the Las Vegas and Cheyenne, Wyoming areas. As noted above, PMCC filed a new application during a subsequent filing window to serve a Las Vegas suburb that is working its

way through a complicated settlement process among a number of mutually exclusive applications and may be granted. *See* pp. 11-12 above. During that same filing window, another party filed an application to construct a station to serve Cheyenne. That application is also working its way through a similarly complicated settlement process among 116 mutually exclusive applications, and it appears at this time that it could also be granted.

ALM hypothesizes in its brief (Br. at 21-22) a circumstance where an applicant could file an applicant proposing signal coverage “far in excess of that permitted under the FCC’s rules, and that application can win a ‘dispositive Section 307(b) preference’ based upon superior theoretical population coverage, even though in real life it would never be permitted to build a station of the size and dimensions required to cover that population.” In the first place, there is no reason to believe that is what happened in this case with respect to PMCC’s application. As the Commission found, there was “no significant or dispositive difference between ALM’s proposal for a new AM station at Spring Valley and [PMCC’s] proposed new AM station at Las Vegas. Specifically, the ALM proposal will serve 735,444 persons [and PMCC] proposes to serve 740,508 persons.” App. 17. We assume that ALM is not suggesting that it had filed an application proposing coverage far in excess of that permitted under the FCC’s rules, although its proposed coverage was essentially identical to PMCC’s. Second, applicants have little if any incentive to propose unrealistically large coverage areas since such proposals

increase the risk of creating multiple mutually exclusive conflicts with other applications.

ALM goes on to suggest in its hypothetical that “[o]nce the auction is held, the winning bidder is free to change around its technical proposal [and] it is too late for the other applicants because their applications have been dismissed or foreclosed from the auction.” Br. at 22. Nothing of the sort occurred here. As an initial matter, ALM’s application was not “dismissed or foreclosed from the auction;” instead, it voluntarily chose not to participate. *See* Section II.A. above. Second, winning bidders may make only limited engineering changes in their applications following the auction, defined in the Commission’s rules as “minor modifications.” *See Auctions First Report & Order*, 13 FCC Rcd at 15986, 15991 ¶¶ 169, 182; 47 C.F.R. §§ 73.3573(f)(5)(iii), 73.3571(h)(4)(iii), 73.3522(a)(3). These provisions sharply limit the extent of any technical modifications a winning bidder may make in its original technical proposal.

Indeed, those limitations resulted in this case in PMCC having ultimately to dismiss its application. *See* p. 11 above. As a result of that dismissal, PMCC forfeited its entire up-front payment (\$37,500). In the typical case, the possibility of such default payments for filing an application that cannot be granted will act as a powerful incentive for the applicant not to do so. *Auctions First Report and Order*, 13 FCC Rcd at 15979 ¶152 (noting that such default payments were among

the “tools at [the Commission’s] disposal to discourage unqualified applicants from participating in the auction process”).

ALM’s claim that the procedure in dispute here “is a departure from what the FCC does in other broadcast services where ‘paper comparisons’ for ‘fair distribution of service’ are made” (Br. at 22) was never raised by ALM or others before the Commission and may not be presented for the first time on review. 47 U.S.C. § 405(a); *see Sprint Nextel Corp. v. FCC*, 524 F.3d 253, 256-57 (D.C. Cir. 2008).

In any event, the argument is both incorrect and irrelevant. The other broadcast service to which ALM alludes is non-commercial educational (“NCE”) FM broadcasting. The Commission is prohibited from selecting among NCE applicants by competitive bidding. *See National Public Radio, Inc. v. FCC*, 254 F.3d 226 (D.C. Cir. 2001). The Commission has, therefore, established a streamlined comparative process to select among mutually exclusive applicants in that service. *See In the matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd 7386 (2000), *on reconsideration*, 16 FCC Rcd 5074 (2001), *rev. denied*, *American Family Ass’n v. FCC*, 365 F.3d 1156 (D.C. Cir.), *cert. denied*, 543 U.S. 1004 (2004). As part of those procedures, the Commission adopted a point system that awards points for “fair distribution of service” based on the requirements of Section 307(b). *See id.* at 7395-99. As part of that point system, the Commission prohibits an applicant that is preferred under that

criterion from downgrading its service to the area on which the preference was based for four years after grant of the license. *See id.* at 7398 ¶27.

This is a very different circumstance from the Commission's processing procedures for AM auctions at issue in this case. First, the procedures the Commission adopted for auction matters were to provide an efficient operation of the competitive bidding process. Individual comparative evaluations in the NCE FM context do not involve the same considerations. Second, as the Commission noted in adopting the holding period for NCE FM proceedings, in those cases an applicant who prevails on the Section 307(b)/fair distribution criteria receives a construction permit as a result of that determination – that is a threshold determination and no further competition is warranted. *See id.* at 7399 ¶27. It is reasonable under those circumstances for the Commission to require the winning applicant to maintain the proposals upon which it received a license grant for a minimum period of time. In the auctions context, however, that result is not certain, as this case illustrates.

Although PMCC and ALM were preferred over Michael under the Section 307(b) determination, PMCC and ALM (if it had not voluntarily withdrawn) were required to participate in the auction to obtain the license. Third, contrary to ALM's claims, there are limits to amendments to its engineering proposal that an applicant may make after winning an auction. *See Auctions First Report & Order*, 13 FCC Rcd at 15986, 15991 ¶¶ 169, 182; 47 C.F.R. §§ 73.3573(f)(5)(iii), 73.3571(h)(4)(iii), 73.3522(a)(3).

Finally, ALM cites numerous cases demonstrating that the Commission took a different approach in the past before the Communications Act provided for auctions and when the Commission was required to decide among mutually exclusive applicants through a comparative hearing. *See, e.g.*, Br. at 18-20. Those cases have no relevance to the reasonableness of the Commission's decision to impose new procedures for the new auctions regime.

***CONCLUSION***

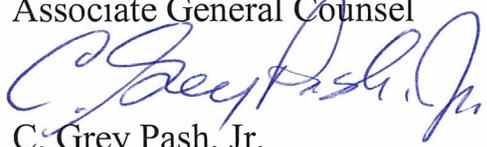
For the foregoing reasons, the Court should dismiss the appeal for lack of standing. In the alternative, the Court should affirm the Commission's orders.

Respectfully submitted,

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February 25, 2009

***CERTIFICATE OF COMPLIANCE***

Pursuant to the requirements of Fed. R. App. P. 32(a)(7)(B), I hereby certify that the accompanying "Brief for Federal Communications Commission" was prepared using a proportionally spaced 14 point typeface and contains 9347 words as measured by the word count function of Microsoft Office Word 2003.

  
C. Grey Pash, Jr.

February 25, 2009

***CERTIFICATE OF SERVICE***

I, C. Grey Pash, Jr., hereby certify that the foregoing “Brief for Federal Communications Commission” was served on February 25, 2009, by electronic mail and by mailing copies by First Class United States mail to the following persons at the addresses shown:

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A handwritten signature in blue ink, reading "C. Grey Pash, Jr.", written over a horizontal line.

C. Grey Pash, Jr.

\*Served by U.S. mail only.

# Statutory Appendix

47 U.S.C. § 154(j) ..... 2  
47 U.S.C. § 301 ..... 2  
47 U.S.C. § 307 ..... 2  
47 U.S.C. § 309 ..... 3  
47 U.S.C. § 402(b) ..... 9  
47 U.S.C. § 405(a) ..... 10  
47 C.F.R. § 1.2104 ..... 10  
47 C.F.R. § 1.2106 ..... 13  
47 C.F.R. § 1.2107 ..... 14  
47 C.F.R. § 1.2108 ..... 16  
47 C.F.R. § 1.2109 ..... 16  
47 C.F.R. § 73.3522 ..... 17  
47 C.F.R. § 73.3571 ..... 19  
47 C.F.R. § 73.3573 ..... 24  
47 C.F.R. § 73.5005 ..... 31  
47 C.F.R. § 73.5006 ..... 31

## **§ 154(j) Conduct of proceedings; hearings**

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

## **§ 301. License for radio communication or transmission of energy**

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

## **§ 307. Licenses**

### **(a) Grant**

The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

### **(b) Allocation of facilities**

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

### **§ 309. Application for license**

#### **(a) Considerations in granting application**

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

#### **(b) Time of granting application**

Except as provided in subsection (c) of this section, no such application--

**(1)** for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

**(2)** for an instrument of authorization in the case of a station in any of the following categories:

**(A)** industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

**(B)** aeronautical en route stations,

**(C)** aeronautical advisory stations,

**(D)** airdrome control stations,

**(E)** aeronautical fixed stations, and

**(F)** such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

\* \* \*

(i) Random selection

**(1) General authority**

Except as provided in paragraph (5), if there is more than one application for any initial license or construction permit, then the Commission shall have the authority to grant such license or permit to a qualified applicant through the use of a system of random selection.

**(2)** No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) unless the Commission determines the qualifications of such applicant pursuant to subsection (a) of this section and section 308(b) of this title. When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purpose of making such determinations, the Commission may, by rule, and notwithstanding any other provision of law--

**(A)** adopt procedures for the submission of all or part of the evidence in written form;

**(B)** delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges; and

**(C)** omit the determination required by subsection (a) of this section with respect to any application other than the one selected pursuant to paragraph (1).

**(3)(A)** The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

**(B)** The Commission shall have authority to require each qualified applicant seeking a significant preference under subparagraph (A) to submit to the Commission such information as may be necessary to enable the Commission to make a determination regarding whether such applicant shall be granted such preference. Such information shall be submitted in such form, at such times, and in accordance with such procedures, as the Commission may require.

**(C)** For purposes of this paragraph:

**(i)** The term "media of mass communications" includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

(ii) The term “minority group” includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

(4)(A) The Commission shall, after notice and opportunity for hearing, prescribe rules establishing a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion, determines that such use is appropriate for the granting of any license or permit in accordance with paragraph (1).

(B) The Commission shall have authority to amend such rules from time to time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.

(C) Not later than 180 days after August 10, 1993, the Commission shall prescribe such transfer disclosures and antitrafficking restrictions and payment schedules as are necessary to prevent the unjust enrichment of recipients of licenses or permits as a result of the methods employed to issue licenses under this subsection.

**(5) Termination of authority**

(A) Except as provided in subparagraph (B), the Commission shall not issue any license or permit using a system of random selection under this subsection after July 1, 1997.

(B) Subparagraph (A) of this paragraph shall not apply with respect to licenses or permits for stations described in section 397(6) of this title.

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission--

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that--

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum;

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed; and

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of

equipment for the relevant services.

**(F)** for any auction of eligible frequencies described in section 923(g)(2) of this title, the recovery of 110 percent of estimated relocation costs as provided to the Commission pursuant to section 923(g)(4) of this title.

#### (4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall--

**(A)** consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

**(B)** include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

**(C)** consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

**(D)** ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

**(E)** require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

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

#### (5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission

may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall--

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

## **§ 402. Judicial review of Commission's orders and decisions**

### **(a) Procedure**

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

### **(b) Right to appeal**

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

- (1)** By any applicant for a construction permit or station license, whose application is denied by the Commission.
- (2)** By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
- (3)** By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
- (4)** By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.
- (5)** By the holder of any construction permit or station license which has been modified or revoked by the Commission.
- (6)** By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.
- (7)** By any person upon whom an order to cease and desist has been served under section 312 of this title.
- (8)** By any radio operator whose license has been suspended by the Commission.
- (9)** By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

**§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order**

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

**47 C.F.R. § 1.2104 Competitive bidding mechanisms.**

(a) Sequencing. The Commission will establish the sequence in which multiple licenses will be auctioned.

(b) Grouping. In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which licenses will be auctioned simultaneously or in combination.

(c) Reserve Price. The Commission may establish a reserve price or prices, either disclosed or undisclosed, below which a license or licenses subject to auction will not be awarded. For any auction of eligible frequencies described in section 113(g)(2) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923(g)(2)) requiring the recovery of estimated relocation costs, the Commission will establish a reserve price or prices pursuant to which the total cash proceeds from any auction of eligible frequencies shall equal at least 110 percent of the total estimated relocation costs provided to the Commission by the National Telecommunications and Information Administration pursuant to section 113(g)(4) of such Act (47 U.S.C. 923(g)(4)).

(d) Minimum Bid Increments, Minimum Opening Bids and Maximum Bid Increments. The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms. The Commission also may establish minimum opening bids and maximum bid increments on a service-specific basis.

(e) Stopping Rules. The Commission may establish stopping rules before or during multiple round auctions in order to terminate the auctions within a reasonable time.

(f) Activity Rules. The Commission may establish activity rules which require a minimum amount of bidding activity.

(g) Withdrawal, Default and Disqualification Payment. As specified below, when the Commission conducts an auction pursuant to § 1.2103, the Commission will impose payments on bidders who withdraw high bids during the course of an auction, or who default on payments due after an auction closes or who are disqualified.

(1) Bid withdrawal prior to close of auction. A bidder that withdraws a bid during the course of an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or subsequent auction(s). In the event that a bidding credit applies to any of the bids, the bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross withdrawn bid and the subsequent gross winning bid, whichever is less. No withdrawal payment will be assessed for a withdrawn bid if either the subsequent winning bid or any of the intervening subsequent withdrawn bids equals or exceeds that withdrawn bid. The withdrawal payment amount is deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission. In the case of multiple bid withdrawals on a single license, the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn in the same or subsequent auction(s). In the event that a license for which there have been withdrawn bids subject to withdrawal payments is not won in the same auction, those bidders for which a final withdrawal payment cannot be calculated will be assessed an interim bid withdrawal payment of between 3 and 20 percent of their withdrawn bids, according to a percentage (or percentages) established by the Commission in advance of the auction. The interim bid withdrawal payment will be applied toward any final bid withdrawal payment that will be assessed at the close of a subsequent auction of the corresponding license.

Example 1 to paragraph (g)(1). Bidder A withdraws a bid of \$100. Subsequently, Bidder B places a bid of \$90 and withdraws. In that same auction, Bidder C wins the license at a bid of \$95. Withdrawal payments are assessed as follows: Bidder A owes \$5 (\$100-\$95). Bidder B owes nothing.

Example 2 to paragraph (g)(1). Bidder A withdraws a bid of \$100. Subsequently, Bidder B places a bid of \$95 and withdraws. In that same auction, Bidder C wins the license at a bid of \$90. Withdrawal payments are assessed as follows: Bidder A owes \$5 (\$100-\$95). Bidder B owes \$5 (\$95-\$90).

Example 3 to paragraph (g)(1). Bidder A withdraws a bid of \$100. Subsequently, in that same auction, Bidder B places a bid of \$90 and withdraws. In a subsequent auction, Bidder C places a bid of \$95 and withdraws. Bidder D wins the license in that auction at a bid of \$80. Assuming that the Commission established an interim bid withdrawal payment of 3 percent in advance of the first auction, withdrawal payments are assessed as follows: At the end of the first auction, Bidder A and Bidder B are each assessed an interim withdrawal payment equal to 3 percent of their withdrawn bids pending Commission assessment of a final withdrawal payment (Bidder A would owe 3% of \$100, or \$3, and Bidder B would owe 3% of \$90, or \$2.70). At the end of the second auction, Bidder A would owe \$5 (\$100-\$95) less the \$3 interim withdrawal payment for a total of \$2. Because Bidder C placed a subsequent bid that was higher than Bidder B's \$90 bid, Bidder B would owe nothing. Bidder C would owe \$15 (\$95-\$80).

(2) Default or disqualification after close of auction. A bidder assumes a binding obligation to pay its full bid amount upon acceptance of the winning bid at the close of an auction. If a bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to a default payment consisting of a deficiency payment, described in § 1.2104(g)(2)(i), and an additional payment, described in § 1.2104(g)(2)(ii) and (g)(2)(iii). The default payment will be deducted from any upfront payments or down payments that the defaulting bidder has deposited with the Commission.

(i) Deficiency payment. The deficiency payment will equal the difference between the amount of the defaulted bid and the amount of the winning bid in a subsequent auction, so long as there have been no intervening withdrawn bids that equal or exceed the defaulted bid or the subsequent winning bid. If the subsequent winning bid or any intervening subsequent withdrawn bid equals or exceeds the defaulted bid, no deficiency payment will be assessed. If there have been intervening subsequent withdrawn bids that are lower than the defaulted bid and higher than the subsequent winning bid, but no intervening withdrawn bids that equal or exceed the defaulted bid, the deficiency payment will equal the difference between the amount of the defaulted bid and the amount of the highest intervening subsequent withdrawn bid. In the event that a bidding credit applies to any of the applicable bids, the deficiency payment will be based solely on net bids or solely on gross bids, whichever results in a lower payment.

(ii) Additional payment--applicable percentage. When the default or disqualification follows an auction without combinatorial bidding, the additional payment will equal between 3 and

20 percent of the applicable bid, according to a percentage (or percentages) established by the Commission in advance of the auction. When the default or disqualification follows an auction with combinatorial bidding, the additional payment will equal 25 percent of the applicable bid.

(iii) Additional payment--applicable bid. When no deficiency payment is assessed, the applicable bid will be the net amount of the defaulted bid. When a deficiency payment is assessed, the applicable bid will be the subsequent winning bid, using the same basis--i.e., net or gross--as was used in calculating the deficiency payment.

(h) The Commission will generally release information concerning the identities of bidders before each auction but may choose, on an auction-by-auction basis, to withhold the identity of the bidders associated with bidder identification numbers.

(i) The Commission may delay, suspend, or cancel an auction in the event of a natural disaster, technical obstacle, evidence of security breach, unlawful bidding activity, administrative necessity, or for any other reason that affects the fair and efficient conduct of the competitive bidding. The Commission also has the authority, at its sole discretion, to resume the competitive bidding starting from the beginning of the current or some previous round or cancel the competitive bidding in its entirety.

(j) Bid apportionment. The Commission may specify a method for apportioning a bid among portions of the license (i.e., portions of the license's service area or bandwidth, or both) when necessary to compare a bid on the original license or portions thereof with a bid on a corresponding reconfigured license for purposes of the Commission's rules or procedures, such as to calculate a bid withdrawal or default payment obligation in connection with the bid.

#### **47 C.F.R. § 1.2106 Submission of upfront payments.**

(a) The Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment. In that event, the amount of the upfront payment and the procedures for submitting it will be set forth in a Public Notice. Any auction applicant that has previously been in default on any Commission license or has previously been delinquent on any non-tax debt owed to any Federal agency must submit an upfront payment equal to 50 percent more than that set for each particular license. No interest will be paid on upfront payments.

(b) Upfront payments must be made by wire transfer in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission.

(c) If an upfront payment is not in compliance with the Commission's Rules, or if insufficient funds are tendered to constitute a valid upfront payment, the applicant shall have a limited opportunity to correct its submission to bring it up to the minimum valid upfront payment prior to the auction. If the applicant does not submit at least the minimum upfront payment, it will be

ineligible to bid, its application will be dismissed and any upfront payment it has made will be returned.

(d) The upfront payment(s) of a bidder will be credited toward any down payment required for licenses on which the bidder is the high bidder. Where the upfront payment amount exceeds the required deposit of a winning bidder, the Commission may refund the excess amount after determining that no bid withdrawal penalties are owed by that bidder.

(e) In accordance with the provisions of paragraph (d), in the event a penalty is assessed pursuant to § 1.2104 for bid withdrawal or default, upfront payments or down payments on deposit with the Commission will be used to satisfy the bid withdrawal or default penalty before being applied toward any additional payment obligations that the high bidder may have.

#### **47 C.F.R. § 1.2107 Submission of down payment and filing of long-form applications.**

(a) After bidding has ended, the Commission will identify and notify the high bidder and declare the bidding closed.

(b) Unless otherwise specified by public notice, within ten (10) business days after being notified that it is a high bidder on a particular license(s), a high bidder must submit to the Commission's lockbox bank such additional funds (the "down payment") as are necessary to bring its total deposits (not including upfront payments applied to satisfy bid withdrawal or default payments) up to twenty (20) percent of its high bid(s). (In single round sealed bid auctions conducted under § 1.2103, however, bidders may be required to submit their down payments with their bids.) Unless otherwise specified by public notice, this down payment must be made by wire transfer in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license or authorization, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable payments. No interest on any down payment will be paid to the bidders.

(c) A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder. Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications. Specific procedures for filing applications will be set out by Public Notice. Ownership disclosure requirements are set forth in § 1.2112. Beginning January 1, 1999, all long-form applications must be filed electronically. An applicant that fails to submit the required long-form application under this paragraph and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the payments set

forth in § 1.2104.

(d) As an exhibit to its long-form application, the applicant must provide a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement it had entered into relating to the competitive bidding process prior to the time bidding was completed. Such agreements must have been entered into prior to the filing of short-form applications pursuant to § 1.2105.

(e) A winning bidder that seeks a bidding credit to serve a qualifying tribal land, as defined in § 1.2110(f)(3)(i), within a particular market must indicate on the long-form application (FCC Form 601) that it intends to serve a qualifying tribal land within that market.

(f) An applicant must also submit FCC Form 602 (see § 1.919 of this chapter) with its long form application (FCC Form 601).

(g)(1)(i) A consortium participating in competitive bidding pursuant to § 1.2110(b)(3)(i) that is a winning bidder may not apply as a consortium for licenses covered by the winning bids. Individual members of the consortium or new legal entities comprising individual consortium members may apply for the licenses covered by the winning bids of the consortium. An individual member of the consortium or a new legal entity comprising two or more individual consortium members applying for a license pursuant to this provision shall be the applicant for purposes of all related requirements and filings, such as filing FCC Form 602. However, the members filing separate long-form applications shall all use the consortium's FCC Registration Number ("FRN") on their long-form applications. An application by an individual consortium member or a new legal entity comprising two or more individual consortium members for a license covered by the winning bids of the consortium shall not constitute a major modification of the application or a change in control of the applicant for purposes of Commission rules governing the application.

(ii) Within ten business days after release of the public notice announcing grant of a long-form application, that licensee must update its filings in the Commission's Universal Licensing System ("ULS") to substitute its individual FRN for that of the consortium.

(2) The continuing eligibility for size-based benefits, such as size-based bidding credits or set-aside licenses, of a newly formed legal entity comprising two or more individual consortium members will be based on the size of such newly formed entity as of the filing of its long-form application.

(3) Members of a consortium intending to partition or disaggregate license(s) among individual members or new legal entities comprising two or more individual consortium members must select one member or one new legal entity comprising two or more individual consortium members to apply for the license(s). The applicant must include in its applications, as part of the explanation of terms and conditions provided pursuant to § 1.2107(d), the agreement of the applicable parties to partition or disaggregate the relevant license(s). Upon grant of the long-form application for that license, the licensee must then apply to partition or disaggregate the license pursuant to those terms and conditions.

**47 C.F.R. § 1.2108 Procedures for filing petitions to deny against long-form applications.**

(a) Where petitions to deny are otherwise provided for under the Act or the commission's Rules, and unless other service-specific procedures for the filing of such petitions are provided for elsewhere in the Commission's Rules, the procedures in this section shall apply to the filing of petitions to deny the long-form applications of winning bidders.

(b) Within a period specified by Public Notice and after the Commission by Public Notice announces that long-form applications have been accepted for filing, petitions to deny such applications may be filed. The period for filing petitions to deny shall be no more than ten (10) days. The appropriate licensing Bureau, within its discretion, may, in exigent circumstances, reduce this period of time to no less than five (5) days. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The time for filing such oppositions shall be at least five (5) days from the filing date for petitions to deny, and the time for filing replies shall be at least five (5) days from the filing date for oppositions. The Commission may grant a license based on any long-form application that has been accepted for filing. The Commission shall in no case grant licenses earlier than seven (7) days following issuance of a public notice announcing long-form applications have been accepted for filing.

(d) If the Commission determines that:

(1) An applicant is qualified and there is no substantial and material issue of fact concerning that determination, it will grant the application.

(2) An applicant is not qualified and that there is no substantial issue of fact concerning that determination, the Commission need not hold a evidentiary hearing and will deny the application.

(3) Substantial and material issues of fact require a hearing, it will conduct a hearing. The Commission may permit all or part of the evidence to be submitted in written form and may permit employees other than administrative law judges to preside at the taking of written evidence. Such hearing will be conducted on an expedited basis.

**47 C.F.R. § 1.2109 License grant, denial, default, and disqualification.**

(a) Unless otherwise specified by public notice, auction winners are required to pay the balance of their winning bids in a lump sum within ten (10) business days following the release of a public notice establishing the payment deadline. If a winning bidder fails to pay the balance of its winning bids in a lump sum by the applicable deadline as specified by the Commission, it will be

allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due. When a winning bidder fails to pay the balance of its winning bid by the late payment deadline, it is considered to be in default on its license(s) and subject to the applicable default payments. Licenses will be awarded upon the full and timely payment of winning bids and any applicable late fees.

(b) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within ten (10) business days after the Commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default payment specified in §§ 1.2104(g)(2) or 1.2104(g)(3), whichever is applicable. In such event, the Commission, at its discretion, may either re-auction the license(s) to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. If the license(s) is offered to the other highest bidders (in descending order), the down payment obligations set forth in § 1.2107(b) will apply. However, in combinatorial bidding auctions, the Commission will only re-auction the license(s) to existing or new applicants. The Commission will not offer the package or licenses to the next highest bidder.

(c) A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment, will be deemed to have defaulted, its application will be dismissed, and it will be liable for the payment set forth in §§ 1.2104(g)(2) or 1.2104(g)(3), whichever is applicable. In such event, the Commission may either re-auction the license(s) to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. However, in combinatorial bidding auctions, the Commission will only re-auction the license(s) to existing or new applicants. The Commission will not offer the package or licenses to the next highest bidder.

(d) Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the competitive bidding process may be subject, in addition to any other applicable sanctions, to forfeiture of their upfront payment, down payment or full bid amount, and may be prohibited from participating in future auctions.

#### **47 C.F.R. § 73.3522 Amendment of applications.**

(a) Broadcast services subject to competitive bidding.

(1) Applicants in all broadcast services subject to competitive bidding will be subject to the provisions of §§ 73.5002 and 1.2105(b) regarding the modification of their short-form applications.

(2) Subject to the provision of § 73.5005, if it is determined that a long form application submitted by a winning bidder or a non-mutually exclusive applicant for a new station or a major change in an existing station in all broadcast services subject to competitive bidding is

substantially complete, but contains any defect, omission, or inconsistency, a deficiency letter will be issued affording the applicant an opportunity to correct the defect, omission or inconsistency. Amendments may be filed pursuant to the deficiency letter curing any defect, omission or inconsistency identified by the Commission, or to make minor modifications to the application, or pursuant to § 1.65. Such amendments should be filed in accordance with § 73.3513. If a petition to deny has been filed, the amendment shall be served on the petitioner.

(3) Subject to the provisions of §§ 73.3571, 73.3572 and 73.3573, deficiencies, omissions or inconsistencies in long-form applications may not be cured by major amendment. The filing of major amendments to long-form applications is not permitted. An application will be considered to be newly filed if it is amended by a major amendment.

(4) Paragraph (a) of this section is not applicable to applications for minor modifications of facilities in the non-reserved FM broadcast service, nor to any application for a reserved band FM station.

(b) Reserved Channel FM and reserved noncommercial educational television stations. Applications may be amended after Public Notice announcing a period for filing amendments. Amendments, when applicable, are subject to the provisions of §§ 73.3514, 73.3525, 73.3572, 73.3573, 73.3580, and § 1.65 of this chapter. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration. Amendments will be accepted as described below and otherwise will only be considered upon a showing of good cause for late filing or pursuant to § 1.65 of this chapter or § 73.3514:

(1) A § 73.7002 Selectee. A Public Notice will announce that the application of a § 73.7002 Selectee (selected based on fair distribution) has been found acceptable for filing. If any Selectee's application is determined unacceptable the application will be returned and the Selectee will be provided one opportunity for curative amendment by filing a petition for reconsideration requesting reinstatement of the application. All amendments filed in accordance with this paragraph must be minor and must not alter the § 73.7002 preference.

(2) A § 73.7003 Tentative Selectee. A Public Notice will announce that the application of a § 73.7003 Tentative Selectee (selected through a point system) has been found acceptable for filing. If any Tentative Selectee's application is determined unacceptable the application will be returned and the Tentative Selectee will be provided one opportunity for curative amendment by filing a petition for reconsideration requesting reinstatement of the application. All amendments filed in accordance with this paragraph must be minor and must claim the same number of qualitative points as originally claimed, or more points than claimed by the applicant with the next highest point total.

(3) A Public Notice will identify all other reserved channel applications, such as non-mutually exclusive applications and the sole remaining application after a settlement among mutually exclusive applications. If any such application is determined unacceptable the application will be returned and the applicant will be provided one opportunity for curative amendment by filing a petition for reconsideration requesting reinstatement of the application. All amendments filed in accordance with this paragraph must be minor.

(c) Minor modifications of facilities in the non-reserved FM broadcast service.

(1) Subject to the provisions of §§ 73.3525, 73.3573, and 73.3580, for a period of 30 days following the FCC's issuance of a Public Notice announcing the tender of an application for minor modification of a non-reserved band FM station, (other than Class D stations), minor amendments may be filed as a matter of right.

(2) For applications received on or after August 7, 1992, an applicant whose application is found to meet minimum filing requirements, but nevertheless is not complete and acceptable, shall have the opportunity during the period specified in the FCC staff's deficiency letter to correct all deficiencies in the tenderability and acceptability of the underlying application, including any deficiency not specifically identified by the staff. [For minimum filing requirements see § 73.3564(a). Examples of tender defects appear at 50 FR 19936 at 19945-46 (May 13, 1985), reprinted as Appendix D, Report and Order, MM Docket No. 91-347, 7 FCC Rcd 5074, 5083-88 (1992). For examples of acceptance defects, see 49 FR 47331.] Prior to the end of the period specified in the deficiency letter, a submission seeking to correct a tender and/or acceptance defect in an application meeting minimum filing requirements will be treated as an amendment for good cause if it would successfully and directly correct the defect. Other amendments submitted prior to grant will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514.

(3) Unauthorized or untimely amendments are subject to return by the Commission without consideration. However, an amendment to a non-reserved band application will not be accepted if the effect of such amendment is to alter the proposed facility's coverage area so as to produce a conflict with an applicant who files subsequent to the initial applicant but prior to the amendment application. Similarly, an applicant subject to "first come/first serve" processing will not be permitted to amend its application and retain filing priority if the result of such amendment is to alter the facility's coverage area so as to produce a conflict with an applicant which files subsequent to the initial applicant but prior to the amendment.

Note 1 to § 73.3522: When two or more broadcast applications are tendered for filing which are mutually exclusive with each other but not in conflict with any previously filed applications which have been accepted for filing, the FCC, where appropriate, will announce acceptance of the earliest tendered application and place the later filed application or applications on a subsequent public notice of acceptance for filing in order to establish a deadline for the filing of amendments as a matter of right for all applicants in the group.

**47 C.F.R. § 73.3571 Processing of AM broadcast station applications.**

(a) Applications for AM broadcast facilities are divided into three groups.

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. A major change for an AM station authorized under this part is any

change in frequency, except frequency changes to non-expanded band first, second or third adjacent channels. A major change in ownership is a situation where the original party or parties to the application do not retain more than 50% ownership interest in the application as originally filed. A major change in community of license is one in which the applicant's daytime facilities at the proposed community are not mutually exclusive, as defined in § 73.37, with the applicant's current daytime facilities, or any change in community of license of an AM station in the 1605-1705 kHz band. All other changes will be considered minor.

(2) The second group consists of applications for licenses and all other changes in the facilities of authorized stations.

(3) The third group consists of applications for operation in the 1605-1705 kHz band which are filed subsequent to FCC notification that allotments have been awarded to petitioners under the procedure specified in § 73.30.

(b)(1) The FCC may, after acceptance of an application for modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore is subject to the provisions of §§ 73.3522, 73.3580 and 1.1111 of this chapter pertaining to major changes. Such major modification applications will be dismissed as set forth in paragraph (h)(1)(i) of this section.

(2) An amendment to an application which would effect a major change, as defined in paragraph (a)(1) of this section, will not be accepted except as provided for in paragraph (h)(1)(i) of this section.

(c) An application for changes in the facilities of an existing station will continue to carry the same file number even though (pursuant to FCC approval) an assignment of license or transfer of control of said licensee or permittee has taken place if, upon consummation, the application is amended to reflect the new ownership.

(d) If, upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of an application, the same will be granted. If the FCC is unable to make such a finding and it appears that a hearing may be required, the procedure set forth in § 73.3593 will be followed.

(e) Applications proposing to increase the power of an AM station are subject to the following requirements:

(1) In order to be acceptable for filing, any application which does not involve a change in site must propose at least a 20% increase in the station's nominal power.

(2) Applications involving a change in site are not subject to the requirements in paragraph (e)(1) of this section.

(3) Applications for nighttime power increases for Class D stations are not subject to the requirements of this section and will be processed as minor changes.

(4) The following special procedures will be followed in authorizing Class II-D daytime-only stations on 940 and 1550 kHz, and Class III daytime-only stations on the 41 regional channels listed in § 73.26(a), to operate unlimited-time.

(i) Each eligible daytime-only station in the foregoing categories will receive an Order to Show Cause why its license should not be modified to specify operation during nighttime hours with the facilities it is licensed to start using at local sunrise, using the power stated in the Order to Show Cause, that the Commission finds is the highest nighttime level--not exceeding 0.5 kW--at which the station could operate without causing prohibited interference to other domestic or foreign stations, or to co-channel or adjacent channel stations for which pending applications were filed before December 1, 1987.

(ii) Stations accepting such modification shall be reclassified. Those authorized in such Show Cause Orders to operate during nighttime hours with a power of 0.25 kW or more, or with a power that, although less than 0.25 kW, is sufficient to enable them to attain RMS field strengths of 141 mV/m or more at 1 kilometer, shall be redesignated as Class II-B stations if they are assigned to 940 or 1550 kHz, and as unlimited-time Class III stations if they are assigned to regional channels.

(iii) Stations accepting such modification that are authorized to operate during nighttime hours at powers less than 0.25 kW, and that cannot with such powers attain RMS field strengths of 141 mV/m or more at 1 kilometer, shall be redesignated as Class II-S stations if they are assigned to 940 or 1550 kHz, and as Class III-S stations if they are assigned to regional channels.

(iv) Applications for new stations may be filed at any time on 940 and 1550 kHz and on the regional channels. Also, stations assigned to 940 or 1550 kHz, or to the regional channels, may at any time, regardless of their classifications, apply for power increases up to the maximum generally permitted. Such applications for new or changed facilities will be granted without taking into account interference caused to Class II-S or Class III-S stations, but will be required to show interference protection to other classes of stations, including stations that were previously classified as Class II-S or Class III-S, but were later reclassified as Class II-B or Class III unlimited-time stations as a result of subsequent facilities modifications that permitted power increases qualifying them to discontinue their "S" subclassification.

(f) Applications for minor modifications for AM broadcast stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and will be processed on a "first come/first served" basis, with the first acceptable application cutting off the filing rights of subsequent, conflicting applicants. The FCC will periodically release a Public Notice listing those applications accepted for filing. Applications received on the same day will be treated as simultaneously filed and, if they are found to be mutually exclusive, must be resolved through settlement or technical amendment. Conflicting applications received after the filing of a first acceptable application will be grouped, according to filing date, behind the lead application in a queue. The priority rights of the lead applicant, against all other applicants, are

determined by the date of filing, but the filing date for subsequent, conflicting applicants only reserves a place in the queue. The rights of an applicant in a queue ripen only upon a final determination that the lead applicant is unacceptable and if the queue member is reached and found acceptable. The queue will remain behind the lead applicant until a construction permit is finally granted, at which time the queue dissolves.

(g) Applications for change of license to change hours of operation of a Class C AM broadcast station, to decrease hours of operation of any other class of station, or to change station location involving no change in transmitter site will be considered without reference to the processing line.

(h) Processing new and major AM broadcast station applications.

(1)(i) The FCC will specify by Public Notice, pursuant to § 73.5002, a period for filing AM applications for a new station or for major modifications in the facilities of an authorized station. AM applications for new facilities or for major modifications, whether for commercial broadcast stations or noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), will be accepted only during these specified periods. Applications submitted prior to the appropriate filing period or “window” opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

(ii) Such AM applicants will be subject to the provisions of §§ 1.2105 and 73.5002 regarding the submission of the short-form application, FCC Form 175, and all appropriate certifications, information and exhibits contained therein. To determine which AM applications are mutually exclusive, AM applicants must submit the engineering data contained in FCC Form 301 as a supplement to the short-form application. Such engineering data will not be studied for technical acceptability, but will be protected from subsequently filed applications as of the close of the window filing period. Determinations as to the acceptability or grantability of an applicant's proposal will not be made prior to an auction.

(iii) AM applicants will be subject to the provisions of §§ 1.2105 and 73.5002 regarding the modification and dismissal of their short-form applications.

(2) Subsequently, the FCC will release Public Notices:

(i) Identifying the short-form applications received during the window filing period which are found to be mutually exclusive, including any applications for noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), as well as the procedures the FCC will use to resolve the mutually exclusive applications;

(ii) Establishing a date, time and place for an auction;

(iii) Providing information regarding the methodology of competitive bidding to be used in the upcoming auction, bid submission and payment procedures, upfront payment procedures, upfront payment deadlines, minimum opening bid requirements and applicable reserve prices

in accordance with the provisions of § 73.5002;

(iv) Identifying applicants who have submitted timely upfront payments and, thus, are qualified to bid in the auction.

(3) After the close of the filing window, the FCC will also release a Public Notice identifying any short-form applications received which are found to be non-mutually exclusive, including any applications for noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6). All non-mutually exclusive applicants will be required to submit an appropriate long form application within 30 days of the Public Notice and, for applicants for commercial broadcast stations, pursuant to the provisions of § 73.5005(d). Non-mutually exclusive applications for commercial broadcast stations will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584. Non-mutually exclusive applications for noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.7004 and 73.3584. If the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the non-mutually exclusive long form application, the same will be granted.

(4)(i) The auction will be held pursuant to the procedures set forth in §§ 1.2101 et seq. and 73.5000 et seq. Subsequent to the auction, the FCC will release a Public Notice announcing the close of the auction and identifying the winning bidders. Winning bidders will be subject to the provisions of § 1.2107 of this chapter regarding down payments and will be required to submit the appropriate down payment within 10 business days of the Public Notice. Pursuant to § 1.2107 of this chapter and § 73.5005, a winning bidder that meets its down payment obligations in a timely manner must, within 30 days of the release of the Public Notice announcing the close of the auction, submit the appropriate long-form application for each construction permit for which it was the winning bidder. Long-form applications filed by winning bidders shall include the exhibits identified in § 73.5005(a).

(ii) Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to § 1.2109(a). Long-form construction permit applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584. Construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees, and if the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served.

(iii) All long-form applications will be cutoff as of the date of filing with the FCC and will be protected from subsequently filed long-form applications. Applications will be required to

protect all previously filed commercial and noncommercial applications. Winning bidders filing long-form applications may change the technical proposals specified in their previously submitted short-form applications, but such change may not constitute a major change. If the submitted long-form application would constitute a major change from the proposal submitted in the short-form application, the long-form application will be returned pursuant to paragraph (h)(1)(i) of this section.

(i) In order to grant a major or minor change application made contingent upon the grant of another licensee's request for a facility modification, the Commission will not consider mutually exclusive applications by other parties that would not protect the currently authorized facilities of the contingent applicants. Such major change applications remain, however, subject to the provisions of §§ 73.3580 and 1.1111. The Commission shall grant contingent requests for construction permits for station modifications only upon a finding that such action will promote the public interest, convenience and necessity.

(j) Applications proposing to change the community of license of an AM station, except for an AM station in the 1605-1705 kHz band, are considered to be minor modifications under paragraphs (a)(2) and (f) of this section, and are subject to the following requirements:

(1) The applicant must attach an exhibit to its application containing information demonstrating that the proposed community of license change constitutes a preferential arrangement of assignments under Section 307(b) of the Communications Act of 1934, as amended (47 U.S.C. 307(b));

(2) The daytime facilities specified by the applicant at the proposed community of license must be mutually exclusive, as defined in § 73.37, with the applicant's current daytime facilities; and

(3) Notwithstanding the provisions of § 73.3580(a), the applicant must comply with the local public notice provisions of §§ 73.3580(c)(3), 73.3580(d)(3), and 73.3580(f). The exception contained in § 73.3580(e) shall not apply to an application proposing to change the community of license of an AM station.

#### **47 C.F.R. § 73.3573 Processing FM broadcast station applications.**

(a) Applications for FM broadcast stations are divided into two groups:

(1) In the first group are applications for new stations or for major changes of authorized stations. A major change in ownership is any change where the original party or parties to the application do not retain more than 50 percent ownership interest in the application as originally filed. In the case of a Class D or an NCE FM reserved band channel station, a major facility change is any change in antenna location which would not continue to provide a 1 mV/m service to some portion of its previously authorized 1 mV/m service area. In the case of a Class D station, a major facility change is any change in community of license or

any change in frequency other than to a first-, second-, or third-adjacent channel. A major facility change for a commercial or a noncommercial educational full service FM station, a winning auction bidder, or a tentative selectee authorized or determined under this part is any change in frequency or community of license which is not in accord with its current assignment, except for the following:

(i) A change in community of license which complies with the requirements of paragraph (g) of this section;

(ii) A change to a higher or lower class co-channel, first-, second-, or third-adjacent channel, or intermediate frequency;

(iii) A change to a same-class first-, second-, or third-adjacent channel, or intermediate frequency;

(iv) A channel substitution, subject to the provisions of Section 316 of the Communications Act for involuntary channel substitutions.

(2) The second group consists of applications for licenses and all other changes in the facilities of authorized stations.

(b)(1) The FCC may, after the acceptance of an application for modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore subject to the provisions of §§ 73.3522, 73.3580 and 1.1111 of this chapter pertaining to major changes. Such major modification applications in the non-reserved band will be dismissed as set forth in paragraph (f)(2)(i) of this section.

(2) An amendment to a non-reserved band application which would effect a major change, as defined in paragraph (a)(1) of this section, will not be accepted, except as provided for in paragraph (f)(2)(i) of this section.

(3) A new file number will be assigned to a reserved band application for a new station or for major changes in the facilities of an authorized station, when it is amended so as to effect a major change, as defined in paragraph (a)(1) of this section. Where an amendment to a reserved band application would require a new file number, the applicant will have the opportunity to withdraw the amendment at any time prior to designation for hearing, if applicable; and may be afforded, subject to the discretion of the Administrative Law Judge, an opportunity to withdraw the amendment after designation for hearing.

(c) An application for changes in the facilities of any existing station will continue to carry the same file number even though (pursuant to FCC approval) an assignment of license or transfer of control of such licensee or permittee has taken place if, upon consummation, the application is amended to reflect the new ownership.

(d) If, upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of an application for FM broadcast facilities, the same will be granted.

If the FCC is unable to make such a finding and it appears that a hearing may be required, the procedure given in § 73.3593 will be followed. In the case of mutually exclusive applications for reserved channels, the procedures in subpart K of this part will be followed. In the case of mutually exclusive applications for unreserved channels, the procedures in subpart I of this part will be followed.

(e) Processing reserved channel FM broadcast station applications.

(1) Applications for minor modifications for reserved channel FM broadcast stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and will be processed on a “first come/first served” basis, with the first acceptable application cutting off the filing rights of subsequent, competing applicants. The FCC will periodically release a Public Notice listing those applications accepted for filing. Conflicting applications received on the same day will be treated as simultaneously filed and mutually exclusive. Conflicting applications received after the filing of the first acceptable application will be grouped, according to filing date, behind the lead application in the queue. The priority rights of the lead applicant, against all other applicants, are determined by the date of filing, but the filing date for subsequent conflicting applicants only reserves a place in the queue. The right of an applicant in a queue ripens only upon a final determination that the lead applicant is unacceptable and that the queue member is reached and found acceptable. The queue will remain behind the lead applicant until the construction permit is finally granted, at which time the queue dissolves.

(2) The FCC will specify by Public Notice a period for filing reserved channel FM applications for a new station or for major modifications in the facilities of an authorized station. FM reserved channel applications for new facilities or for major modifications will be accepted only during the appropriate filing period or “window.” Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

(3) Concurrently with the filing of a new or major modification application for a reserved noncommercial educational channel, the applicant shall submit to the FCC's public reference room and to a local public inspection file consistent with § 73.3527(e)(2), supporting documentation of points claimed, as described in the application form.

(4) Timely filed applications for new facilities or for major modifications for reserved FM channels will be processed pursuant to the procedures set forth in subpart K of this part (§ 73.7000 et seq.) Subsequently, the FCC will release Public Notices identifying: mutually exclusive groups of applications; applications selected pursuant to the fair distribution procedures set forth in § 73.7002; applications received during the window filing period which are found to be non-mutually exclusive; tentative selectees determined pursuant to the point system procedures set forth in § 73.7003; and acceptable applications. The Public Notices will also announce: additional procedures to be followed for certain groups of applications; deadlines for filing additional information; and dates by which petitions to deny must be filed in accordance with the provisions of § 73.3584. If the applicant is duly

qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the application, it will be granted. If an application is determined unacceptable for filing, the application will be returned, and subject to the amendment requirements of § 73.3522.

(f) Processing non-reserved FM broadcast station applications.

(1) Applications for minor modifications for non-reserved FM broadcast stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and, generally, will be processed in the order in which they are tendered. The FCC will periodically release a Public Notice listing those applications accepted for filing. Processing of these applications will be on a “first come/first serve” basis with the first acceptable application cutting off the filing rights of subsequent applicants. All applications received on the same day will be treated as simultaneously tendered and, if they are found to be mutually exclusive, must be resolved through settlement or technical amendment. Applications received after the tender of a lead application will be grouped, according to filing date, behind the lead application in a queue. The priority rights of the lead applicant, as against all other applicants, are determined by the date of filing, but the filing date for subsequent applicants for that channel and community only reserves a place in the queue. The rights of an applicant in a queue ripen only upon a final determination that the lead applicant is unacceptable and if the queue member is reached and found acceptable. The queue will remain behind the lead applicant until a construction permit is finally granted, at which time the queue dissolves.

(2)(i) The FCC will specify by Public Notice, pursuant to § 73.5002(a), a period for filing non-reserved band FM applications for a new station or for major modifications in the facilities of an authorized station. FM applications for new facilities or for major modifications, whether for commercial broadcast stations or noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), will be accepted only during the appropriate filing period or “window.” Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

(ii) Such FM applicants will be subject to the provisions of §§ 1.2105 and 73.5002 regarding the submission of the short-form application, FCC Form 175, and all appropriate certifications, information and exhibits contained therein. FM applicants may submit a set of preferred site coordinates as a supplement to the short-form application. Any specific site indicated by FM applicants will not be studied for technical acceptability, but will be protected from subsequently filed applications as a full-class facility as of the close of the window filing period. Determinations as to the acceptability or grantability of an applicant's proposal will not be made prior to an auction.

(iii) FM applicants will be subject to the provisions of §§ 1.2105 and 73.5002(c) regarding the modification and dismissal of their short-form applications.

(3) Subsequently, the FCC will release Public Notices:

(i) Identifying the short-form applications received during the window filing period which are found to be mutually exclusive, including any applications for noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), as well as the procedures the FCC will use to resolve the mutually exclusive applications;

(ii) Establishing a date, time and place for an auction;

(iii) Providing information regarding the methodology of competitive bidding to be used in the upcoming auction, bid submission and payment procedures, upfront payment procedures, upfront payment deadlines, minimum opening bid requirements and applicable reserve prices in accordance with the provisions of § 73.5002;

(iv) Identifying applicants who have submitted timely upfront payments and, thus, are qualified to bid in the auction.

(4) If, after the close of the appropriate window filing period, a non-reserved FM allotment remains vacant, the window remains closed until the FCC, by Public Notice, specifies a subsequent period for filing non-reserved band FM applications for a new station or for major modifications in the facilities of an authorized station pursuant to paragraph (f)(2)(i) of this section. After the close of the filing window, the FCC will also release a Public Notice identifying the short-form applications which are found to be non-mutually exclusive, including any applications for noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6). These non-mutually exclusive applicants will be required to submit the appropriate long-form application within 30 days of the Public Notice and, for applicants for commercial broadcast stations, pursuant to the provisions of § 73.5005(d). Non-mutually exclusive applications for commercial broadcast stations will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584. Non-mutually exclusive applications for noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.7004 and 73.3584. If the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience, and necessity will be served by the granting of the non-mutually exclusive long-form application, it will be granted.

(5)(i) Pursuant to § 1.2107 of this chapter and § 73.5005, a winning bidder that meets its down payment obligations in a timely manner must, within 30 days of the release of the public notice announcing the close of the auction, submit the appropriate long-form application for each construction permit for which it was the winning bidder. Long-form applications filed by winning bidders shall include the exhibits identified in § 73.5005(a).

(ii) Winning bidders are required to pay the balance of their winning bids in a lump sum prior to the deadline established by the Commission pursuant to § 1.2109(a) of this chapter. Long-

form construction permit applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584. Construction permits will be granted by the Commission only after full and timely payment of winning bids and any applicable late fees, and if the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served.

(iii) All long-form applications will be cut-off as of the date of filing with the FCC and will be protected from subsequently filed long-form applications and rulemaking petitions. Applications will be required to protect all previously filed commercial and noncommercial applications. Winning bidders filing long-form applications may change the technical proposals specified in their previously submitted short-form applications, but such change may not constitute a major change. If the submitted long-form application would constitute a major change from the proposal submitted in the short-form application or the allotment, the long-form application will be returned pursuant to paragraph (f)(2)(i) of this section.

(g) Applications proposing to change the community of license of an FM station or assignment are considered to be minor modifications under paragraphs (a)(2), (e)(1), and (f)(1) of this section, and are subject to the following requirements:

(1) The applicant must attach an exhibit to its application containing information demonstrating that the proposed community of license change constitutes a preferential arrangement of allotments or assignments under Section 307(b) of the Communications Act of 1934, as amended (47 U.S.C. 307(b));

(2) The facilities specified by the applicant at the proposed community of license must be mutually exclusive, as defined in § 73.207 or 73.509, with the applicant's current facilities or its current assignment, in the case of a winning auction bidder or tentative selectee; and

(3) Notwithstanding the provisions of § 73.3580(a), the applicant must comply with the local public notice provisions of §§ 73.3580(c)(3), 73.3580(d)(3), and 73.3580(f). The exception contained in § 73.3580(e) shall not apply to an application proposing to change the community of license of an FM station.

(4) Non-reserved band applications must demonstrate the existence of a suitable assignment or allotment site that fully complies with §§ 73.207 and 73.315 without resort to § 73.213 or 73.215.

Note 1 to § 73.3573: Applications to modify the channel and/or class to an adjacent channel, intermediate frequency (IF) channel, or co-channel may utilize the provisions of the Commission's Rules permitting short spaced stations as set forth in § 73.215 as long as the applicant shows by separate exhibit attached to the application the existence of an allotment reference site which meets the allotment standards, the minimum spacing requirements of § 73.207 and the city grade coverage requirements of § 73.315. This exhibit must include a site map or, in the alternative, a statement that the transmitter will be located on an existing tower.

Examples of unsuitable allotment reference sites include those which are offshore, in a national or state park in which tower construction is prohibited, on an airport, or otherwise in an area which would necessarily present a hazard to air navigation.

Note 2 to § 73.3573: Processing of applications for new low power educational FM applications: Pending the Commission's restudy of the impact of the rule changes pertaining to the allocations of 10-watt and other low power noncommercial educational FM stations, applications for such new stations, or major changes in existing ones, will not be accepted for filing. Exceptions are: (1) In Alaska, applications for new Class D stations or major changes in existing ones are acceptable for filing; and (2) applications for existing Class D stations to change frequency are acceptable for filing. In (2), upon the grant of such application, the station shall become a Class D (secondary) station. (See First Report and Order, Docket 20735, FCC 78-386, 43 FR 25821, and Second Report and Order, Docket 20735, FCC 78-384, 43 FR 39704.) Effective date of this FCC imposed "freeze" was June 15, 1978. Applications which specify facilities of at least 100 watts effective radiated power will be accepted for filing.

Note 3 to § 73.3573: For rules on processing FM translator and booster stations, see § 74.1233 of this chapter.

Note 4 to § 73.3573: A Class C station operating with antenna height above average terrain ("HAAT") of less than 451 meters is subject to reclassification as a Class C0 station upon the filing of a triggering application for construction permit that is short-spaced to such a Class C station under § 73.207 but would be fully spaced to such a station considered as a Class C0 assignment. Triggering applications may utilize § 73.215. Triggering applications must certify that no alternative channel is available for the proposed service. Available alternative frequencies are limited to frequencies that the proposed service could use at the specified antenna location in full compliance with the distance separation requirements of § 73.207, without any other changes to the FM Table of Allotments. Copies of a triggering application and related pleadings must be served on the licensee of the affected Class C station. If the staff concludes that a triggering application is acceptable for filing, it will issue an order to show cause why the affected station should not be reclassified as a Class C0 station. The order to show cause will provide the licensee 30 days to express in writing an intention to seek authority to modify the subject station's technical facilities to minimum Class C HAAT or to otherwise challenge the triggering application. If no such intention is expressed and the triggering application is not challenged, the subject station will be reclassified as a Class C0 station, and processing of the triggering application will be completed. If an intention to modify is expressed, an additional 180-day period will be provided during which the Class C station licensee must file an acceptable construction permit application to increase antenna height to at least 451 meters HAAT. Upon grant of such a construction permit application, the triggering application will be dismissed. Class C station licensees must serve on triggering applicants copies of any FAA submissions related to the application grant process. If the construction is not completed as authorized, the subject Class C station will be reclassified automatically as a Class C0 station. The reclassification procedure also may be initiated through the filing of an original petition for rule making to amend the FM Table of Allotments as set forth in Note 2 to § 1.420(g).

#### **47 C.F.R. § 73.5005 Filing of long-form applications.**

(a) Within thirty (30) days following the close of bidding and notification to the winning bidders, each winning bidder must submit an appropriate long-form application (FCC Form 301, FCC Form 346, or FCC Form 349) for each construction permit or license for which it was the high bidder. Long-form applications filed by winning bidders shall include the exhibits required by § 1.2107(d) of this chapter (concerning any bidding consortia or joint bidding arrangements); § 1.2110(j) of this chapter (concerning designated entity status, if applicable); and § 1.2112 of this chapter (concerning disclosure of ownership and real party in interest information, and, if applicable, disclosure of gross revenue information for small business applicants).

(b) The long-form application should be submitted pursuant to the rules governing the service in which the applicant is a high bidder and according to the procedures for filing such applications set out by public notice. When electronic procedures become available for the submission of long-form applications, the Commission may require all winning bidders to file their long-form applications electronically.

(c) An applicant that fails to submit the required long-form application under this section, and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and shall be subject to the payments set forth in 47 CFR 1.2104(g).

(d) An applicant whose short-form application, submitted pursuant to § 73.5002(b), was not mutually exclusive with any other short-form application in the same service, or whose short-form application was mutually exclusive only with one or more short-form applications for a noncommercial educational broadcast station, as described in 47 U.S.C. 397(6), shall submit an appropriate long-form application within thirty (30) days following release of a public notice identifying any such non-mutually exclusive applicants. The long-form application should be submitted pursuant to the rules governing the relevant service and according to any procedures for filing such applications set out by public notice. The long-form application filed by a non-mutually exclusive applicant need not contain the additional exhibits, identified in paragraph (a) of this section, required to be submitted with the long-form applications filed by winning bidders. When electronic procedures become available, the Commission may require any non-mutually exclusive applicants to file their long-form applications electronically.

#### **47 C.F.R. § 73.5006 Filing of petitions to deny against long-form applications.**

(a) As set forth in 47 CFR 1.2108, petitions to deny may be filed against the long-form applications filed by winning bidders in broadcast service auctions and against the long-form applications filed by applicants whose short-form applications were not mutually exclusive with any other applicant, or whose short-form applications were mutually exclusive only with one or more short-form applications for a noncommercial educational broadcast station, as described in 47 U.S.C. 397(6).

(b) Within ten (10) days following the issuance of a public notice announcing that a long-form

application for an AM, FM or television construction permit has been accepted for filing, petitions to deny that application may be filed. Within fifteen (15) days following the issuance of a public notice announcing that a long-form application for a low-power television, television translator or FM translator construction permit has been accepted for filing, petitions to deny that application may be filed. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

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

(d) Broadcast construction permits will be granted by the Commission only if the Commission denies or dismisses all petitions to deny, if any are filed, and is otherwise satisfied that an applicant is qualified, and after full and timely payment of winning bids and any applicable late fees. See 47 CFR 73.5003. Construction of broadcast stations shall not commence until the grant of such permit or license to the winning bidder and only after full and timely payment of winning bids and any applicable late fees.