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

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264
	)	

FIRST REPORT AND ORDER

Adopted: August 6, 1998 **Released:** August 18, 1998

By the Commission: Chairman Kennard issuing a separate statement; Commissioners Furchtgott-Roth and Tristani dissenting in part and concurring in part and issuing a joint statement.

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I. INTRODUCTION

1. By this *First Report and Order*, we implement provisions of the Balanced Budget Act of 1997, which expanded the Commission's competitive bidding authority under Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j), by adding provisions governing auctions for broadcast services.[1] We adopt general competitive bidding procedures to select among mutually exclusive applicants for commercial analog broadcast service and Instructional Television Fixed Service (ITFS) licenses. We adopt herein a "new entrant" bidding credit to further the goals of the designated entity provisions of Section 309(j). We note, however, that we intend to continue our review of the barriers to entry or growth that may exist for small, minority- and women-owned businesses in broadcasting, and make future adjustments to our auction rules, as appropriate, in light of these studies. In addition, pursuant to our discretion under Section 309(l) to utilize either comparative hearings or competitive bidding procedures to resolve certain mutually exclusive commercial broadcast applications filed before July 1, 1997, we conclude that all of these pre-July 1st applications should be resolved by competitive bidding procedures. We also decide in this *First Report and Order* to resolve pending comparative renewal proceedings that are outside the scope of our auction authority under Sections 309(j) and 309(l) of the Communications Act through comparative hearings in which the applicants may present whatever evidence they believe relevant, with the renewal expectancy remaining the most important factor.

II. BACKGROUND AND SUMMARY

2. As fully described in the *Notice of Proposed Rulemaking* in this proceeding,[2] the Commission has traditionally used comparative hearings to decide among mutually exclusive applications to provide commercial broadcast service, and it has used a system of random selection to award certain types of broadcast licenses, such

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

[2] 12 FCC Rcd 22363 (1997) (hereafter *Notice*).

as low power television and television translator, pursuant to Section 309(i), 47 U.S.C. § 309(i). For purposes of comparative hearings, the Commission has developed a variety of comparative criteria,[3] including the "integration" of ownership and management, which presumed that a station would offer better service to the extent that its owner(s) were involved in the station's day-to-day management. However, in *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993) (*Bechtel II*), the United States Court of Appeals for the District of Columbia Circuit held that "continued application of the integration preference is arbitrary and capricious, and therefore unlawful." The Commission subsequently froze all ongoing comparative cases (including comparative renewal cases) pending resolution of the questions raised by *Bechtel II*.[4]

3. Subsequently, on August 5, 1997, Congress enacted the Balanced Budget Act of 1997, which expanded the Commission's auction authority under Section 309(j) of the Communications Act to include commercial broadcast applicants. Amended Section 309(j) provides that, except for licenses for certain public safety noncommercial services and for certain digital television services and noncommercial educational or public broadcast stations, "the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding . . . [i]f . . . mutually exclusive applications are accepted for any initial license or construction permit." Balanced Budget Act of 1997, § 3002(a)(1), *codified as* 47 U.S.C. § 309(j). In addition, Section 3002(a)(2), *codified as* 47 U.S.C. § 309(i), amends Section 309(i) to terminate the Commission's authority to issue any license through the use of a system of random selection after July 1, 1997, except for licenses or permits for stations defined by Section 397(6) of the Communications Act (*i.e.*, noncommercial educational or public broadcast stations). Finally, Section 3002(a)(3) adopts Section 309(l), *codified as* 47 U.S.C. § 309(l), which governs the resolution of pending comparative broadcast licensing cases. Specifically, it says the Commission "shall have the authority" to resolve mutually exclusive applications for commercial radio or television stations filed before July 1, 1997 by competitive bidding procedures. It specifies further that any auction conducted under this provision must be restricted to persons filing competing applications before July 1, 1997.

4. As a result of the Budget Act, the Commission no longer has the option of resolving competing applications for commercial broadcast stations by comparative hearings except for certain applications filed before July 1, 1997, and it lacks the authority to resolve competing applications for commercial broadcast stations by a system of random selection. The Commission began this rulemaking proceeding to implement these provisions of the Budget Act.

5. In the *Notice*, the Commission tentatively proposed to adhere to the Commission's existing competitive bidding procedures that are already in place for non-broadcast services, set forth in 47 C.F.R. §§ 1.2101-1.2111, subject to any changes made in these procedures in the ongoing *Part 1 Rulemaking*, where the

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

[4] *Public Notice, FCC Freezes Comparative Hearings*, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995). Also, following *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (*Bechtel I*), and again following *Bechtel II*, the Commission issued further notices of proposed rulemaking. In *Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5475 (1993), it proposed to amend 47 C.F.R. § 73.3597, which governs the assignment and transfer of broadcast authorizations to lengthen the period of time that a successful applicant receiving a grant after a comparative hearing must operate its station before selling it. Similar issues had been raised in a petition for reconsideration filed by Black Citizens for a Fair Media in GEN Docket No. 90-264 and in responsive comments. In *Second Further Notice of Proposed Rulemaking*, 9 FCC Rcd 2821 (1994), the Commission sought comments on a variety of issues raised by *Bechtel II*.

Commission had proposed certain modifications to those procedures.[5] We invited interested parties to identify any procedures that are inappropriate for broadcast auctions and to propose alternatives. After the release of the *Notice* in this proceeding, the Commission adopted a *Third Report and Order and Second Further Notice of Proposed Rulemaking* in the *Part 1 Rulemaking*, 13 FCC Rcd 374 (1997) (hereafter *Third Report and Order*), in which it modified its competitive bidding procedures in all auctionable services in an effort to streamline the Commission's regulations, make the auction process more efficient, and provide more guidance to auction participants. The general competitive bidding procedures for future applications that are subject to auctions are discussed in Section III(C).

6. In addition to seeking comment on competitive bidding procedures for broadcast auctions, the *Notice* requested comment on a variety of other issues raised by the auction legislation, including our tentative conclusions regarding the scope of Section 309(l). Section III(A) reviews the statutory framework for broadcast auctions, and the special statutory provisions relating to pending comparative licensing cases in Section 309(l). Resolution of the frozen *Bechtel* cases is addressed in Section III(B). Special procedures for pending applications which will be resolved by competitive bidding procedures, either because such resolution is statutorily mandated or because we have concluded that it will better serve the public interest, are outlined in Section III(C). Our statutory obligation to use competitive bidding to award ITFS licenses is discussed in Section III(D). Section III(E) describes how we will handle pending comparative renewal proceedings, which by statute may not be resolved through competitive bidding. Finally, Section III(F) addresses a recusal request filed in regard to this proceeding.

III. DISCUSSION

A. Statutory Overview

1. General Authority to Use Competitive Bidding to Award Secondary and Primary Commercial Broadcast Licenses

7. As indicated above, the Commission's authority to award spectrum licenses is set forth in Section 309(j) of the Communications Act. Prior to the enactment of the Budget Act, Section 309(j) provided that the Commission "shall have the authority . . . to grant . . . any initial license or construction permit . . . through the use of a system of competitive bidding," but that authority was limited to awarding licenses for certain non-broadcast uses of the electromagnetic spectrum and required a determination by the Commission that "a system of competitive bidding will promote the objectives described in" Section 309(j)(3). By virtue of the enactment of the Budget Act, however, Section 309(j)(1) now reads:

> If, consistent with the obligations described in paragraph (6)(E) [to avoid mutual exclusivity], 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.

(emphasis added.)

[5] *See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686 (1997) (hereafter *Part 1 Rulemaking*).

8. Given the express language of amended Section 309(j)(1) providing that the Commission shall grant any initial license or permit through a system of competitive bidding, we tentatively concluded in the *Notice*, 12 FCC Rcd at 22379 (¶ 40), that we are required to use auctions for all pending and new mutually exclusive applications to provide secondary broadcast service, such as low power television (LPTV), and FM and television translators. We also tentatively read Section 309(j)(1) as mandating that, except for certain pending licensing cases, the resolution of which is expressly governed by Section 309(l), and certain digital stations governed by Section 309(j)(2), the Commission must use competitive bidding to award authorizations for all new primary commercial broadcast stations, if mutually exclusive applications are filed.

9. ***Discussion***. Based upon the broad, explicit language of Section 309(j)(1), we continue to believe that auctions are mandatory for all secondary commercial broadcast services (*e.g.*, LPTV, FM translator and television translator services). Similarly, we find that, except for certain pending applications that are subject to Section 309(l), our auction authority is mandatory, rather than permissive, for all full power commercial radio and analog television stations. Specifically, our general auction authority set forth in Section 309(j)(1), as amended, now provides that the Commission "*shall* grant" licenses by competitive bidding and it no longer restricts the type of spectrum license which may be awarded through competitive bidding or requires an affirmative public interest determination that the use of competitive bidding will serve the objectives of the statute.

10. In this regard, we disagree with the small number of commenters who contend that we lack statutory authority to use competitive bidding to award licenses to provide secondary broadcast service. Nothing in the statutory language or in the accompanying legislative history indicates that the requirement to use competitive bidding for "any initial license or construction permit" is limited to full power radio and analog television stations, or that Congress intended such a limitation. Nor are secondary commercial broadcast service licenses exempted from the auction requirement under Section 309(j)(2), which enumerates the certain types of spectrum licenses that are not subject to competitive bidding. We find no ambiguity in the statutory language as to the requirement to auction these applications. Moreover, the legislative history does not support the contention that Congress intended to limit auction authority to those types of commercial broadcast licenses generally awarded through the comparative hearing process. The Conference Report states that "[a]ny mutually exclusive applications for radio or television broadcast licenses received after June 30, 1997, shall be subject to the Commission's rules regarding competitive bidding, including applications for *secondary broadcast services* such as low power television, television translators, and television booster stations."[6] This list of secondary broadcast service licenses is illustrative rather than exhaustive. For this reason, the omission of FM translators from that list does not persuade us, as a few commenters urge,[7] that Congress intended to exempt such applications from competitive bidding.

11. We continue to believe, moreover, that all pending mutually exclusive applications for these secondary broadcast services must be resolved through a system of competitive bidding. Nothing in Section 309(j)(1) suggests that the requirement to use auctions applies only to applications filed in the future. The only statutory reference to pending applications is contained in Section 309(l). This provision governs the resolution of pending comparative licensing cases but applies only to "competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997." As set forth in greater detail in Section III(B) below, our authority to auction these applications is permissive, rather than mandatory. Whether we have discretion not to use auctions for pending mutually

[6] H.R. Conf. Rep. 217, 105th Cong. 1st Sess. 573 (1997) (hereafter Conference Report) (emphasis added).

[7] *See, e.g.*, Reply Comments of Beacon Broadcasting Corp. at 2; Duhamel Broadcasting Enterprises at 4-6.

exclusive commercial secondary broadcast applications filed before July 1, 1997, therefore, depends on whether such applications fall within the scope of subsection (l).

12. We do not believe that Congress intended to include these secondary broadcast applications within Section 309(l). As several commenters note, licenses to provide secondary broadcast services are not awarded through the *comparative* hearing process.[8] Yet, Section 309(l) is expressly titled, and thus governs, the "[r]esolution of pending comparative licensing cases." *See also* Conference Report at 573 (referring to Section 309(l) as pertaining to "pending comparative licensing cases"). Given that no "pending comparative licensing cases" exist in the secondary broadcast services, we conclude that Congress intended Section 309(l) to apply only to pending pre-July 1, 1997 applications that formerly were resolved through comparative hearings, *i.e.*, commercial full service stations. Moreover, although we previously resolved competing LPTV applications by a system of random selection pursuant to Section 309(i), the Budget Act withdrew that authority. *See* Budget Act, § 3002(a)(2). Given the simultaneous termination of our lottery authority with respect to these pending applications, we do not believe that Congress contemplated that we instead use comparative hearings, in lieu of auctions, particularly since we do not currently award secondary broadcast service licenses through the comparative hearing process. Accordingly, we conclude that all mutually exclusive applications for secondary broadcast service must be awarded through auctions.

2. Statutory Authority to Use Competitive Bidding for Modification Applications

13. In the *Notice*, 12 FCC Rcd at 22382 (¶ 47), we asked for comment on whether we should apply competitive bidding procedures to mutually exclusive applications for major modifications of existing broadcast facilities, as well as applications for minor modifications, which can be mutually exclusive in certain rare instances. Some commenters opposing this proposal argue that the Commission does not have authority to auction modification applications, because Section 309(j) states that mutually exclusive applications for "any initial license or construction permit" shall be subject to competitive bidding. 47 U.S.C. § 309(j)(1).[9]

14. After further consideration, we conclude that the Commission is not precluded by the terms of Section 309(j) from auctioning mutually exclusive modification applications. Applications proposing major changes to existing facilities are, in our view, analogous to applications for construction permits for new stations. In the *Second Report and Order* originally adopting general competitive bidding procedures, we concluded that it may be appropriate in some cases to treat a major modification application as an initial application for competitive bidding purposes. In particular, we said that if the changes to an existing facility proposed in a modification application are substantial and if such modification application is mutually exclusive with another major modification application or with an initial application, then resolving the mutual exclusivity by competitive bidding may be appropriate.[10] We note that subjecting a modification application to competitive bidding may also be particularly appropriate where it is mutually exclusive with one (or more) initial applications, as Section 309(j) mandates the use of auctions where mutually exclusive applications are accepted for "*any* initial license

[8] *See, e.g.*, Comments of Kidd Communications at 5-6; Reply Comments of Beacon Broadcasting Corp. at 2.

[9] *See, e.g.*, Comments of Cox Radio, Inc. at 2; Noncommercial Educational Broadcast Licensees at 9; KM Broadcasting, Inc. at 5; Rio Grande Broadcasting Co. at 13; Heidelberg-Stone Broadcasting Co. at 13; ITFS Parties at 7; Reply Comments of WB Television Network at 12.

[10] *See Second Report and Order, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 9 FCC Rcd 2348, 2355 (1994) (hereafter *Second Report and Order*), *recon. granted in part, Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) (hereafter *Second Memorandum Opinion and Order*).

or construction permit." 47 U.S.C. § 309(j)(1) (emphasis added).

15. We note, moreover, that our approach here is consistent with our previous interpretation of the identical statutory language in Section 309(i) authorizing the Commission to award spectrum licenses through a system of random selection "[i]f there is more than one application for *any initial license or construction permit*." 47 U.S.C. § 309(i)(1)(A) (1996) (emphasis added). In adopting lottery procedures for the LPTV service, we construed the statutory phrase "any initial license or construction permit" to authorize lotteries of mutually exclusive major modification applications, and our lottery procedures for that service therefore encompassed such applications. *See Second Report and Order* in Gen. Docket No. 81-768, 93 FCC 2d 952, 981-82 (1983). When Congress amended Section 309(i) to terminate our authority to use lotteries except with respect to the award of noncommercial broadcast licenses, 47 U.S.C. § 309(i)(5)(B) (1997), it retained the statutory language "any initial license or construction permit." That same language is repeated verbatim in the provision setting forth our general auction authority. *See* Section 309(j)(1). Consistent with our previous interpretation of Section 309(i) as it pertains to major modification applications, we therefore construe the identical language in Section 309(j)(1) as authorizing us to resolve mutually exclusive major modification applications through a system of competitive bidding.

16. Our determination to subject mutually exclusive major modification applications to competitive bidding is additionally supported by the absence of another viable method for resolving instances of mutual exclusivity in a timely and efficient manner. Although some commenters oppose the auctioning of modification applications, they do not believe that comparative hearings are a "realistic option" for resolving competing modification applications,[11] and they do not suggest another method of resolving mutual exclusivities that are as efficient as auctions. For example, some commenters simply oppose the use of auctions to resolve competing modification applications without suggesting any alternatives,[12] while others suggest procedures that seem time consuming and administratively cumbersome. One commenter recommends the adoption of a point accumulation system to permit the resolution of mutually exclusive modification applications.[13] We do not believe that the development of a new point system for the sole purpose of evaluating a limited number of broadcast major modification applications would be preferable to utilizing the Commission's well-established auction system to resolve mutually exclusive modification applications. Resolving competing major modification applications on a comparative basis would most likely result in disagreements over criteria to utilize in developing any such new comparative system.[14] Another commenter generally contends that, if modification applications become mutually exclusive, the Commission "staff [should] work with the parties to eliminate [the] mutual exclusivity." If a technical solution cannot be found, then the Commission should allow "the use of alternative dispute resolution techniques or other settlement avenues before considering competitive bidding."[15] This suggestion appears administratively burdensome for the Commission and time consuming for the parties; moreover, if the mutual

[11] *See* Comments of Cox Radio, Inc. at 3 (given rejection by courts of previous comparative hearing criteria, it seems a futile exercise to try to develop in a timely manner new comparative criteria that would withstand judicial scrutiny).

[12] *See, e.g.*, Reply Comments of National Public Radio, Inc., *et al*. at 7; Comments of Kayo Broadcasting at 1-4.

[13] *See* Comments of Six Video Broadcast Licensees at 6.

[14] *See, e.g.*, Comments of Independent Broadcast Consultants, Inc. at 5 (resolve modifications according to "relative merit based on increased population served"); Edward Czelada at 2 (major change applications should be granted "solely on existing public service issues, such as coverage, first service and population").

[15] Comments of the National Association of Broadcasters at 3. This commenter did not specify what "alternative dispute resolution" methods might be utilized.

exclusivity is not resolved by these unidentified alternative dispute resolution techniques, then the use of auctions (or some other method of resolution) would still be required.

17. We recognize, however, that competing major modification applications can often be resolved by changes to the engineering proposals submitted by applicants and may raise special considerations where settlements are particularly appropriate. We will therefore allow applicants who have, under the window filing procedures adopted herein for new and major modification applications, filed either competing major modification applications, or competing major modification and new applications, to resolve their mutual exclusivities by means of engineering solutions or settlements during a limited period after the filing of short-form applications but before the start of the auction.[16] We realize that allowing competing major modification applicants to settle following the filing of short-form applications is not consistent with the terms of the general Part 1 anti-collusion rule, which is triggered by the filing of short-form applications. *See infra* ¶ 155. However, that rule was formulated in the context of geographic area licensing, rather than site-specific licensing as in broadcast where determinations of mutual exclusivity can depend on specific technical proposals, which in some instances may be altered so as to allow the grant of several formerly mutually exclusive applications. We will therefore allow parties with competing major modification applications this limited opportunity to settle or otherwise resolve their mutual exclusivities following submission of their short-form applications, in accordance with our statutory directive "to use engineering solutions . . . and other means" to resolve competing applications. 47 U.S.C. § 309(j)(6)(E). We emphasize that any such settlement agreements must comply with all Commission regulations, and that the Commission will proceed to auction promptly any competing major modification applications that are not resolved by the parties.

18. In the past, we have designated for hearing groups of mutually exclusive broadcast applications involving major modification applications.[17] Given Congress' expressed preference in the Budget Act for competitive bidding as a method of selecting from among competing applicants, we believe that utilizing auctions to resolve competing major modification applications would now be appropriate. Applying competitive bidding procedures to modification applications "comports with our objectives of increasing competition and awarding spectrum to those who value it most highly."[18] Auctions are moreover an efficient method of resolving mutually exclusive applications that should speed the grant of construction permits to competing parties and the improvement or initiation of service to the public. For these reasons, we will apply competitive bidding procedures, as set forth in detail below, to resolve mutual exclusivities among major modification applications and between major modification and initial applications, if the parties are unable to resolve their mutual exclusivities during a limited period, as established by public notice, following the filing of short-form applications.

19. We will not, however, generally subject competing minor modification applications to auction procedures. Given the infrequency with which minor modification applications are mutually exclusive and the less significant changes usually proposed in minor modification applications, we will, as discussed in detail

[16] The precise period for pre-auction settlement of competing modification applications will be specified in the public notice identifying the mutually exclusive applicants who filed in the window.

[17] *See, e.g., Palmetto Communications Co.*, 5 FCC Rcd 5154 (ALJ 1990); *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485 (Rev. Bd. 1984) (cases involving major modification applications resolved on basis of typical comparative criteria, including integration).

[18] *Second Report and Order*, 9 FCC Rcd at 2355 (concluding that "there is merit" in treating major modification applications as akin to initial applications for purposes of competitive bidding, at least in some circumstances).

below, encourage parties "to use engineering solutions, negotiation . . . and other means" to resolve any mutual exclusivities. 47 U.S.C. § 309(j)(6)(E). The commenters oppose utilizing auction procedures to resolve competing minor modification applications,[19] and we see less utility to be gained from subjecting minor change applications to competitive bidding procedures. Accordingly, in the rare instances in which minor modification applications become mutually exclusive, the parties will be expected to work together to resolve the mutual exclusivity. *See infra* ¶¶ 177-178. We furthermore note that, particularly if our proposal in another proceeding regarding modifications is ultimately adopted, fewer modifications in the broadcast services will be regarded as "major."[20]

3. Statutory Exemption for Noncommercial and Public Broadcast Stations

20. Section 309(j)(2) sets forth three types of spectrum licenses to which our competitive bidding authority does not apply. In addition to licenses for certain public safety radio services and certain digital television stations, we may not use competitive bidding to award licenses for "stations described in section 397(6) of this Act." Section 397(6) of the Communications Act, 47 U.S.C. § 397(6), defines the terms "noncommercial educational broadcast station" and "public broadcast station."[21] To effectuate this exemption, we proposed in the *Notice*, 12 FCC Rcd at 22383 (¶ 50), that such nonprofit applicants would be exempt from competitive bidding when they applied to use reserved broadcast channels, for which applicants must be noncommercial educational entities. Auctions would be used for nonreserved frequencies, however, where applicants may be either commercial or noncommercial educational entities. We stated that we would treat nonprofit applicants for commercial frequencies, including those who could qualify under 47 C.F.R. § 73.503 as non-profit educational organizations, no differently under the proposed filing and competitive bidding procedures than any other mutually exclusive applicant for commercial frequencies.

21. ***Discussion***. Under current Commission regulations, certain television channels and FM frequencies are reserved solely for noncommercial educational use. Nonreserved broadcast channels are usually called "commercial." Currently, noncommercial educational applicants may apply for commercial channels under the same application procedures as commercial applicants. Upon establishment of their qualifications under Sections 73.503 or 73.621, the stations are licensed as noncommercial stations. Because of this dichotomy and as the comments we received in response to the *Notice* made clear, applying the exemption set forth in Section 309(j)(2)(C) in situations where one or more of the mutually exclusive applicants for a broadcast license on a commercial frequency seeks to establish a noncommercial broadcast station is not a simple matter.

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[19] *See, e.g.*, Comments of Cox Radio, Inc. at 6 (opposing auctioning minor modification applications "under any circumstances").

[20] As several commenters urge in this proceeding, we have proposed in another proceeding to alter the definitions of "major" and "minor" modifications in the AM service and FM translator service, so that fewer modifications in those services are regarded as major. *See* Comments of Cox Radio, Inc. at 6; Jacor Communications, Inc. at 4-5. If this proposal is adopted, then fewer types of modification applications would be subject to auction if mutually exclusive. *See Notice of Proposed Rule Making and Order, 1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, FCC 98-117 at ¶¶ 48-50 (rel. June 15, 1998) (*Technical Streamlining Notice*). Virtually all modifications in the FM and television services are, under our current rules, already regarded as minor.

[21] This provision specifies that "[t]he[se] terms . . . mean a television or radio broadcast station which --
(A) under the rules and regulations of the Commission in effect on the effective date of this paragraph, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or
(B) is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes.

22. A number of commenters, including noncommercial educational broadcasters, note that Section 309(j)(2)(C) explicitly provides that the Commission's auction authority does not apply to licenses issued "for stations described in section 397(6)" and that Section 397(6) of the Act, which defines noncommercial educational and public stations, is not expressly limited to stations operating on reserved frequencies. Accordingly, they urge that mutually exclusive applications filed by noncommercial educational or public broadcast entities are exempt from competitive bidding, regardless of whether the frequency applied for is reserved or whether there are also commercial applicants for that frequency.[22]

23. Other commenters oppose this approach. They contend that licenses or construction permits are "issued by the Commission - for stations described in section 397(6)" only in those circumstances where the Commission knows in advance that the ultimate licensee will be a noncommercial educational or public entity. Thus, they would argue, only in situations where by definition the license will be issued to an entity described in Section 397(6), *i.e.*, a reserved frequency is involved, are auctions prohibited. [23] These commenters point out that substantial complexities are raised by interpreting the competitive bidding exemption for noncommercial educational broadcasters to include such broadcasters when applying for commercial channels. For example, if ten commercial entities and one noncommercial entity apply for a nonreserved frequency and if auctions may not be used to resolve the mutual exclusivity because of the presence of the single noncommercial applicant, it is not clear what equities and public policies would govern the procedure to be used to choose among the applicants.

24. We do not believe that we have received sufficiently focused comment to finally resolve the noncommercial issue in this proceeding. While the exemption in Section 309(j)(2)(C) for noncommercial educational broadcasters clearly precludes us from using competitive bidding to award broadcast station licenses on the reserved noncommercial frequencies, there are difficult issues as to how we should apply the provision when licensing frequencies in the commercial band. Different interpretations of the congressional intent of Section 309(j)(2)(C) and its consequences can be made in the context of our allocation and licensing practices. One possible approach would be to prohibit the use of auctions whenever one or more of the competing applicants for a nonreserved channel is a Section 397(6) entity. Another possible approach would be to conclude that frequencies in the commercial band could not be used for noncommercial stations. Yet another option could be to adopt some form of hybrid procedure involving both lotteries and auctions when noncommercial and commercial applicants compete for commercial channels.[24]

25. We did not focus on the complicated nature of this issue in our *Notice* in this proceeding. As a result, we believe that our decision would be aided by a further round of comment. For example, a related question is whether the Commission should modify its standards that allow noncommercial entities to seek to reclassify

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[22] *See, e.g.*, Comments of Noncommercial Educational Broadcast Licensees at 3-4; National Public Radio, Inc., *et al*. at 5-6; Board of Education of the City of Atlanta, *et al.* at 3-4; Association of America's Public Television Stations at 5-6; Beacon Broadcasting, Inc. at 2.

[23] *See* Reply Comments of Jacor Communications, Inc. at 3-6; Lakefront Communications, Inc. at 2-6. The comments of JTL Communications Corporation (at 3) also support the Commission's proposal in ¶ 50 of the *Notice*, arguing that nonprofit applicants should compete in the market like other applicants and that nonprofit applicants were not necessarily faced with the same financial handicaps as small or minority-owned businesses.

[24] The Commission has the authority to award licenses for stations described in Section 397(6) by lottery. *See* 47 U.S.C. § 309(i) as amended by Budget Act.

commercial frequencies as noncommercial.[25] We intend to further develop all possible options for resolving this question and seek further comment in the outstanding rulemaking proceeding (MM Docket No. 95-31) regarding the reexamination of the comparative standards for noncommercial educational applicants. Thus, we will not proceed to auction at this time any cases where both noncommercial and commercial applicants have filed competing applications for nonreserved channels. We will resolve these cases following the release of a report and order in our noncommercial proceeding, MM Docket No. 95-31, although prior to resolution by the Commission, the pending applicants involved in such cases may of course agree to a settlement that complies with all Commission regulations. *See infra* ¶¶ 76-77. In ultimately resolving this question of awarding licenses to noncommercial applicants applying for commercial channels, our goal will be to maximize participation of noncommercial broadcast entities consistent with the statute.

B. Resolution of Comparative Initial Licensing Cases Involving Applications Filed Before July 1, 1997

1. Discretion to Use Auctions in Pending Cases

26. As noted above, Section 309(l) expressly governs the resolution of pending mutually exclusive applications for new commercial radio and television stations filed before July 1, 1997. We tentatively concluded in the *Notice* that this provision accords us the discretion to decide such cases either by a competitive bidding proceeding or through the comparative hearing process. In this regard, we relied on statutory language providing that "the Commission shall . . . have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) to assign such license or permit." We noted, however, that the Conference Report contradicted this reading of the provision in that it states that the section "*requires* the Commission to use competitive bidding to resolve any mutually exclusive applications" filed "prior to July 1, 1997."[26] We asked for comments on whether the statute could be read to require that these pending pre-July 1, 1997 applications must be resolved by competitive bidding procedures.

27. ***Discussion.*** We continue to believe that we have discretion to resolve comparative licensing proceedings that involve pre-July 1, 1997 applications for new commercial radio and television stations by either competitive bidding procedures or through the comparative hearing process. The vast majority of commenters either support our tentative reading of the statute or acknowledge without addressing the issue that we have statutory authority to use comparative hearings for these cases.[27] We disagree with commenters that either the absence of an express reference to the pre-July 1, 1997 applications in the Section 309(j)(2) exemptions, or the indication in the legislative history accompanying Section 309(l) that auctions are "required," compels a

[25] Under our existing procedures, we grant requests by applicants to reserve for noncommercial educational use FM channels located outside the reserved band, only if channels in the reserved band are not available because of foreign allocations (Canadian or Mexican) or potential interference to operations on VHF television Channel 6. *See, e.g., Lindside, West Virginia*, 2 FCC Rcd 6046 (Alloc. Br. 1987).

[26] Conference Report at 573 (emphasis added).

[27] *See, e.g.*, Comments of KM Communications, Inc. at 2; Columbia FM Limited Partnership at 2; Stephen M. Cilurzo, attaching Letter dated October 17, 1997 from Senator John McCain, Chairman, Committee of Commerce, Science, and Transportation to Stephen Cilurzo ("Section 3002 of Title III authorizes the Federal Communications Commission (FCC) to select permittees for radio and television. The authority to use auctions is permissive, not mandatory.").

conclusion that auctions are required.[28]

28. The explicit language of Section 309(l)(1) provides that the Commission "shall have the authority to conduct a competitive bidding proceeding," in contrast to the mandatory language of Section 309(j)(1) providing that "the Commission shall grant the license . . . through a system of competitive bidding." The language of Section 309(l), we believe, unambiguously addresses a situation in which auctions are permissible, but are not required. There was thus no reason for Congress to exempt these applications from the Commission's auction authority in Section 309(j)(2) unless Congress meant, in contrast to the permissive language of Section 309(l)(1), to prohibit use of auctions to resolve such applications.

29. Some commenters urge that the absence of language in Section 309(l) affirmatively stating that the Commission may use comparative hearings to resolve these cases signifies that auctions are mandatory rather than permissive.[29] We disagree. Until enactment of the Budget Act, the Commission had disposed of such initial license applications exclusively through the comparative hearing process. Thus, in interpreting Section 309(l), we attach little significance, for example, to Section 3002(a)(2) of the Budget Act, which repeals our lottery authority. Given the Commission's exclusive use of comparative hearings to resolve competing applications to provide full power radio and television service, Congress had no reason to provide statutory language affirming the Commission's existing authority to resolve this group of pending cases through the comparative hearing process. By contrast, it had every reason to provide explicit language prohibiting such resolution, if this was what it meant to do.

30. It is a well-established principle of statutory construction that when congressional intent, as reflected in the statutory language, is clear "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1985). Here, the plain language of Section 309(l)(1) raises no question that justifies resort to the legislative history for clarification as to the proper interpretation. Nor can the statement in the legislative history that auctions are "required" for these cases override the plain language of the statute, which does not impose such a requirement but merely affords the Commission authority to use auctions.[30] We also note that a contrary interpretation would render Section 309(l)(1) superfluous, inasmuch as Section 309(j)(1) already provides authority to use auctions in these cases. This provides additional support, consistent with the statute's express language, that in Section 309(l)(1) Congress intended to single out these pending cases for different treatment, by affording the Commission discretion to determine whether the use of auctions would be appropriate. For these reasons, we conclude that our auction authority for the pre-July 1, 1997 applications is permissive rather than mandatory, and that we have authority to resolve these applications through the comparative hearing process.

2. Public Interest Considerations Favoring Resolution by Competitive Bidding

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[28] *See, e.g.*, Comments of Thomas M. Eells at 1-2; Liberty Productions, LP at 2-3; Willsyr Communications, LP at 16; Reply Comments of Irene Rodriquez Diaz de McComas at 3.

[29] *See, e.g.*, Comments of Liberty Productions, LP at 2-3.

[30] *See, e.g., United Air Lines, Inc. v. CAB*, 569 F.2d 640, 647 (D.C. Cir.1977) ("We find no mandate in logic or in case law for reliance on legislative history to reach a result *contrary* to the plain meaning of a statute . . . .") (emphasis in original). *See also Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) ("It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'") (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); *Greyhound Corp. v. Mt. Hood Stages, Inc*., 437 U.S. 322, 330 (1978) (same, citing other cases).

31. In this section we address the general issue of whether to use a system of competitive bidding to resolve mutual exclusivity among any of the pre-July 1, 1997 applications subject to Section 309(l). Special circumstances relating to certain frozen hearing cases, and particularly whether equitable considerations warrant a different approach in those cases, are discussed in Section III(B)(3) below.

32. In the *Notice*, 12 FCC Rcd at 22369-72 (¶¶ 14-19), we tentatively concluded that resolving the pending comparative licensing cases subject to Section 309(l) through a system of competitive bidding would serve the public interest. At the outset, we noted our statutory authority to alter our process for choosing among license applications and to apply amended processing rules to pending applications. We observed that the vast majority of pending applicants, having filed after *Bechtel II* and the imposition of the comparative freeze, were unlikely to have relied on any particular selection criteria. *Id.* at 22370 (¶ 15). And, as to those pending applicants filing before *Bechtel*, we noted that the court's invalidation of the integration criterion precluded us from deciding cases according to applicants' reasonable expectations when they filed. In these circumstances, we tentatively concluded that resolving the pending cases by auction was not unfair even for these applicants.

33. We also cited our continuing concern with the potential delay, administrative costs, and uncertainty associated with comparative hearings and the relative advantages of auctions in terms of expediting service to the public in a more cost-effective manner, allocating the spectrum to the applicant valuing it the most, and recovering for the public a portion of the value of spectrum made available for commercial use. We sought comments on our tentative conclusion that generally resolving these competing pre-July 1, 1997 applications through a system of competitive bidding would better serve the public interest than resolving them through the comparative hearing process. In this context, we also proposed to refund, upon request, all hearing fees paid in cases in which we ultimately use competitive bidding procedures to select the winner, as well as filing fees actually paid by applicants declining to participate in the auction.

34. ***Discussion***. We continue to believe that auctions will generally be fairer and more expeditious than deciding the pending mutually exclusive applications filed before July 1, 1997 through the comparative hearing process. We conclude that auctions will generally expedite service and better serve the public interest in these cases. Based upon our long experience with the comparative process, we believe that once the competitive bidding procedures, as well as any special processing rules for these pending comparative cases are in place, auctions will result in a more expeditious resolution of each particular case, thereby expediting the initiation of new broadcast service to the public. In this regard, we note that, despite the 180-day period during which we waived our settlement rules as required by Section 309(l)(3), there are approximately 150 proceedings involving more than 600 pre-July 1, 1997 mutually exclusive applications that remain to be decided.[31]

35. Commenters are also correct that holding an auction in these cases will not eliminate possible litigation over the basic qualifications of the winning bidder. We note, however, that the Communications Act authorizes the Commission to prescribe expedited procedures for the resolution of issues concerning the qualifications of winning bidders. *See* 47 U.S.C. § 309(j)(5). We adopt such procedures below. *See* Section III(C). Based on our experience with the hearing process, moreover, we believe that any possible delay caused

[31] As of the deadline for filing settlements executed within 180 days after enactment of the Budget Act, settlement agreements had been filed in approximately 225 cases and approximately 150 cases remained to be resolved. Of these approximately 150 cases for which settlement agreements were not filed during the 180-day period, approximately 20 involve noncommercial and commercial applicants competing for nonreserved channels; as described above, resolution of these cases will be addressed in our noncommercial proceeding, MM Docket 95-31. Of the remaining 130 cases involving solely commercial applicants, fewer than ten cases have progressed at least through an Initial Decision by an Administrative Law Judge, and the rest have not been designated for hearing. These numbers could be higher if some pending settlements are not approved.

by such litigation would still be significantly less than what we might reasonably expect if we were to resolve these cases through the comparative hearing process.

36. In this regard, we have long noted the potential for delay inherent in the adjudicatory nature of the comparative process. In connection with a rulemaking initiated in 1989 to explore the possibility of using lotteries to award initial broadcast licenses, for example, we estimated that a routine comparative proceeding can take from three to five years or more to complete after designation of the mutually exclusive applications for hearing, and that complex cases may take much more time.[32] More recently in *Orion Communications Limited v. FCC*, 131 F.3d 176, 180 (D.C. Cir. 1997), the court recognized that repetitious appeals may prolong proceedings for years even after the Commission's decision.

37. Here, the potential for delay is also increased by the court's decision in *Bechtel II* invalidating our central comparative criterion, integration of ownership and management, and the resulting freeze on the processing and adjudication of comparative proceedings in effect since February 1994. The commenters are divided over the ease by which the Commission may resolve the standard comparative issue if it elects not to use auctions to resolve the frozen *Bechtel* cases, and the extent to which *Bechtel II* permits us to modify the existing comparative criteria. But none dispute our assertion in the *Notice*, 12 FCC Rcd at 22366-67 (¶ 5), that the integration criterion has been crucial in recent comparative cases, or urge that we decide these cases without regard to the court's express holding in *Bechtel II*, 10 F.3d at 878, that "continued application of the integration preference is arbitrary and capricious, and therefore unlawful." Moreover, we note many other relevant factors (*e.g.*, local residence, civic participation, past broadcast experience) were "enhancements" of the integration criterion. Determining which of these criteria could best survive *Bechtel II*-type scrutiny and determining how such criteria should now be weighted is a difficult process that no doubt would lead to serious challenges in the courts with the outcome unclear.[33] Indeed, there is wide disparity in the record as to what the best approach would be.[34] The value of developing a revised comparative system (and expending the associated administrative costs)

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[32] *See Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM, and Television Stations By Random Selection*, 4 FCC Rcd 2256, 2257 (1989), cataloguing various factors contributing to this delay, including the heavy use by comparative broadcast applicants of motions to enlarge issues; complex and intricate discovery procedures that materially add to the cost and length of comparative proceedings; lengthy hearings that may involve numerous witness and hearing exhibits; the 30-90 day time period for filing findings with the Administrative Law Judge; the approximately six-month period that it takes the Administrative Law Judge to issue his opinion; and the time for any administrative or judicial appeals.

[33] *See Bechtel II*, 10 F.3d at 886-87 ("[T]he ability to pick persons and firms who will be 'successful' at delivering any kind of service is a rare one, however success might be defined . . . . [I]f success could be captured in a formula, the skill of identifying future successes would not be so scarce and well rewarded. Any sort of recipe that could be discerned would necessarily abstract criteria from a complex web of facts . . . . All these difficulties flow from the statutory scheme itself.").

[34] *See, e.g.*, Comments of Cromwell Group, Inc. at 2 (rely on factors including local ownership and management, local residence, satisfactory technical proposal that will serve the most people, financial ability to operate for one year, and preferences for the applicant that proposed the frequency and filed earlier); United Broadcasters Co. at 5-8 (rely on comparative coverage, broadcast experience, and diversification); Rio Grande Broadcasting Co. at 5 (just exclude integration); John W. Barger at 3 (just exclude integration); Stephen M. Cilurzo at 6-8 (use an equally weighted point system including broadcast experience (enhanced by the length of experience, the areas of expertise and how they relate to the overall success of a new start up broadcast system), past local residence (enhanced by civic involvement, daytime [sic] preference, and best practical [sic] service, but remand the case to the ALJ if this changes the outcome); J. McCarthy Miller & Biltmore Forest Broadcasting FM, Inc. at 8-10 (decide all cases within 90 days based only on broadcast experience enhanced if in the service area, length of experience, and ownership share); Orion Communications Limited at Exhibit 1 (rely on enhancement factors (broadcast experience, broadcast record, local residence in the proposed service area, civic participation of parties in proportion to their equity interests without regard to minority or female ownership), efficient use of the frequency, and diversification); Susan M. Bechtel at 8-10 (exclude integration, female ownership and minority ownership); J&M
Broadcasting Co., Inc. at 6-8 (comparative coverage, past broadcast record, and meaningful civic participation); Heidelberg-

is further attenuated by the fact that it would only be used for these pending cases (and potentially also a very small number of comparative renewal cases) and would have no future applicability. Thus, we conclude that using a system of competitive bidding rather than the comparative hearing process for competing pre-July 1, 1997 applications that are subject to Section 309(l) will avoid the difficulties and potential delays of developing and defending new or modified comparative criteria to apply in the cases that did not settle during the 180-day period that ended February 1, 1998.

38. Moreover, we are acutely aware of the delay already occasioned in all of the frozen *Bechtel* cases. Section 309(j)(3) provides that "[i]n identifying classes of licenses and permits to be issued by competitive bidding," the Commission shall seek to promote "(A) the development and *rapid* deployment of new technologies *. . . for the benefit of the public . . . without administrative or judicial delays*." (emphasis added.) As a more general matter, expedited service to the public is an important public interest consideration. We estimate that it would take many years for the Commission's administrative law judges to adjudicate and decide well over 100 cases. Auctions can be carried out much more quickly. And, whatever the cause of past delay in resolving these cases,[35] we believe that minimizing further delay and now providing new service to the public as quickly as possible best serves the public interest.

39. Some commenters favoring the use of comparative hearings for these pending cases express concern that the switch to auctions will detrimentally affect the quality of broadcast service. They focus particularly on the impact that auctions will allegedly have in terms of securing service that is narrowly tailored to the needs of the small, local community.[36] As to these more general policy concerns, however, Congress itself has made the judgment that auctions are generally preferable to comparative hearings by requiring them for commercial broadcast applications filed on or after July 1, 1997. In giving us discretion to determine whether or not to use auctions in pending cases, we believe Congress intended us to focus on any special circumstances in these cases that would tip the policy balance in favor of comparative hearings, not to re-visit the general congressional determination that broadcast auctions serve the public interest. In any event, it is far from clear that a licensee that wins its license in an auction has less incentive to serve the needs and interests of the community than one who wins in a comparative hearing.[37]

40. Moreover, auctions will have significant public interest benefits. In a 1997 report to Congress, we indicated that our experience with auctions shows that competitive bidding is a more efficient and cost-effective method of assigning spectrum in cases of mutual exclusivity than any previously employed method, including comparative hearings.[38] And, as we stated in the *Notice*, 12 FCC Rcd at 22371 (¶ 18), we have relied on the relative advantages of auctions -- which also include the public interest benefits of encouraging the efficient use of the frequency, assigning the frequency to the eligible party that values it the most and recovering for the public a portion of the value of spectrum made available for commercial use -- in other contexts in which we have faced

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Stone Broadcasting Co. at 5 (just take out integration; *Bechtel* does not authorize any modification of the other criteria); Williams Broadcasting Co. at 4 (rely on diversification).

[35] *See, e.g.*, Comments of Orion Communications Limited at 6.

[36] *See, e.g.*, Comments of Wolfgang V. Kurtz at 1-2; Cromwell Group, Inc. at 1-2.

[37] *Cf. Bechtel II*, 10 F.3d at 884 ("absentee owners thus have strong incentives to ensure that their station complies with the relevant statutes and rules").

[38] *The FCC Report to Congress on Spectrum Auctions*, 13 FCC Rcd 9601, 9612 (1997).

a choice of either using comparative hearings or a system of competitive bidding to resolve mutual exclusivity among license applicants. We believe many of these same benefits will apply in this context.

41. We continue to believe, moreover, that there is no inherent unfairness in using auctions to resolve mutual exclusivity among these pre-July 1, 1997 applications. Commenters are correct that all of these applicants, including those not designated for hearing, filed in response to public notices stating that mutual exclusivity would be resolved by the comparative hearing process.[39] Most, however, filed after *Bechtel II* and the institution of the comparative freeze, which made it clear that some change in the existing comparative criteria was inevitable. While possibly filing with the expectation of participating in a comparative hearing, these applicants clearly had no basis to rely on a particular selection scheme. And, as to those that filed before *Bechtel II*, the court's holding in that case legally precludes us from deciding their pending applications in accordance with their reasonable expectations when they filed their applications.

42. Additionally, it is by no means certain that an applicant that formulated its comparative proposal based on the criteria in effect before *Bechtel II* will have a better chance of prevailing in a comparative hearing than in an auction. This uncertainty, moreover, is unaffected by the strength of its comparative proposal under the pre-*Bechtel II* criteria. The difficulty is that integration, although one of several factors used to predict which applicant will offer the best service, was nevertheless a crucial element of the comparative scheme before *Bechtel II*. Specifically, quantitative integration (*i.e.*, the extent to which the owners would manage the station on a day-to-day full time basis) determines the credit awarded for a variety of qualitative enhancement factors, such as local residence, civic participation, broadcast experience, past broadcast record and minority ownership. Elimination of this criterion, even if all other criteria are retained, may therefore have a profound, largely unpredictable impact on all comparative proposals. Given the pivotal role assigned to quantitative integration and particularly its potential to diminish or nullify all credit for a multiplicity of possible enhancement factors, we cannot predict how an applicant will fare under such a modified comparative system. Nor can we replicate the remaining standards existing before *Bechtel II* in a manner that would preserve the applicants' relative comparative standing prior to *Bechtel II*.

43. And, although the switch to auctions requires that pending applicants spend additional funds to participate in the auction, the statute requires that such auctions be limited to the pending applicants. *See* Section 309(l)(2), 47 U.S.C. § 309(l)(2). This insulates them from having to bid against applicants not previously incurring costs to secure the license and ensures that these previous expenditures will not unfairly disadvantage the pending applicants in the auction. In all likelihood, the amounts bid for the licenses in these cases will reflect the significant amounts already expended by *all* qualified bidders. In these circumstances, and particularly given that we may not lawfully consider the integration criterion after *Bechtel II*, we believe that deciding the competing pre-July 1, 1997 applications by auction entails no inherent unfairness to any of these applicants, including those that had filed their applications before the *Bechtel II* decision.

44. We disagree with commenters that changing the selection process for pending applications filed before July 1, 1997 is impermissibly retroactive or otherwise unlawful.[40] As we indicated in the *Notice*, 12 FCC Rcd at 22369-70 (¶ 14), our statutory authority to alter the way we process applications and to apply the amended

[39] *See, e.g.*, Comments of Stephen M. Cilurzo at 2-3; Rio Grande Broadcasting Co. at 3; Heidelberg-Stone Broadcasting Co. at 3.

[40] *See, e.g.*, Comments of Susan M. Bechtel at 6-8; Lindsay Television, Inc. at 8-10; Throckmorton Broadcasting, Inc. at 3-4.

processing rules to pending applications is well established. The seminal case is *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956), where the Supreme Court upheld the dismissal without a hearing of an application based on a rule adopted after the application was filed. Following *Storer*, the courts have consistently recognized that filing an application creates no vested right to a hearing, and that an application may be dismissed if the substantive standards subsequently change.[41] The pre-July 1, 1997 applicants, whether their applications are pending on the processing line or have been designated for hearing, have no vested right to a comparative hearing that is abridged by our decision to award such authorizations by a system of competitive bidding. Thus, resolving these cases by auction is not a retroactive rule and is not unlawful under *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), because this does not "impair rights a party possessed when [it] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[42] Nor is Section 309(l) retroactive "merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269.

45. Rather, our authority to resolve these cases by auction rather than by comparative hearing depends upon whether that decision is arbitrary and capricious. In this regard, we note that the Commission was upheld in its previous determination to decide by lottery cellular applications that had been filed with the expectation that mutual exclusivity would be decided by comparative hearing. *See Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987). There, as here, legislation afforded the Commission an alternative to deciding mutually exclusive license applications through the comparative hearing process. Moreover, in contrast to this situation, there was no legal impediment to the Commission resolving the pending cellular applications according to the applicants' original expectations. Nevertheless, the court in *Maxcell*, after evaluating the impact of the regulatory change on pending applicants, concluded that the Commission's overriding concern with the efficient processing of cellular applications fully justified the Commission's decision to use lotteries rather than comparative hearings to decide pending applications. Similar considerations justify our decision to use auctions here.

46. We disagree with commenters that *Maxcell* is distinguishable either because none of the pre-July 1st applicants had notice of a possible regulatory change, or because the switch to auctions requires that such applicants make additional expenditures to pursue their bid for licenses.[43] As noted above, as a result of *Bechtel II*, whatever the Commission decides regarding the pending frozen cases, the process will be different than when

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[41] *See, e.g., Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997) (permittee had no vested right in a particular outcome of its extension request that was abridged when the Commission dismissed that request pursuant to a subsequent, more restrictive rule); *Hispanic Information & Telecommunications Network v. FCC*, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989), *citing Storer Broadcasting*, 351 U.S. at 197 (upholding the dismissal without a comparative hearing of an application for an Instructional Television Fixed Service license pursuant to a subsequently adopted rule establishing a one year period during which local ITFS applicants had absolute priority over nonlocal applicants). *See also Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309 (D.C. Cir. 1995) (permissible for the Commission in a notice-and-comment rulemaking to make technical changes in the definition of the service areas applicable to all existing licensees).

[42] *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). *See also DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (FCC's explicit policy to allocate surrendered direct broadcast satellite (DBS) channels to existing licensees did not create a right that was retroactively abridged under *Landgraf* when the Commission decided that allocating them through competitive bidding would better serve the public interest); *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997) (denial of a request for an extension of time to construct based on a subsequent, more restrictive rule is not retroactive under *Landgraf* because the rule in effect when the permittee sought an extension did not establish a "right" to a given outcome).

[43] *See* Comments of Susan M. Bechtel at 6-7; Lindsay Television, Inc. at 8-9.

the pre-*Bechtel II* applications were filed. And the post-*Bechtel II* applicants were on notice that whatever system we adopted would have to be different from the integration-centered system struck down in *Bechtel II*. Moreover, as noted above, any adverse financial impact of having to participate in an auction is mitigated somewhat by the statutory requirement that any auction to decide these cases be limited to the pending applicants for a particular license. Thus, using auctions to resolve the pre-July 1st applications is not arbitrary and capricious or impermissibly retroactive. And, from a public interest standpoint, we believe that, on balance, any adverse financial or equitable impact on the pending applicants is overcome by the strong public interest in the public receiving new broadcast service as quickly as possible and other benefits of auctions, particularly given the legal impossibility of deciding any of these cases based on the comparative criteria in effect before *Bechtel II*.

47. Finally, neither the statute nor our proposed implementation of the statute involves a denial of equal protection or the taking of property without due process under the Fifth Amendment, as argued by some commenters.[44] Pursuant to Section 309(l)(2), only persons filing applications before July 1, 1997 will be allowed to participate in the auction. No equal protection issue ever arises because the law applies equally to these pending applicants, none of which knew when they filed their applications that mutual exclusivity would be resolved by auction. No other persons will be qualified to participate in auctions involving applicants in the frozen *Bechtel* cases. Moreover, the shift to auctions is supported by strong public interest reasons.

48. We also disagree with commenters that there is a violation of due process because applicants who have expended considerable sums to prepare, and in some instances prosecute, their applications through the comparative hearing process now face the prospect, by virtue of an unforeseeable regulatory change, of either abandoning their considerable investment or spending additional funds to participate in an auction.[45] As indicated above, whatever the expectations of these applicants, they had no vested interest in having their applications decided by a comparative hearing, and the impact of this regulatory change is ameliorated somewhat by the statutory requirement that auctions to decide these cases be closed to other participants. In these circumstances, a decision to resolve the pending applications through a system of competitive bidding pursuant to subsequent legislation expressly authorizing such resolution thus does not deprive them of due process.

49. The statute is also not a taking of property without just compensation in violation of the Fifth Amendment. The payment of regulatory fees, in this case hearing and filing fees, does not constitute a taking under the Fifth Amendment regardless of whether such fees accurately reflect the cost to the Commission of processing the applications in question.[46] And, in any event, as proposed in the *Notice*, 12 FCC Rcd at 22370-71 (¶ 16), we will refund upon request all hearing fees actually paid by applicants in proceedings in which the construction permit is awarded by auction rather than by comparative hearing, and all filing fees paid by pre-July 1, 1997 applicants within the scope of Section 309(l) who elect not to participate in the auction.

50. We decline the suggestion of various commenters that we go further and reimburse the legitimate

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[44] *See* Comments of Susan M. Bechtel at 3-4; Lindsay Television, Inc. at 6-7; Willsyr Communications, LP at 30-31 (Equal Protection, Due Process and Fifth Amendment). Comments of Lauren A. Colby at 2 (Fifth Amendment Taking and Due Process). Comments of Throckmorton Broadcasting, Inc. at 1-2 (Due Process).

[45] *See, e.g.*, Comments of Lauren A. Colby at 2-3; Susan M. Bechtel at 4; Lindsay Television, Inc. at 6.

[46] *Longshore v. United States*, 77 F.3d 440 (Fed. Cir.), *cert denied*, 117 S.Ct. 52 (1996) (rejecting claim of disappointed cellular applicant that application fee levied by Congress constituted an unlawful taking of property under the Fifth Amendment because it exceeded the Commission's processing costs).

and prudent expenses of applicants who either do not participate in the auction or are outbid in the auction.[47] As indicated above, whatever the expectations of these applicants, they had no vested interest in having their applications decided by a comparative hearing, and the impact of this change is ameliorated somewhat by the statutory requirement that auctions to decide these cases be closed to other participants. In these circumstances, a decision to resolve the pending applications instead through a system of competitive bidding, pursuant to subsequent legislation expressly authorizing such resolution, does not, as some have argued,[48] deprive them of due process or constitute a taking without just compensation. Courts have, as commenters note, allowed compensation for losses incurred as a result of an unanticipated regulatory shift,[49] but they have done so only pursuant to a contract in which the government expressly agreed to indemnify private parties against the risk of such a regulatory shift.[50] Thus, even assuming *arguendo*, that we had the legal authority to reimburse these applicants,[51] we have no obligation to reimburse the pending applicants' expenses in prosecuting applications filed with the expectation of participating in a comparative hearing, and we decline to do so.

3. Treatment of Pending Hearing Cases

51. In the *Notice*, 12 FCC Rcd at 22372 (¶ 22), we sought comment on whether, even if we decide to use competitive bidding procedures for most cases involving pre-July 1, 1997 applications, we should nevertheless use comparative hearings for the approximately 20 cases that had progressed at least through an Initial Decision by an Administrative Law Judge before the court held in *Bechtel II* that the principal criterion previously used by the Commission to predict which applicant would offer the best service (integration) was unlawful. In this context, we asked for comment on whether the resources these applicants have expended, as well as the delays they have experienced, raise special equitable concerns that should lead us to resolve this group of cases through the comparative process. Following the expiration of the 180-day waiver period for settlements prescribed by Section 309(l)(3) and discussed in Section III(C)(1) below, fewer than ten hearing cases in which the applications have progressed at least through an Initial Decision by an Administrative Law Judge remain for resolution either through a system of competitive bidding or the comparative hearing process.[52]

52. ***Discussion***. We agree with those commenters who argue that, even for the small number of cases that have progressed at least through an Initial Decision, auctions better serve the public interest than comparative

[47] *See, e.g.*, Comments of United Broadcasters Company at 10; Rio Grande Broadcasting Co. at 8-9; Marri Broadcasting, LP at 4-5; Dewey Matthew Runnels at 4-5; Howard G. Bill at 4-5; Heidelberg-Stone Broadcasting Co. at 8-9; Grass Roots Radio, Inc. at 2-3; Willsyr Communications, LP at 32-33; Roy F. Perkins, Jr. at 1-2; Liberty Productions, LP at 3-4; Columbia FM Limited Partnership at 7.

[48] *See, e.g.*, Comments of Lauren A. Colby at 2-3; Susan M. Bechtel at 4; Lindsay Television, Inc. at 6.

[49] *See, e.g.*, Comments of Willsyr Communications, LP at 32-33; Lauren A. Colby at 2.

[50] In *United States v. Winstar Corp.*, 116 S.Ct. 2432 (1996), several financial institutions sued a federal regulatory agency when congressional legislation precluded the agency from honoring a contractual promise regarding accounting practices and this change resulted in the closure of the institutions. Recovery was permitted because of an express contractual promise, in which the government agreed to indemnify the thrift institutions against financial loss as a result of a regulatory change.

[51] These commenters do not suggest any legal authority through which we could make such payments and we are aware of none.

[52] The number could be somewhat larger if not all pending settlements are approved.

hearings.[53] We recognize that these applicants have spent considerable time and money prosecuting their applications before *Bechtel II*, and that as a result of that decision, our consideration of its implications, and congressional consideration and enactment of auction legislation, they have experienced significant delays in obtaining a final decision as to the selection of the licensee.[54] These circumstances, however, do not outweigh the additional delays, uncertainty and administrative costs that would be incurred by resolving these cases through the comparative hearing process and which led us to decide to resolve pending cases through auction. *See supra* discussion at ¶¶ 34-43.

53. We disagree with those commenters who argue that these cases, which have already progressed at least through an Initial Decision, can be expeditiously resolved through the hearing process and that it would be arbitrary and capricious to ignore the results of the prior hearing.[55] Despite the compilation of a hearing record in these cases, we anticipate that their resolution through the hearing process will not be expeditious, and that auctions for these cases will much more likely expedite service to the public. Our experience with the hearing process gives us reason to believe that these cases will likely involve significant litigation over points of questionable public interest significance.[56]

54. This is particularly true because the key comparative criterion -- integration -- will no longer exist and the Commission would be required to articulate a revised comparative criteria system. To the extent that new criteria would be adopted, as some commenters urge,[57] we would need to allow an opportunity for applicants to supplement the record. In the event factual disputes were to arise with respect to such supplemental filings (which they almost certainly would), and perhaps in any event, supplemental hearings and supplemental Initial Decisions would be required. If the Commission simply used the remaining criteria and qualitative enhancements (with the qualitative enhancements considered as stand-alone comparative criteria), and articulated a clear new weighting system, supplemental hearings and supplemental Initial Decisions might be avoidable. But we would still need to allow supplemental pleadings for applicants to evaluate themselves and the other applicants under the revised comparative system. We are confident every applicant would argue it should win and the competing applicants should lose, and that they would press their views vigorously. Even assuming that all of this could be decided directly by the Commission without a remand to the ALJ in every case, this process would be time-consuming. Thus, while it would not take as much time as those cases that have not been designated for hearing,

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[53] *See, e.g.*, Comments of Columbia FM Limited Partnership at 6; KM Communications, Inc. at 2; Reply Comments of WB Television Network at 6-7; Irene Rodriquez Diaz de McComas at 3-4.

[54] For these reasons, some commenters urge that we use the comparative hearing process to resolve these cases. *See, e.g.*, Comments of J&M Broadcasting Co., Inc. at 3; Orion Communications Limited at 1-3; Heidelberg-Stone Broadcasting Co. at 6-8; United Broadcasters Company at 9; Rio Grande Broadcasting Co. at 7; Stephen M. Cilurzo at 4-6 (also cites mental anguish and stress as equitable factors); Lisa M. Harris at 7-8; Breeze Broadcasting Co., Ltd. at 3-4; Reply Comments of Galaxy Communications, Inc. at 2; Letter of Anchor Broadcasting Limited Partnership at 3.

[55] *See, e.g.*, Comments of Lisa M. Harris at 7-8; Breeze Broadcasting Co., Ltd. at 3-4.

[56] *See, e.g., Colonial Communications, Inc.*, 5 FCC Rcd 1967 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 2296 (1991), *recon. dismissed*, 7 FCC Rcd 674 (1992) (lengthy litigation over the relative comparative significance of past continuous local residence of several years' duration versus childhood local residence plus current residence for a short period); *Ronald Sorenson*, 6 FCC Rcd 1952 (1991) (litigation over relative comparative significance of longer local residence versus greater involvement in civic activities); *Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984 (1984) (litigation over relative comparative significance of ownership of two distant television permits versus limited media interests in local market plus distant CATV interests).

[57] *See, e.g.*, Comments of Cromwell Group, Inc. at 2; Reply Comments of Howard G. Bill at 3.

we believe it would be far more time-consuming than if we held auctions.

55. For all these reasons, we anticipate that, even though the time-consuming tasks associated with prosecuting a case through an Initial Decision have been completed, resolving these cases through the comparative process would further delay service to the public, and thus would not serve the public interest.

56. We recognize that the switch to auctions requires further expenditures by applicants who have already made substantial expenditures in reliance on established Commission procedures for awarding commercial broadcast licenses where there are mutually exclusive applications. As noted above, however, Section 309(l)(2) provides that, in the event auctions are held to resolve cases involving pre-July 1, 1997 applications, only the pending applicants are eligible to be qualified bidders. This means that the pending applicants will be bidding only against the competing applicants that have spent the same amount of time, and presumably incurred similar expenses, in prosecuting their applications through a comparative hearing. In this manner, the pending applicants will not be unfairly disadvantaged in the auction as a result of previous expenditures to secure the license. Rather, as in the case of applicants not designated for hearing, we would expect that the price ultimately paid for the license will reflect the expenditures incurred by all qualified bidders in prosecuting their long-pending applications.

57. One commenter[58] suggests that, although Section 309(l)(2) clearly prohibits the Commission from opening new filing periods for additional applications that would be included in auctions involving pre-July 1st applications, it nevertheless leaves open the question of new investors or participants in existing applications. We recently amended our Part 1 rules to prescribe uniform ownership disclosure standards requiring applicants filing short-form applications for future auctions to identify controlling interests as well as all parties holding a 10% or greater interest. *See Third Report and Order*, 13 FCC Rcd at 418-420. To the extent that the comments urge that we require preauction disclosures of all new owners or parties, we disagree that either the letter or the spirit of Section 309(l)(2) warrants the adoption of special disclosure standards for applications that are subject to Section 309(l)(2). Thus, for such applications we will require the reporting prior to the auction of any changes in the ownership information required by our uniform Part 1 disclosure standards. We nevertheless agree that, consistent with Part 1 rules providing that a short-form application is considered to be newly filed if it is amended by a major amendment (*see* 47 C.F.R. § 1.2105(b)(2)), a change in the control of an application otherwise subject to Section 309(l) would render the existing applicant ineligible to participate in an auction that is statutorily limited to pre-July 1st applicants.

58. We also note that proceeding with hearings and concomitant litigation will also be costly for all the applicants. Thus, given the circumstances, additional costs cannot be avoided. Even assuming that the winning bid in an auction will exceed the additional litigation costs the winner would have to pay in a hearing, all the applicants would incur further litigation expenses. It is not at all clear that it is fairer to all the applicants, particularly to those who eventually lose in a hearing, to make them incur significant, additional hearing expenses as a tradeoff for the possibility that the winner's expenses may be less than in an auction. Given the difficulty of predicting who would win under the revised comparative criteria if we resolved these cases through the comparative hearing process (*see supra* ¶ 42), we think it is appropriate to focus on fairness to the class as a whole, not just on the winning applicants.

59. In addition, we are ameliorating the impact of additional expenses by refunding all hearing and certain filing fees. *See infra* ¶¶ 101-104. In sum, the public interest in getting new service to communities long

[58] *See* Comments of J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 14.

awaiting such service as soon as possible under the circumstances, when combined with the other public interest benefits of auctions, discussed above, outweigh, in our view, any adverse impact on these pending hearing applicants of requiring them to participate in an auction.[59] The auction procedures for these pending hearing cases are set forth in Section III(C)(1), below. These cases should be set for auction particularly quickly in light of how long they have been pending.

C. General Rules and Procedures for Competitive Bidding

1. Pending Comparative Initial Licensing Cases Subject to Section 309(l)

60. ***Scope of Section 309(l)***. Having decided to exercise our discretion under Section 309(l)(1) to resolve through competitive bidding all applications that are subject to that provision, we must now establish the rules for the auctions. Paragraph (2) of Section 309(l) restricts the persons we may treat as qualified bidders eligible to participate in a competitive bidding proceeding conducted to resolve these pending cases, and paragraph (3) prescribes special settlement provisions, discussed below, for these cases. To determine whether these paragraphs apply to particular applicants and proceedings, however, we need to define the scope of pending cases covered by Section 309(l).

61. By its express terms, Section 309(l) applies to "competing applications for . . . construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997." Paragraph (2), in contrast to the permissive language in paragraph (1), mandates that if the Commission exercises its discretion to use competitive bidding in these cases it "shall . . . treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such [competitive bidding] proceeding [to assign such license or permit]." In the *Notice*, 12 FCC Rcd at 22373-74 (¶ 24), we tentatively concluded that Section 309(l) did not apply to a single application filed before July 1, 1997. We relied in this regard on the express reference in Section 309(l) to "competing applications." Thus, in the event one or more applications filed after June 30, 1997 are mutually exclusive with a single pre-July 1, 1997 application, we tentatively concluded that an auction was mandated under Section 309(j) and that the special Section 309(l) provisions concerning bidder eligibility and settlements would not apply.

62. In contrast, we tentatively concluded, *Notice*, 12 FCC Rcd at 22374 (¶ 25), that Section 309(l) did apply whenever two or more mutually exclusive pre-July 1, 1997 applications are filed. We found further that paragraph (2), which dictates that "only persons filing such applications" are eligible to be qualified bidders, may require the dismissal of post-June 30, 1997 applications in certain circumstances. In this context, we considered the consequences of a filing period, which opened before June 30, 1997 but closed after that date. We tentatively concluded that, in the event two or more applications were filed before July 1, 1997, any mutually exclusive applications filed after June 30 1997, because they are ineligible under paragraph (2) to be qualified bidders, must be dismissed. Recognizing that this is a harsh result, particularly when it requires the dismissal of applications timely submitted within an announced filing period, we asked for comment on whether there are other legally permissible interpretations of this provision.

63. ***Discussion***. We continue to believe that, where post-June 30th applications are mutually exclusive

[59] We also note that the value of developing a revised comparative system (and expending the associated administrative costs) would be even less for this small class of cases (as well as the small class of pending comparative renewal cases) than the broader class of pending cases. *See supra* ¶ 37.

with two or more pre-July 1, 1997 applications, we are statutorily compelled by the express language of Section 309(l)(2) to dismiss them and conduct a competitive bidding procedure that is restricted to the pre-July 1, 1997 applications. We also believe that given the express reference to "competing applications" in Section 309(l), this provision does not apply to a single pre-July 1, 1997 application. It is well established that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose.[60] With this principle in mind, we turn first to the issue of eligibility to participate in the auction. Paragraph (2) unambiguously provides that the Commission "shall . . . treat the persons filing such applications as the *only* persons eligible to be qualified bidders," and the Conference Report, at 573, confirms that "[t]he Commission *shall* limit the class of eligible applicants who may be considered qualified bidders . . . to the persons who filed applications with the Commission before that date [July 1, 1997]." (emphasis added.) Thus, we confirm our tentative conclusion that we are statutorily precluded from permitting post-June 30th applicants to participate as qualified bidders in a competitive bidding procedure conducted to resolve mutual exclusivity among two or more pre-July 1, 1997 competing applications. Given our decision to use competitive bidding procedures for these cases, we must therefore dismiss any such mutually exclusive applications filed after June 30, 1997.

64. Several commenting parties complain that the distinction between applications filed before July 1 and after June 30 is arbitrary.[61] None, however, offers an alternative, legally persuasive reading of the statute that would permit us to include post-June 30th applications in any competitive bidding procedure involving mutually exclusive pre-July 1st applications. Nor have they cited relevant precedent authorizing us to vary from the plain meaning of the statutory provision. Rather, Congress adopted a bright line distinction. That such a distinction operates to exclude some applicants but to include others does not make it unlawful. Moreover, the practical effect of this bright line distinction will be limited, as we believe that settlement agreements have been filed in connection with the small number of cases involving post-June 30th applications mutually exclusive with two or more pre-July 1, 1997 applications.

65. The express language of Section 309(l) likewise governs the resolution of the second issue, regarding the applicability of any portion of Section 309(l) to singleton applications filed before July 1, 1997. Given the unambiguous reference in Section 309(l) to "competing applications . . . filed with the Commission before July 1, 1997," we are not persuaded that any of its special provisions (regarding bidder eligibility or the 180-day period during which certain settlement rules were waived) apply to a singleton application filed before July 1, 1997. Thus, whether we should grant pre-July 1st singleton applications, or alternatively open new filing periods and conduct auctions in those instances in which mutually exclusive applications are filed, is governed by Section 309(j)(1) rather than by Section 309(l). But Section 309(j) is silent on this question (*see infra* ¶ 106), making it appropriate to look to the legislative history to determine what Congress intended with regard to singleton applications. The legislative history addresses this point at least with respect to situations in which there are no mutually exclusive applications "because the Commission has yet to open a filing window." Specifically, "the conferees expect that, regardless of whether the [singleton] application was filed before, on or after July 1, 1997, the Commission will provide an opportunity for competing applications to be filed, consistent with the Commission's procedures,"[62] and employ competitive bidding to assign the license if competing applications are

[60] *See* cases listed in note 30 above.

[61] *See, e.g.*, Comments of George S. Flinn at 3-4; Robert B. Mahaffey at 4-7. *But see* Comments of Pappas Telecasting of America at 2-3.

[62] Conference Report at 573-74.

filed. Where the filing windows or cut-off lists have closed, however, we agree that it is appropriate to grant pending singleton applications.[63] Such applications, even if filed before July 1, 1997, are outside the express scope of Section 309(l)(2). Neither the language of Section 309(j)(1) nor its accompanying legislative history suggests that Congress intended to require that we reopen already closed filing periods if there is only one pending application. Particularly given our obligations under Section 309(j)(6)(E) to avoid mutual exclusivity, nothing in the requirement in Section 309(j) to use competitive bidding procedures to resolve mutually exclusive applications provides a basis to create a further opportunity for the filing of mutually exclusive applications where, despite an opportunity to file competing applications, there is only one pending application. The possibility of our opening an already closed filing period exists only in the event that there are pending *mutually exclusive* applications not subject to Section 309(l). *See infra* ¶¶ 105-109. To the extent that we suggested otherwise in the *Notice*, we correct that impression here.

66. ***Pending Applications With Waiver Requests of the Freeze on Television Applications***. In a related context, we have received a number of comments asking us to clarify whether Section 309(l)(2), which insulates pre-July 1, 1997 applicants from competition with post-June 30, 1997 applicants in the event of an auction, applies to analog television applications submitted for filing before July 1, 1997 along with requests for waiver of the permanent freeze on applications for new analog television broadcast stations.[64] By way of background, we note that the Commission announced in July 1996 that it would no longer accept applications for any vacant NTSC allotment, but it provided an additional 30-day period (until September 20, 1996) for the filing of such applications. *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service (Sixth Further Notice*), 11 FCC Rcd 10968, 10992 (1996). At that time, the Commission indicated that it would continue to process on a case-by-case basis pending requests for waiver of the 1987 freeze that involved the top 30 television markets, as well as any waiver requests filed during the 30-day period. It pledged further that, in the event it granted any waiver requests and accepted the related television applications, it would "continue [its] process of issuing Public Notices that 'cut-off' the opportunity for filing competing, mutually exclusive applications [and] . . . w[ould] allow additional competing applications to be filed." *Id.* at 10992 (1996).

67. At issue here is whether pending applications with waiver requests, all filed before July 1, 1997, are subject to the provisions of Section 309(l), and in particular the extent to which Section 309(l)(2) precludes the acceptance of additional applications that would be eligible to compete in any auction employed to resolve mutual exclusivity among any pre-July 1, 1997 analog television applications accepted for filing. We conclude that the pending applications with waiver requests constitute "applications . . . filed with the Commission before July 1, 1997" within the meaning of Section 309(l). We discern no distinction in the statutory language, or in the accompanying legislative history, between applications filed with waiver requests and applications submitted without waiver requests.

68. Thus, to the extent that there are multiple pending applications with waiver requests for a single television allotment, that, if granted, would result in mutually exclusive applications, the restrictions on bidder eligibility set forth in Section 309(l)(2) would apply. We disagree that these applications are beyond the scope of Section 309(l) because no file number was assigned, no public notice was issued, and no cut-off list was

[63] *See* Reply Comments of Press Communications, LLC at 4; Reply Comments of WB Television Network at 8-9; Comments of De La Hunt Broadcasting Corp. at 2.

[64] The commenting parties are divided on whether Section 309(l) applies. Several urge that it does apply. *See* Comments of Davis Television Duluth, LLC, *et al*. at 3-8; Reply Comments of Arnold Broadcasting, Inc. at 2-4. Others take the opposing view. *See* Comments of Gulf Coast Broadcasting, Inc. at 6-8; New Life Evangelistic Center, Inc. at 2-4.

published. We recognize that there is some degree of unfairness in this result, particularly given our explicit pledge to provide an opportunity for the filing of competing applications with respect to any analog television application that we accepted. We believe, however, that we have no choice under the statute. The language of paragraph (2) is unambiguous that, where competing applications were filed with the Commission before July 1, 1997, "the Commission shall . . . treat the persons filing such applications as the only persons eligible to be qualified bidders." The situation of prospective applicants deprived of the opportunity to file competing applications by our grant of multiple waiver requests for a single allotment is analogous to that of post-June 30th applicants that are similarly ineligible to participate in an auction because more than one application was filed with the Commission before July 1, 1997 during an open cut-off period.[65] We note that these pending, potentially mutually exclusive applicants, who filed applications with freeze waiver requests before July 1, 1997, would not be entitled to participate in an auction except to the extent that we grant particular waiver requests and accept the related applications.[66] Pursuant to our determination to use auctions for all applications that are subject to Section 309(l), if we grant multiple waiver requests for a single allotment, we will conduct an auction that, as required by Section 309(l)(2), will be limited to mutually exclusive applicants who submitted applications on or before the September 20, 1996 close of the period for filing such applications. No auction would be required, however, where multiple applications with waiver requests were filed but by the time they were processed only one application with a waiver request remained on file. In the event we grant the remaining waiver request, we would simply grant the related pre-July 1, 1997 application without soliciting further applications. We believe that this result is compelled by the express language of Section 309(l)(2).

69. By contrast, if only one application with a freeze waiver request was filed for a single allotment, such that there would be no mutually exclusive applications, Section 309(l) would not apply because the threshold requirement for "competing applications . . . filed with the Commission before July 1, 1997" has not been satisfied. Nothing in the Budget Act or the legislative history indicates that, where a single pre-July 1st application with a waiver request was filed, Section 309(l)(2) precludes the acceptance of additional applications consistent with our normal practice, that would then be resolved through a system of competitive bidding pursuant to Section 309(j). Such applications are no different under the statute than other pre-July 1, 1997 applications that were not subject to a cut-off period.

70. In this regard, we disagree with commenters urging that we may, consistent with the legislative history, grant such single television applications as soon as we grant the freeze waiver request. As noted above, the Conference Report, at 574, reflects that, where no competing applications were filed against a singleton application because "the Commission has yet to open a filing window," it is expected to provide an opportunity for competing applications to be filed and to use an auction if competing applications are filed. A few commenters urge that the Commission effectively opened a filing window for competing applications when it afforded a 30-day period ending on September 20, 1996 for the filing of applications for vacant NTSC allotments before it ceased accepting such applications.[67] We disagree. The intent of that 30-day period was to afford an opportunity to file any applications that were currently being prepared for filing, not to solicit competing applications. *Sixth Further Notice*, 11 FCC Rcd at 10992. The Commission did not, for example, publish a list

[65] *See* Comments of New Life Evangelistic Center, Inc. at 1-2, urging the publication of an A cut-off list so that it can file an application that would be mutually exclusive with two pending applications for Channel 14 at Pittsburg, Kansas.

[66] One commenter requests that we dismiss the waiver requests for a single allotment and delete the vacant allotment at this time. *See* Comments of Gulf Coast Broadcasting, Inc. at 8-9. That request, however, is beyond the scope of this proceeding, as are the merits of individual waiver requests.

[67] *See, e.g.*, Comments of Davis Television Duluth, LLC, *et al*. at 5.

of pending applications with requests for waiver of the 1987 freeze, but promised to provide in the future an opportunity to file competing applications, with respect to any applications with waiver requests filed by September 20, 1996 that it accepted. *Id.* For this reason, we disagree with commenters that, by delaying the effective date of the permanent freeze until September 20, 1996, the Commission effectively opened such a filing period. Thus, in the event we grant a freeze waiver request and accept a single television application for a NTSC allotment filed prior to July 1, 1997, we will, consistent with the statute and the Conference Report, solicit additional applications, and, if mutually exclusive applications are filed, resolve those applications by competitive bidding.

71. ***Settlements***. In the *Notice*, 12 FCC Rcd at 22374-75 (¶ 26), we tentatively construed Section 309(l)(3) to require the Commission to waive any applicable provisions of its settlement regulations to permit applicants subject to Section 309(l) to enter into settlement agreements that remove conflicts among their applications. We also indicated that, in addition to the mandatory waiver of any regulations governing settlements among competing broadcast applicants, we were willing to waive certain policies to facilitate settlements among pending applicants for new commercial full-power radio or television stations filed before July 1, 1997, including the prohibition against "white knight" settlements involving the award of a permit to non-applicant third party where necessary to facilitate a full-market settlement among pre-July 1, 1997 comparative broadcast applicants. Based upon the express language of the statute, we concluded that applicants outside the scope of Section 309(l) (*i.e.*, pending applicants for secondary broadcast service, post-June 30, 1997 applicants for a new commercial full-power radio or television station, and a single pre-July 1, 1997 applicant that is mutually exclusive with one or more post-June 30, 1997 applicant(s) for a new commercial full-power radio or television station) could not benefit from the waiver.

72. Pursuant to Section 309(l)(3), mandating that the Commission "shall . . . waive any provisions of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications," we have waived the payment limitations set forth in Section 73.3525 of the Commission's rules, 47 C.F.R. § 73.3525, as well as our prohibition against third-party settlements.[68] Several commenters urge that our settlement policy is too restrictive in excluding post-June 30, 1997 applicants for new commercial full power radio and television stations (even if mutually exclusive with pre-July 1, 1997 applicants) and all pending applicants for licenses to provide secondary broadcast service.[69]

73. ***Discussion.*** We believe that, with one minor modification, our tentative reading of Section 309(l)(3) was correct. Although we indicated that this provision would apply to settlement agreements filed with the Commission within the 180-day period, we believe that the better reading of this provision is that it applies to agreements executed within the 180-day period and filed with the Commission, pursuant to Section 73.3525(a) of the Commission's rules. We note, moreover, that we have received comments suggesting that only full-market settlements among pre-July 1, 1997 applicants are eligible to take advantage of the waiver mandated by Section 309(l).[70] We reiterate that the statutory waiver provision applies to any settlement among pre-July 1, 1997 applicants for a new commercial full-power radio or television station, even if all the applicants are not parties

[68] *See, e.g, Gonzales Broadcasting, Inc.*, 12 FCC Rcd 12253, 12255-56 (1997) (waiving limitations on payments to settling applicants); *Playa Del Sol Broadcasters*, FCC 98I-05 (OGC Feb. 12, 1998) (same); *Praise Broadcasting Network. Inc.*, FCC 98I-03 (OGC Feb. 9, 1998); *Charles A. Farmer*, FCC 98M-20 (ALJ Feb. 12, 1998).

[69] *See, e.g.*, Reply Comments of Paxson Communications Corp. at 10.

[70] *See, e.g.*, Comments of R. L. Schwary at 1; Linear Research Associates at 1-8.

to the agreement. *See Notice*, 12 FCC Rcd at 22375 (¶ 27). We will, however, only waive our policy against "white knight" settlements to facilitate full-market settlement agreements among competing applicants. *Id.* at 22374-75 (¶ 26). *See also infra* ¶¶ 78-79.

74. Commenters are correct that we have the discretion to waive our settlement rules and policies on our own motion to facilitate settlements among applicants outside the scope of Section 309(l) and to extend beyond the 180-day period the statutorily mandated waiver for settlements among pre-July 1st applicants that fall within Section 309(l). As several commenters assert, nothing in the language of Sections 309(j)(1) or 309(l)(3) or the accompanying legislative history expressly precludes us from waiving our settlement rules and policies on our own motion to accommodate settlement agreements that are not expressly within the scope of Section 309(l)(3).[71] And, despite the expansion of our authority under Section 309(j) to mandate auctions in certain situations, Congress did not modify our statutory obligation under Section 309(j)(6)(E) to use appropriate means "to avoid mutual exclusivity in application and licensing proceedings." Indeed, the Commission's continuing obligations under Section 309(j)(6)(E) were specifically highlighted in the Conference Report.[72]

75. We are not persuaded, however, that an across-the-board waiver for applicants ineligible to take advantage of the waiver mandated by Section 309(l)(3) or a further waiver period for applicants that were eligible to take advantage of the statutorily mandated waiver but did not do so would serve the public interest or comport with congressional intent. Congress made no change in Section 311(c) that would require a substantial relaxation of our settlement rules generally. Moreover, in an apparent effort to expedite resolution of the frozen *Bechtel* comparative cases and at the same time provide an avenue of relief to the long-pending frozen *Bechtel* applicants, Congress selected a significant yet not unlimited period of time during which more liberal settlements were permitted among these applicants. It did not make this waiver open-ended or extend it to other pending mutually exclusive commercial broadcast applicants, who, by virtue of Section 3002(a) of the Budget Act, are now subject to resolution by competitive bidding. Post-June 30, 1997 applicants in comparative licensing cases, moreover, were expressly excluded from the 180-day waiver provision. In these circumstances, we believe that a further across-the-board waiver is not what Congress contemplated and would not further Congress's policy of encouraging early settlements of these pending comparative cases. We believe, moreover, that our existing settlement rules and policies are adequate to fulfill our statutory obligation to avoid mutual exclusivity under Section 309(j)(6)(E) for applicants in the frozen *Bechtel* cases that were not settled by February 1, 1998.

76. We emphasize, moreover, that pre-July 1, 1997 applicants, who would have been able to take advantage of the statutorily mandated waiver set forth in Section 309(l)(3) if such agreements had been entered into by February 1, 1998, may still avoid an auction through a settlement agreement that complies with all Commission regulations. This same avenue is available to post-June 30th applicants and to all pending secondary service applications, which fall outside the scope of Section 309(l). Our settlement rules permit, *inter alia*, payments to a settling applicant that do not exceed its legitimate and prudent expenses. We note further that this is the second time that there has been a waiver of the settlement rules in an effort to facilitate resolution of the long-frozen comparative initial licensing proceedings. While we agree that a further waiver would not necessarily

[71] *See, e.g.*, Reply Comments of WB Television Network at 10; Comments of Grace Communications LC at 7.

[72] *See* Conference Report at 572 ("[T]he conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.").

lead to the kind of abusive filings the settlement rules were originally intended to discourage,[73] the settlement period that just ended was fairly lengthy. We have no reason to believe that an additional period would produce settlements in a significant number of the remaining cases.

77. In these circumstances, therefore, we are not persuaded that fundamental fairness requires a further waiver period, particularly given our explicit statement in the *Notice* that we did not envision waiving our settlement rules beyond the 180-day period that ended February 1, 1998.[74] In the event that pending applicants believe special circumstances warrant a waiver of our settlement regulations and policies, they may submit a waiver request. However, in no event may pending competing applicants for new facilities discuss settlement after short-form applications (FCC Form 175) are due. *See infra* ¶ 155. In accordance with our continuing obligation to avoid mutual exclusivity under Section 309(j)(6)(E) and our public interest responsibilities, we will, of course, give full and careful consideration to all such waiver requests.

78. ***White Knight Settlement Agreements***. Three separate questions have been raised relating to the waiver of the prohibition against non-party settlements that warrant consideration. First, SL Communications urges that the waiver should apply to all comparative proceedings involving pre-July 1, 1997 applications, even proceedings in which there is only one remaining applicant (*e.g.*, to permit the buyout by a non-party of a bankrupt or unqualified applicant). However, as noted in ¶¶ 71-73 above, the special settlement provisions of Section 309(l)(3) apply only to "competing [*i.e.*, mutually exclusive] applications." Moreover, as we determined in *Dorothy O. Schulze and Deborah Brigham, A General Partnership*, 13 FCC Rcd 3259, 3264 (1998), this provision of the Budget Act applies exclusively to cases that might otherwise be resolved by competitive bidding. The discretion to use a system of competitive bidding, however, arises only if there are mutually exclusive applications. Second, Paxson Communications urges that the waiver of the prohibition against "white knight" settlement agreements is too restrictive. In support of its claim that the waiver should encompass partial, as well as universal, settlements, Paxson observes that white knight settlements are often the only realistic means by which applicants can be reimbursed for tremendous expenses incurred in these protracted cases. However, approving white knight settlement agreements that did not include all of the pending applicants would be contrary to the spirit, if not the letter, of Section 309(l)(2). This provision expressly restricts qualified bidders to those persons filing applications before July 1, 1997 and was clearly intended to insulate pending applicants from having to bid against entities whose financial resources were not similarly encumbered by prosecution expenses.

79. Two commenters make a similar suggestion regarding pre-July 1, 1997 applicants that were unable to reach a settlement within the 180-day period. Specifically, they urge us to permit such applicants to enter into "white knight" settlements whereby non-parties can acquire the bidding rights of the pending applicants. They claim this would provide equitable relief to applicants, which did not anticipate having to participate in an auction, and would also serve the public interest by maximizing auction revenues.[75] Whatever the benefits of this approach in terms of settling the remaining cases, it is, however, contrary to Section 309(l)(2), which explicitly restricts our discretion regarding persons qualified to participate in a competitive bidding proceeding that involves

[73] *See Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85 (1990), *recon. granted*, 6 FCC Rcd 2901 (1991); *Rebecca Radio of Marco*, 5 FCC Rcd 937, *recon. denied*, 5 FCC Rcd 2913 (1990).

[74] *See* Comments of Bledsoe Communications, Ltd. at 2-3.

[75] *See* Comments of Marri Broadcasting, L.P. at 2-4; Dewey Matthew Runnels at 2-4.

pre-July 1, 1997 applicants. And, in any event, for the reasons set forth above, we are not inclined to waive any of our settlement rules and policies beyond the 180-day period that ended on February 1, 1998.

80. ***Special Auction Procedures for Frozen Non-Hearing Cases***. To auction the pre-July 1, 1997 full service commercial broadcast applications that have not been designated for hearing and that did not settle under the special provisions of Section 309(l)(3), we will, to the extent possible, apply the general competitive bidding procedures adopted for future broadcast auctions, as set forth in Section III(C)(3) below. Some modifications will, of course, need to be made to our general auction procedures adopted herein, so as to apply them to a closed group of pending mutually exclusive applications. To keep our auction procedures as clear and consistent as possible, we have attempted, as described below, to deviate as little as possible from the competitive bidding procedures adopted for broadcast auctions generally.

81. To prepare the frozen pre-July 1st non-hearing cases for auction, the Mass Media Bureau, in conjunction with the Wireless Telecommunications Bureau, will by public notices identify the applicants in each group of mutually exclusive applications who are eligible to bid on the broadcast construction permits for which they previously filed long-form applications (*i.e.*, FCC Form 301 for AM, FM or television construction permits). We emphasize that, in accordance with congressional directive, pending applicants will be eligible to bid on only those construction permits for which they previously filed long-form applications. Such public notices will also announce the filing deadline for short-form applications (FCC Form 175), announce the amount of and deadline for submitting upfront payments, and provide more detail on the time, place and method of competitive bidding to be used, as well as applicable bid submission and payment procedures.

82. We will require all pending applicants to confirm their interest in participating in an auction by filing a short-form application. Although we realize that these applicants have already filed complete long-forms, the submission of a short-form application is necessary so that applicants may identify their authorized bidders, create their FCC account numbers, and indicate whether they are entitled to a "new entrant" bidding credit. *See infra* ¶ 190. Pending applicants who have already filed long-form applications will not, of course, need to file any engineering data with their FCC Form 175s, as future applicants in non-table services will be required to do so that determinations of mutual exclusivity can be made. *See infra* ¶ 143. Given the importance of certain information on the short-form application to the auction process and the brevity of the short-form itself, we will require the submission of short-forms by pending applicants, and will dismiss the previously-filed, long-form application of any pending applicant who fails to timely file a short-form application to participate in the auction. If the Commission were to receive only one short-form application confirming interest in bidding competitively on any construction permit, and thus there is no mutual exclusivity for auction purposes, the Commission will cancel the auction for any such permit and proceed to the review of the sole remaining applicant's previously-filed long-form application.

83. Assuming that mutually exclusive short-form applications are submitted by the previously-filed applicants, the auction will proceed pursuant to our general competitive bidding procedures. As in auctions of broadcast applications filed in the future, we will also require prospective bidders submitting short-form applications to make an upfront payment prior to the commencement of the auction of any pending applications. The submission of an upfront payment helps safeguard the auction process by requiring applicants to demonstrate their financial wherewithal and by providing the Commission with funds to cover any bid withdrawal or default payments. The amount of the upfront payments for pending applicants will be determined as set forth under our general auction rules in ¶¶ 129-134. All pending applicants who file complete short-forms and submit appropriate upfront payments will be qualified to participate in the auction, which will proceed as set forth below.

84. We will not, prior to the auction, review the long-form applications previously filed by the pending applicants, nor will we accept amendments to these previously-filed long-forms. In addition, before the auction we will not consider petitions to deny already filed, or accept additional petitions, against pending applications, nor consider any questions raised in such petitions relating to the tenderability or acceptability of the pending long-form applications. Although some commenters called for the review of all pending applications and petitions to deny prior to auction,[76] we believe that the interests of this group of pending applicants will be best served overall by our approach. Only those pending applicants who ultimately become winning bidders will need to expend time and resources to amend their long-form applications. Moreover, if we were to review all of the considerable number of pending applications, and any petitions to deny against them, prior to an auction, we would delay the commencement of bidding significantly.[77] Proceeding to the auction as expeditiously as possible will not only end the administrative limbo in which these pending applications have been caught, but will also result in the licensing of new broadcast stations to serve the public more quickly.

85. Following the close of the auction and the issuance of a public notice announcing the winning bidders, we will require each winning bidder to submit a down payment on its winning bid(s) within ten business days,[78] and to make any necessary amendments to its previously-filed long-form application(s) within 30 days.[79] The winning bidders' long-form applications would then be placed on public notice, thereby triggering the filing window for petitions to deny. Even in those rare instances in which the filing window for petitions to deny against the winning bidder's application had fully or partially run prior to the enactment of the Budget Act, we will, consistent with the procedures adopted herein for petitions to deny following an auction generally, allow ten days for the filing of petitions to deny. *See infra* ¶ 165. We believe this approach is appropriate and not unduly burdensome, particularly given the rarity of the situation and the abbreviated petition to deny period for auction winners' applications. We will also, at this time, consider any pending petitions to deny that were previously filed against the winning bidder. For the reasons discussed in greater detail in ¶ 99 below with respect to the frozen hearing cases, we will consider site assurance and financial qualification issues raised in any petition to deny only to the extent they involve allegations of false certification.

86. If the Commission denies any petitions to deny and otherwise determines that the applicant is qualified, we will then follow our general procedures set forth herein for payment and for issuing the construction permit to the winning bidder. *See infra* ¶ 166. The previously-filed long-form applications of the unsuccessful competing bidders will be dismissed following the grant of the winning bidder's construction permit. If, however, the winning bidder fails to remit the required payments, is found unqualified to be a licensee, or is otherwise disqualified, we will exercise our discretion to offer the construction permit to the other highest bidders in

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[76] *See* Comments of John Anthony Bulmer at 2-3; Michael Ferrigno at 6; Linear Research Associates at 4; Williams Broadcasting Co. at 5; Donald James Noordyk at 6; Todd Stuart Noordyk at 5-6; Batesville Broadcasting Co., Inc. at 5-6; Positive Alternative Radio, Inc., *et al*. at 7-8; Throckmorton Broadcasting, Inc. at 6.

[77] In particular, if a pending long-form application were dismissed as unacceptable for filing prior to auction, that applicant would have the right to file a petition for reconsideration of the dismissal, thereby adding to the pre-auction delay. For similar reasons, we have determined not to conduct any pre-auction review of the technical submissions of future broadcast auction applicants, except as necessary to determine mutual exclusivity. *See infra* ¶¶ 149-153.

[78] *See infra* ¶ 162 for a more detailed discussion of down payments.

[79] Such amendments may include the alteration of any commitments, such as divestiture commitments, made in the long-form to obtain an advantage in the comparative hearing process, but which are not required by Commission rules.

descending order at their final bids.[80] Because Congress has expressly restricted participation in any auction of the mutually exclusive applications subject to Section 309(l) to the pending pre-July 1st applicants, we believe that offering any construction permit upon which the winning bidder defaults to the next highest bidders, rather than reauctioning the construction permit to new applicants, would comport with statutory requirements and would be more expeditious.

87. In organizing the auction of the pre-July 1, 1997 pending broadcast applications subject to the comparative freeze, the Commission retains the discretion to conduct a combined auction of some or all pending applications subject to competitive bidding, or to conduct separate auctions for the different services. We also retain the discretion to include some or all of these pending broadcast applications when the Commission holds auctions of unsold or defaulted licenses in other services.

88. ***Special Auction Procedures for Frozen Hearing Applicants***. In the *Notice*, 12 FCC Rcd at 22376 (¶ 30), we tentatively proposed that in these hearing cases the Administrative Law Judge (or the General Counsel in cases pending before the Commission) would issue an order indicating that the permittee is to be selected by competitive bidding, specifying the date by which such applicants must give notice of their intent to participate in the auction, and stating whether there are unresolved issues as to the basic qualifications of any particular applicant. We tentatively proposed to terminate the hearing proceeding in those cases in which there were no such issues, and to resume the hearing in other cases only in the event an applicant with such unresolved issues was the winning bidder after the auction. We sought comment on whether it would be more efficient to review the basic qualifications of the pending applicants in hearing cases prior to the auction.

89. At the outset we clarify that, where the Commission has denied or dismissed an application and such denial or dismissal has become final (*e.g.*, when an applicant failed to seek further administrative or judicial review of that ruling), such an entity is not entitled to participate in the auction. Among those remaining in the proceeding, we will permit all pending applicants to participate in the auction, without regard to any unresolved hearing issues (or outstanding petitions to enlarge) as to the basic qualifications of a particular applicant. We will do so regardless of the number of remaining applicants or whether the adverse resolution of outstanding basic qualifying issues would eliminate all but one applicant.[81] This serves the public interest by not delaying the selection of an auction winner to resolve potentially irrelevant issues. It also comports with Section 309(j)(5) of the Communications Act authorizing the prescription of expedited procedures for the resolution of any issues pertaining to the winning bidder's basic qualifications. It is more efficient to decide basic qualifying issues only against the winning applicant.

90. We therefore disagree with commenters who contend that deciding basic qualifying issues prior to the auction will lead to a more expeditious resolution of these long-pending hearing cases.[82] Deferring such issues until after the auction furthers the public interest by avoiding unnecessary litigation that would waste the resources of the private parties and of the Commission. The alternative is to postpone the auction until after we

[80] *See* 47 C.F.R. § 1.2109 (giving Commission discretion to either reauction licenses to existing or new applicants or to offer licenses to other highest bidders in descending order at their final bids, in the event of default by, or disqualification of, the winning bidder).

[81] If the winning bidder is (or a series of winning bidders are) disqualified and only one applicant remains, that applicant will be granted without a further auction.

[82] *See, e.g.*, Comments of United Broadcasters Company at 7-8; Thomas M. Eells at 5; John W. Barger at 3. *But see* Comments of J. McCarthy Miller & Biltmore Forest Broadcasting FM, Inc. at 13; Columbia FM Limited Partnership at 7-8.

fully litigate these unresolved questions, which may substantially delay service to the public. In this regard, we could not, as some commenters have suggested, exclude from the auction pending applicants based on non-final administrative determinations or unresolved allegations against such particular applicants.[83] We believe that the time and expense entailed in adjudicating fully all unresolved issues relating to the basic qualifications as to all pending applicants would greatly exceed any additional delay that might result from the eventual disqualification of a winning bidder. For these reasons, we find that deferring consideration of basic qualifying issues until after the auction is fairer and ultimately more efficient than resolving any issues relating to the basic qualifications of all pending applicants, only one of which will be the winning bidder. This approach is consistent with our practice in prior auctions and lotteries of including applicants even where questions may exist as to their qualifications.

91. We disagree, moreover, that either Section 309(l)(2) or the accompanying legislative history requires that we determine the pending applicants' basic qualifications before conducting any auction.[84] Section 309(l), although clear that we may only award licenses to fully qualified applicants, is silent on whether basic qualifying issues should be adjudicated before or after the competitive bidding procedure. But it directs that any competitive bidding procedure employed to resolve these cases be conducted pursuant to Section 309(j). In this regard, Section 309(j)(5) provides that "[c]onsistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) for the resolution of any substantial and material issues of fact concerning qualifications." 47 U.S.C. § 309(j)(5). The "rapid deployment of new . . . services for the benefit of the public" is one of the objectives listed in paragraph (3), which was not amended as part of the Budget Act, and, despite the termination of our lottery authority to award certain types of commercial broadcast licenses, Section 309(i)(2) still accords the Commission discretion to make the determination of basic qualifications with respect to the lottery winner only.[85] In fact, we initially declined to adopt rules implementing our authority to award licenses through a system of random selection precisely because the statute originally required that we adjudicate the applicants' basic qualifications before the lottery. This undermined the primary purpose of the statute, which was to reduce the expense, delays and backlogs incurred by comparative proceedings.[86] Auction authority was likewise granted to avoid the costs and delays of comparative hearings,[87] and the language in Section 309(i) is comparable to Sections 309(j)(1) and 309(l) in that both prescribe requirements that must be met before the Commission can award a license, not before it conducts a lottery or an auction.[88] In these circumstances, we believe that, if Congress had intended to

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[83] *See* Comments of Lisa M. Harris at 9-15; Breeze Broadcasting Co., Ltd. at 4-8.

[84] *See* Comments of Thomas M. Eells at 5-6.

[85] Section 309(i)(2)(C) provides that "the Commission may, by rule, and notwithstanding any other provision of law . . . (C) omit the determination [of basic qualifications] with respect to any application other than the one selected pursuant to paragraph (1)." 47 U.S.C. § 309(i)(2)(C).

[86] *Amendment of Part 1 of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings,* 89 FCC 2d 257, 277-279 (1982).

[87] *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding,* 8 FCC Rcd 7635, 7651 (1993), *citing,* H.R. Rep. 111, 103d Cong. 1st Sess. 254, 258 (1993).

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

require that in these frozen *Bechtel* cases the Commission depart from its established practice of determining qualifications only with respect to the winning bidder, it would have done so explicitly. The Conference Report does not suggest otherwise. It provides that "[t]he Commission shall limit the class of eligible applicants who may be considered qualified bidders (provided such applicants otherwise qualify under the Commission's rules) to the persons who filed applications with the Commission before that date."[89] This simply says that the only applicants who may be included in the auction are those on file before July 1, 1997 who meet the Commission's rules to be a qualified *bidder*, not those who are necessarily qualified to be a *licensee*. In this respect, the Conference Report supports our conclusion that Section 309(l)(2) does not require that we exclude from an auction pre-July 1, 1997 applicants with outstanding, unresolved basic qualifications issues.

92. As a result of settlements executed during the 180-day waiver period, all of the frozen hearing cases are now pending before the Commission. Following release of this order, the General Counsel, acting on delegated authority, will issue an order in each case identifying the eligible, qualified bidders entitled to participate in the auction, referring all such cases to the Mass Media Bureau for processing in accordance with the auction procedures outlined above for the frozen *Bechtel* non-hearing cases, and either stay or terminate the hearing proceeding, depending on whether there are any unresolved hearing issues (including any unresolved petitions to enlarge issues) relating to the basic qualifications of any particular applicant. As proposed in the *Notice*, 12 FCC Rcd at 22376 (¶ 30), the hearing proceeding will resume only in the event that such an applicant is the winning bidder.

93. Thereafter, all pleadings filed before the auction relating to any frozen comparative case (whether hearing or non-hearing) should be submitted to the Mass Media Bureau for processing in accordance with its procedures for frozen non-hearing cases outlined above, except that settlement agreements in stayed hearing proceedings should be submitted to the Commission. As we recognized in the *Notice*, 12 FCC Rcd at 22376-77 (¶ 32), the Mass Media Bureau, as a party to the hearing proceeding, is precluded by the separation of investigative and prosecuting functions prescribed by 5 U.S.C. § 554(d) of the Administrative Procedure Act from having any decision-making function with respect to any remaining qualifying issues in these hearing cases. We continue to believe that having the Mass Media Bureau review FCC Forms 175 to determine completeness and process administrative information relating solely to the conduct of the auction does not entail decision-making responsibilities that would violate the separation of functions requirement. No commenters disagree with this conclusion. And, given our determination to resolve after the auction any remaining basic qualification issues in these hearing cases, pre-auction pleadings unrelated to the conduct of the auction, except possibly for certain settlement agreements, would be procedurally improper and will be summarily dismissed. Thus, even in a stayed hearing proceeding, a settlement agreement is the only type of procedurally proper pre-auction pleading that might be filed that would entail decision-making responsibilities that could not be handled by the Mass Media Bureau. Such settlements, and any related pleadings, should therefore be submitted to the Commission rather than to the Mass Media Bureau.

94. The General Counsel, acting pursuant to delegated authority, will expeditiously process all such settlement agreements in accordance with all applicable Commission rules and policies, including the anti-collusion rules, which, as discussed below, are triggered by the filing of a short-form application. If such a settlement agreement is approved, the General Counsel will issue an order either dismissing the application(s)

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language is contained in amended Section 309(j). That provision specifies that "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."

[89] Conference Report at 573.

of certain previously identified qualified bidder(s) or, in the event of a universal settlement agreement resulting in the grant of an application, terminating the proceeding.

95. In the *Notice*, 12 FCC Rcd at 22376 (¶ 30), we asked for comment on how we should proceed in the event a settlement agreement in a frozen hearing case filed either with the ALJ or the Commission was denied or withdrawn. We received no comments on this question. We will proceed as follows. If a settlement agreement pending before the Commission is denied or withdrawn prior to the deadline for short-form applications, the General Counsel will issue an order as described above, stating that the proceeding is ripe for resolution by competitive bidding, identifying all qualified bidders entitled to participate in the auction, referring the case to the Mass Media Bureau, and indicating whether the hearing proceeding is terminated or stayed pending the completion of the auction.

96. ***Post-Auction Procedures for Hearing Cases***. The post-auction procedures for hearing cases in which the hearing proceeding was terminated before the auction shall be governed by the same procedures outlined above for non-hearing frozen *Bechtel* proceedings.

97. In cases in which the proceeding was stayed because there were hearing issues (or unresolved petitions to enlarge issues) pertaining to the basic qualifications of a particular applicant, the hearing proceeding will resume only if such applicant is the winning bidder. In such stayed hearing cases, therefore, the order identifying the winning bidder will also state whether the hearing proceeding is resumed. In the event none of the outstanding hearing issues (or unresolved petitions to enlarge issues) pertain to the winning bidder's basic qualifications, the hearing proceeding will be terminated as a ministerial matter by the Mass Media Bureau, and the case will proceed in accordance with the procedures for non-hearing cases (and any hearing cases where the hearing proceeding was terminated before the auction).

98. If the hearing proceeding is resumed, it will proceed as follows. All applicants who have not formally requested the dismissal of their applications, or whose applications have not been finally denied or dismissed, are entitled to participate in the resumed hearing proceeding. The Commission will issue an order resolving according to its routine adjudicatory procedures any unresolved hearing issues and any other issues relating to the basic qualifications of the winning bidder. As tentatively proposed in the *Notice*, 12 FCC Rcd at 22377 (¶ 34), we will accord the winning bidder 30 days for any amendments necessary to report changes in its long-form application and 15 days to respond to any new petitions to enlarge. The filing of new petitions to enlarge will be governed by 47 C.F.R. § 1.229 of the Commission's rules. Given the small number of cases in which the hearing proceeding is likely to resume, we deem it inappropriate to restrict the time for filing new motions to enlarge issues, and no commenters have urged that we do so. We clarify, however, that there will be no new opportunity for the filing of petitions to deny in these resumed hearing proceedings.

99. ***Site and Financial Certification Issues***. To the extent that there are unresolved site or financial issues in these resumed hearing proceedings, or such issues are requested in a new petition to enlarge issues, we will resolve such issues (or add such issues if a substantial and material question of fact is raised) only to the extent that they involve a question of false certification. As discussed in ¶¶ 172-176 below regarding broadcast auctions generally, we are eliminating the site and financial certification requirements from the long-form applications filed by auction winners. In these circumstances, we deem it inappropriate to resolve such issues in cases in which there has not been a settlement agreement and the permittee must therefore be selected by competitive bidding. The winning bidder is subject to the same requirements regarding the payment of the winning bid, and the same payment provisions in the event of a default as any other broadcast applicant granted a construction permit through a system of competitive bidding. It is those requirements, rather than the original

certifications, that serve as a mechanism to discourage insincere proposals. For this reason, adjudicating issues relating to whether the winning bidder had reasonable assurance of site availability or was financially qualified would waste the resources of the Commission and of the parties and would serve only to delay service to the public. Candor, however, continues to concern the Commission whether it awards the broadcast construction permits through the comparative hearing process or through a system of competitive bidding. *Cf. Dorothy O. Schulze and Deborah Brigham, A General Partnership*, 13 FCC Rcd 3259, 3264 (1998). Issues relating to whether the winning bidder falsely certified reasonable assurance of its site availability or financial qualifications must therefore be resolved before we can grant a construction permit to the winning bidder.

100. All other unresolved hearing issues and any new issues relating to the winning bidder's basic qualifications in these cases will be resolved in accordance with the Commission's routine adjudicatory procedures. Thus, the Commission will issue an order resolving such issues and, if appropriate, grant the winning bidder's application. In the event the winning bidder is ultimately disqualified and such determination is not subject to further administrative and judicial review, we will, as urged by some commenters,[90] exercise our discretion to offer the construction permit to the other highest bidders in descending order at their final bids. *See* 47 C.F.R. § 1.2109. We do not believe that reauctioning any permit upon which the winning bidder defaults or is disqualified would serve the public interest because the Commission is precluded by Section 309(l) from soliciting any new applicants to participate in such a reauction, and a reauction could also entail some further delay in granting the permit.

101. ***Refunds.*** In the *Notice*, 12 FCC Rcd at 22370-71 (¶ 16), we proposed to refund all hearing fees paid in any frozen comparative proceeding in which the permittee is ultimately selected by competitive bidding rather than through the comparative hearing process, and also to refund the filing fees paid by any applicant that elects not to participate in the auction. Given the length of the comparative freeze, we continue to believe that such refunds are appropriate as a matter of fairness. Certain commenters request that we pay such refunds immediately, with interest, because, they assert, the fees were collected under false pretenses and are being improperly retained.[91] We disagree. All such fees were properly collected at a time when a comparative hearing was the only mechanism for resolving mutually exclusive applications for full power radio and television stations, and we have not impermissibly retained any fees. In this *First Report and Order* we decide for the first time to exercise our discretion under Section 309(l) regarding comparative licensing cases and to resolve such cases by a system of competitive bidding, pursuant to our newly authorized auction authority for commercial broadcast licenses. Moreover, there is no provision in the statute or our implementing rules authorizing the refund of fees with interest. We believe that the payment of interest would be inappropriate here, particularly since we charge penalties but do not assess interest for late-filed fees.

102. Administrative considerations dictate that refunds be issued only upon a specific request, rather than automatically. In this regard, the procedure for requesting a refund is neither complicated nor lengthy. As to the timing of the refunds, however, we agree with commenters that refunds to applicants electing not to participate in the auction should not be delayed until after the grant of the winning bidder's application is final.[92] On or before the date for filing a short-form application, pending applicants in all comparative licensing cases

[90] *See, e.g.*, Comments of J. McCarthy Miller & Biltmore Forest FM Broadcasting, Inc. at 14-16.

[91] *See* Comments of Rio Grande Broadcasting Co. at 11-12; Heidelberg-Stone Broadcasting Co. at 11-12.

[92] *See* Comments of KM Communications, Inc. at 3-4; Rio Grande Broadcasting Co. at 11; Heidelberg-Stone Broadcasting Co. at 11.

subject to resolution by competitive bidding pursuant Section 309(l) may file a pleading disavowing any interest in participating in the auction and seeking the dismissal of their applications. Once the dismissal of any such application is final, we will entertain requests for refunds of any hearing and filing fees actually paid by such applicants.

103. However, we will not refund filing fees paid by applicants participating in the auction that are outbid by a competing applicant. We take the extraordinary step of refunding filing fees paid by those applicants not participating in the auction, in recognition of the fact that these applicants might not have filed their applications if they had known the permit would be awarded by competitive bidding. This is appropriate as a matter of fairness because these applications have been pending up to four years or longer.[93] There is no comparable basis to refund such fees to unsuccessful bidders, which, but for the higher bid of a competing applicant, would have received a construction permit. In contrast to applicants withdrawing their applications rather than participating in a competitive bidding proceeding, unsuccessful bidders, by competing in the auction, have continued to prosecute their applications. There is therefore no reason to refund previously paid filing fees. Although equitable considerations militate against requiring applicants to pay fees for proceedings in which they do not participate, the ultimate disposition of an application is not a valid basis for refunding filing fees.

104. As to the timing of the refund of hearing fees to such unsuccessful bidders, the refund is premised on the fact that applications, filed in anticipation of a comparative hearing, are now decided by auction. Refunds are therefore premature until the dismissal or denial of the unsuccessful bidder's application is final and it can no longer challenge the winning bidder's basic qualifications. That occurs, however, only once the grant of the winning bidder's application and the denial of the losing bidder's application is final.

2. Pending Applications Not Subject to Section 309(l)

105. As generally described above in ¶¶ 7-12 and ¶¶ 60-65, a broader group of pending mutually exclusive applications falls outside the scope of Section 309(l) and is subject to the mandatory auction authority contained in Section 309(j)(1). These applications include mutually exclusive pending applications for the secondary broadcast services (whether filed before or after July 1, 1997), and competing full service AM and FM applications filed on or after July 1, 1997, but prior to the temporary freeze on the filing of such applications imposed after the release of the *Notice* in this proceeding. This pending group subject to auction under Section 309(j)(1) also includes a few situations where one broadcast application was filed before July 1, 1997, and other mutually exclusive applications were filed on or after that date. We will, as proposed in the *Notice*, 12 FCC Rcd at 22379-80 (¶ 41), apply to the extent possible the general competitive bidding procedures adopted for future broadcast auctions. *See* Section III(C)(3). The minor adjustments necessary to be made to our general competitive bidding procedures to accommodate the pending mutually exclusive applications not subject to Section 309(l) are set forth below. Any of these pending applicants who choose not to participate in an auction may also request a refund of their previously-paid filing fees, pursuant to the procedure set forth with regard to the Section 309(l) pending applicants. *See supra* ¶¶ 101-104.

[93] *See Implementation of Section 309(j) -- Competitive Bidding (Cellular Unserved Order)*, 9 FCC Rcd 7387, 7391-92 (1994) (noting that if the Commission used competitive bidding procedures for pending cellular applications, those pending applicants indicating no desire to participate would, as a matter of fairness, be entitled to a refund of application processing fees). *Accord Report and Order* in MM Docket No. 94-131 and PP Docket No. 93-253, 10 FCC Rcd 9589, 9632 (1995) (deciding to use lottery for pending MDS applicants, on file over four years, but noting that if it used competitive bidding, those pending applicants indicating a desire not to participate may as a matter of fairness be entitled to refunds of any application processing fees).

106. The most significant issue with regard to the pending applications falling outside the scope of Section 309(l) concerns the pool of bidders who will be eligible for any auction of these mutually exclusive applications. In contrast to new Section 309(l), which expressly restricts the group of applicants eligible to participate in an auction to the pre-July 1, 1997 applicants, Section 309(j)(1) is silent on that question. This section neither precludes the Commission from restricting the class of eligible bidders to those with applications already filed, nor requires the Commission to reopen the filing period for additional applicants that would be eligible to participate in the auction. Because we have discretion as to whether to conduct an auction limited to the pending mutually exclusive applications, or whether we include such applications within our first general broadcast auction and permit new applicants to file additional applications that may be mutually exclusive with the pending applications, we asked for comment on how to exercise this discretion. *See Notice*, 12 FCC Rcd at 22380 (¶ 42).

107. All commenters addressing this issue oppose the reopening of any filing periods or windows that have already closed to allow additional parties to file competing applications.[94] They argue that reopening any such filing periods or windows would be unfair to pending applicants who were diligent in filing their applications in a timely manner and would reward dilatory applicants who had previously failed to file within clearly delineated time parameters. Commenters assert that the pending applicants have already expended time and funds to file complete long-form applications, and it would be inequitable to reopen filing windows for new applicants who would be required to file only short-form applications. In addition, commenters assert that reopening filing periods to allow additional competing applications would only delay the grant of construction permits and the commencement of service to the public. Given these equitable and public interest considerations, commenters argue that the sole purpose in reopening filing windows would be in expectation of generating higher auction revenues, which they contend is impermissible in this context, citing 47 U.S.C. § 309(j)(7)(A) (in prescribing certain auction regulations, the Commission may not base a finding of public interest, convenience and necessity on expectation of federal revenues from the use of a system of competitive bidding).[95]

108. Notwithstanding Section 309(j)(7)(A), we continue to believe that we have the discretion to reopen relevant filing periods, if so doing would serve the public interest. We agree, however, with the commenters that, in cases of pending mutually exclusive applications not subject to Section 309(l) where the relevant period or window for filing applications under our existing procedures has expired, the public interest would not be served by reopening the filing period for additional mutually exclusive applications. These pending applicants timely filed complete long-form applications pursuant to our procedures then in place, with the reasonable expectation that their only competitors would be persons who similarly timely filed applications within the Commission's designated filing period. The reopening of filing windows would certainly not expedite the disposition of the pending applications or the commencement of service to the public, but could produce further delays. Moreover, unlike situations where we have declined to hold an auction limited to pending applicants but preferred to permit the filing of applications by additional parties, the auction procedures adopted herein make no substantial changes

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[94] *See* Comments of Big Ben Broadcasting, *et al*. at 1-3; Dakota Communications, *et al.* at 2-9; Scranton Times L.P. and Shamrock Communications. Inc. at 2-4; Six Video Broadcast Licensees at 2-3; Jay Man Productions, Inc. at 2-5; Apache Radio Broadcasting Corp. at 8-9; Tri-County Broadcasting, Inc. at 6; KERM, Inc. at 6; Certain Broadcast Applicants at 3-8; George S. Flinn, Jr. at 4; James G. Cavallo at 7; KM Communications, Inc. at 6; Grace Communications L.C. at 6-7; Communications Technologies, Inc. at 2; Michael Ferrigno at 7; Kidd Communications at 7; Williams Broadcasting Co. at 6-7; Donald James Noordyk at 7-8; Todd Stuart Noordyk at 6-7; Batesville Broadcasting Co., Inc. at 6-7; Positive Alternative Radio, Inc., *et al.* at 8-9; and Throckmorton Broadcasting, Inc. at 8-9.

[95] *See, e.g.*, Comments of Big Ben Broadcasting, *et al.* at 2-3; Dakota Communications, *et al.* at 4-8; Scranton Times L.P. and Shamrock Communications, Inc. at 3-4; Jay Man Productions, Inc. at 2-3; Apache Radio Broadcasting Corp. at 8-9; Tri-County Broadcasting, Inc. at 6; KERM, Inc. at 6; Certain Broadcast Applicants at 6-7.

in the nature of the broadcast services or in the rights and responsibilities of broadcast licensees.[96] Thus, we see no compelling reason to reopen filing windows that have already expired to permit the filing of additional applications by applicants who failed to file during the Commission's previously clearly delineated filing periods.

109. Accordingly, for groups of pending mutually exclusive applications not subject to Section 309(l) where the relevant filing periods have already expired, the auction will proceed in the same manner as the auction of the Section 309(l) pending applications, for which we are statutorily precluded from reopening any filing periods. The procedures set forth in ¶¶ 80-87 above will therefore also govern the auction of the pending applications not subject to Section 309(l) that have already been subject to competition through the opening and closing of periods for the filing of mutually exclusive applications. With regard to any remaining pending singleton applications where the relevant period for filing competing applications has opened and closed, but no mutually exclusive applications were ever filed, we will continue to process and grant according to our regular procedures. *See supra* ¶ 65.

110. We note, however, that there are pending before the Commission a number of broadcast applications (primarily AM and FM translator) that have never been subjected to competition because periods or windows for the filing of competing applications have not yet been opened by the Commission.[97] Rather than open individual filing windows or issue individual cut-off lists for each of these pending broadcast applications, we believe it more efficient to simply include these applications in the first general auction we conduct for new applicants in the relevant service. Specifically, during the first auction window opened for new applications in that service under the general window filing approach adopted herein (*see infra* ¶¶ 136-140), these pending applicants will be required to confirm their interest in participating in an auction for the construction permit for which they previously applied by filing a short-form application. No engineering data will be required to be filed with the short-forms of these pending applicants for the purpose of making mutual exclusivity determinations, as they have already filed complete long-forms.[98] The Commission will dismiss the long-form application of any pending applicant who fails to file a timely short-form application during the first general auction window for the relevant service. Following the determination of mutual exclusivity among all the applications filed in response to this window by both pending and new applicants, the Commission will proceed, as described below

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[96] For example, in the 220 MHz auction proceeding, we not only adopted auction proceedings but also significantly altered the technical and operational rules for that service. Because of such substantial changes in the nature of the 220 MHz service, we concluded it would be unfair to preclude new applicants from having the opportunity to apply for licenses in what was essentially a new service. *See Third Report and Order and Fifth Notice of Proposed Rulemaking, Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, 12 FCC Rcd 10943, 11038-39 (1997). With regard to the broadcast services, however, there have been no substantial changes in the nature of the services since the expiration
of the filing windows in which the pending applicants filed, and no such changes are being implemented in this proceeding.

[97] As previously described, there are also pending before the Commission analog television applications that have never been accepted for filing or subjected to competition because they request a waiver of our 1987 order imposing a freeze on applications for any new television stations in 30 major markets. *See Order*, RM-5811 (Mimeo No. 4074, released July 17, 1987). In any cases where we ultimately determine to grant such a waiver, those pending television applications that are not subject to Section 309(l) because no mutually exclusive applications were filed (*see supra* ¶¶ 69-70) will be subject to competition in the same manner as the other pending commercial broadcast applications that have not been subject to competition.

[98] If, in addition to reconfirming its interest in the construction permit for which it has already filed a long-form application, a pending applicant that is not subject to Section 309(l) also wants to apply for another available channel or frequency in the first general auction window for that service, the pending applicant will need, like new applicants applying for any available channels or frequencies in the window, to submit with the short-form application the requisite engineering necessary to make mutual exclusivity determinations, as set forth in the general auction procedures. *See infra* ¶¶ 141-143.

in our general auction procedures, to the auctioning of the mutually exclusive applications and to the processing of any non-mutually exclusive applications. *See infra* ¶¶ 149-161.

111. As with the pending applications subject to Section 309(l), we will not, prior to the auction, review the long-form applications previously filed by pending applicants not subject to section 309(l) who participate in the first general auction window, nor will we accept amendments to or petitions to deny against these previously-filed long-forms. Within 30 days following the close of the auction, a winning bidder will, if a new applicant, be required to submit a complete long-form application and, if a pending applicant, be required to make any necessary amendments to its pending long-form. Procedures for the submission of all payments and for the filing of petitions to deny against the long-forms of the winning bidders will be the same as under our general auction procedures. *See infra* ¶¶ 162-176.

3. Procedures for Broadcast Auctions Generally

a. General Competitive Bidding Matters

112. ***Retention of Broadcast Licensing Procedures***. As proposed in the *Notice*, 12 FCC Rcd at 22381-82 (¶ 46), a winning bidder in broadcast auctions will, consistent with existing broadcast licensing procedures, be awarded a construction permit, rather than a "license." As currently required, winning bidders will then be required, within a specified time period, to construct their facilities and file an application for a "license to cover construction permit" to obtain a license for the constructed facilities. *See* 47 C.F.R. § 73.3598. We will retain this broadcast licensing procedure in the auction context, because it comports with the requirements of Section 319 of the Communications Act[99] and has functioned well in the non-auction context. We also note that, given the requirements of Section 319, broadcast auction winners, unlike winning bidders in some other auctionable services, will not be permitted to construct their facilities prior to grant of their long-form applications and issuance of their construction permits.[100] *See* 47 U.S.C. § 319(d) ("With respect to any broadcasting station, the Commission shall not have any authority to waive the requirement of a permit for construction," except that the requirement for a permit may be waived by the Commission "for minor changes in the facilities of authorized broadcast stations.").[101]

113. ***Secondary Services in the Auction Context***. We reiterate that awarding broadcast and secondary broadcast service construction permits by auction will not alter the secondary nature of the LPTV and FM and television translator services. *See Notice*, 12 FCC Rcd at 22382 (¶ 46). A winning bidder who, after paying for its construction permit and satisfying the requirements for a secondary broadcast license, receives the license will not have any greater rights vis-a-vis full service broadcast facilities than any other broadcaster licensed to provide that same secondary service. For example, an LPTV or television translator licensee who receives its license by competitive bidding must still protect full power television stations from interference and will still be subject to

[99] Section 319(a) states that "[n]o license shall be issued under the authority of this Act for the operation of any station unless a permit for its construction has been granted by the Commission." 47 U.S.C. § 319(a).

[100] The *Third Report and Order* revising the Commission's general Part 1 auction rules adopted a new Section 1.2113, 47 C.F.R. § 1.2113, which permits winning bidders, at their own risk, to construct facilities prior to the grant of their long-form applications. *Third Report and Order*, 13 FCC Rcd at 469-470.

[101] The Commission has amended its rules to permit certain minor changes in broadcast facilities without a construction permit. *See Report and Order* in MM Docket No. 96-58, 12 FCC Rcd 12371 (1997). Such minor change applications are not, however, subject to auction. *See infra* ¶¶ 177-178.

displacement by a full service television licensee. *See* 47 C.F.R. §§ 73.3572(a); 74.703(b).[102] Similarly, an FM translator station will not be permitted to continue to operate if it causes interference to any authorized broadcast station, even if the translator licensee received its license by competitive bidding. *See* 47 C.F.R. § 74.1203(a) & (b).[103] A few commenters complain that auctioning secondary services is unfair or inequitable.[104] However, the fact that mutual exclusivity among secondary broadcast applicants will in the future be resolved by competitive bidding cannot, in our opinion, provide sufficient grounds to alter the basic character of any of the secondary services. *See* 47 U.S.C. § 309(j)(6)(D) (nothing in the use of competitive bidding shall "be construed to convey any rights . . . that differ from the rights that apply to other licensees within the same service that were not issued pursuant" to the Commission's competitive bidding authority).[105] Given our statutory mandate to auction the LPTV and translator services despite their secondary status (*see supra* ¶¶ 9-12), bidders must carefully weigh the risks that the secondary nature of these services present and adjust their bidding strategies accordingly.

114. ***Displacement of LPTV and Television Translators by Digital Television (DTV) Stations***. Although the secondary status of the LPTV and television translator services is unchanged by the adoption of competitive bidding procedures, we reemphasize here, as requested by several commenters,[106] our support for certain previously-adopted special measures to protect LPTV and television translator stations during the transition to digital television. As we stated in the *Sixth Report and Order*, LPTV stations and television translators displaced by new DTV stations will be allowed to apply for suitable replacement channels in the same area without being subject to competing applications. Such applications by displaced LPTV and television translator stations will be considered on a first-come, first-served basis, and may be submitted at any time without waiting for a filing window to open. *See Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 14588, 14653-54 (1997) (hereafter *Sixth Report and Order*).[107] Our adoption of auction filing windows in this proceeding does not alter our earlier decision with regard to displacement relief for LPTV and television translator stations.

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[102] With regard to the secondary status of LPTV stations, the Commission has requested comment on a petition for rulemaking proposing a new "Class A" television service for which certain LPTV stations could qualify. *See Public Notice, Petition for Rulemaking for "Class A" TV Service* (rel. April 21, 1998).

[103] FM translator stations will also continue to be subject to other existing rules concerning their secondary status. *See, e.g.*, 47 C.F.R. § 74.1204(f) (allowing FM broadcasters right to object to proposed translators that would be likely to interfere with reception of a regularly received existing service, even if there is no prohibited contour overlap); 47 C.F.R. § 74.1232(h) (FM translator authorization subject to termination if the circumstances in the community or area served are so altered as to have prohibited grant of the translator application had such circumstances existed at time of filing).

[104] *See, e.g.*, Comments of Friendship Broadcasting, LLC at 1; Board of Education of the City of Atlanta, *et al*. at 6; Bible Broadcasting Network, Inc. at 3.

[105] *See also* Comments of Jacor Communications, Inc. at 7-8 (auction winner should not obtain any additional right to operate broadcast station that causes interference to previously operating or otherwise protected stations, regardless of means by which permittee obtained its permit); Reply Comments of KQED, Inc. at 2-3 (opposes altering existing rules that establish secondary status of FM translators).

[106] *See, e.g.*, Comments of National Translator Association at 8; Association of America's Public Television Stations at 17-18.

[107] In essence, therefore, applications by LPTV and television translator licensees for DTV displacement relief will be treated like minor modification applications, which can be filed at any time outside of filing windows. *See infra* ¶ 177. This treatment of DTV displacement relief applications is consistent with our general rule regarding displacement relief for LPTV and television translators. *See* 47 C.F.R. § 73.3572(a)(2).

115. ***Accommodation of Section 307(b) in AM Auctions.*** As set forth in Section 307(b) of the Communications Act, the Commission is charged with the duty to make such distribution of broadcast licenses "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). Section 307(b), however, enunciates this mandate without denoting the procedure to be employed to effectuate the fair, efficient and equitable distribution of radio service. Over the years, the Commission has used a variety of means to implement the Section 307(b) directive. Previously, when mutually exclusive applicants sought authority to construct broadcast stations to serve different communities, the Commission, in the context of the comparative hearing process, implemented the Section 307(b) mandate by first determining which community had the greatest need for additional service, before addressing the comparative qualifications of the applicants. *See FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). If the 307(b) determination was dispositive, the standard comparative issues were not considered. *See Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046 (D.C. Cir. 1977). The Commission altered this approach for implementing Section 307(b) in the commercial FM and television services by establishing and incorporating in its rules a Table of Allotments for each service.[108] These allotment tables provide for a distribution of channels for specific communities throughout the United States based on fixed mileage separations. The Commission fulfills the 307(b) obligation by making available for licensing only a frequency that has been assigned to a specific community in the Table of Allotments through a rulemaking proceeding. A system of priorities guides the Commission's 307(b) determinations, setting preferences for applicants proposing to establish a station in a nonserved or underserved community.[109]

116. By comparison, AM radio frequencies are allocated on a demand basis, with applicants specifying the desired community and providing engineering exhibits to demonstrate the absence of interference to existing stations. Without an allotment table, mutual exclusivity may occur between AM applicants proposing to serve different communities. If such mutually exclusive AM applications were filed, the Commission formerly addressed the Section 307(b) considerations in the resultant comparative hearing process.

117. As discussed above, Section 309(j) of the Communications Act sets forth the Commission's authority to award spectrum licenses by competitive bidding. In originally authorizing the Commission's use of competitive bidding to award licenses in subscriber-based services and in subsequently expanding that authority to include broadcast licenses, Congress did not eliminate or revise Section 307(b) of the Act. Prior to authorizing (let alone requiring) the use of auctions for broadcast stations, Congress expressly indicated that its grant of auction authority to the Commission should not affect specific provisions of the Communications Act that limit the rights of licensees, or that direct the Commission to adhere to other requirements. In particular, Congress stated that the adoption of competitive bidding procedures does not affect, *inter alia*, Section 307 of the Communications Act. Section 309(j)(6) contains "Rules of construction" and stipulates that "Nothing in this subsection, or in the use of competitive bidding, shall ... (B) limit or otherwise affect the requirements of ... section ... 307 ... of this title ...." 47 U.S.C. § 309(j)(6)(B).[110] This provision of Section 309(j)(6) was neither

[108] *See Sixth Report and Order on Television Allocations*, 41 FCC 148 (1952); *Revision of FM Broadcast Rules*, 40 FCC 747 (1963). 47 C.F.R. § 73.202 contains the FM Table of Allotments and 47 C.F.R. § 73.606 contains the television Table of Allotments.

[109] In contrast, LPTV and television and FM translator stations are not required to meet basic full-service station requirements, *i.e.* provide responsive programming or maintain a presence in the community, cover the community with an adequate strength signal, *etc.* Although LPTV and translator stations are licensed to specific communities, the Commission has concluded that Section 307(b) issues are not relevant in the context of these secondary services. *See Low Power Television and Television Translator Service*, 2 FCC Rcd 1278, 1281 (1987).

[110] *See also* H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 253 (1993).

modified nor excised by the 1997 Budget Act.

118. As noted with respect to FM and television, a community's need for service is assessed in the context of the initial rulemaking proceeding to determine additions and substitutions to the Table of Allotments. This procedure is unaltered by the implementation of competitive bidding. Furthermore, we have always required demonstration that a singleton AM applicant seeking to change its community of license complies with our standards under Section 307(b).[111] However, the discontinuance of the comparative hearing process leaves the 307(b) analysis for mutually exclusive AM applications without a venue.

119. A few commenters urge the Commission to treat all such mutually exclusive AM applicants seeking authority to serve different communities as a non-auctionable class.[112] We reject this proposal as inconsistent with the clear statutory mandate. As described in detail above, amended Section 309(j) requires the Commission to auction mutually exclusive applications for the broadcast and secondary broadcast services, and includes no express exemption from competitive bidding for competing AM applications that specify different communities of license.

120. After consideration, however, we conclude that, our competitive bidding authority under Section 309(j) should be implemented in a way that accommodates our statutory duty under Section 307(b) to effect an equitable geographical distribution of stations across the nation. Congress specifically directed that the requirements of Section 307 should not be affected by the use of competitive bidding. *See* 47 U.S.C. § 309(j)(6)(B). Thus, our obligation to fulfill the Section 307(b) statutory mandate endures. The Commission and the courts have traditionally interpreted Section 307(b) to require that we identify the community having the greater need for a broadcast outlet as a *threshold* determination in any licensing scheme, for to decide otherwise would subordinate the "needs of the community" to the "ability of an applicant for another locality." *FCC v. Allentown Broadcasting Corp.* at 361-362.[113] We conclude that our rules should incorporate a similar threshold Section 307(b) analysis to determine whether particular applications are eligible for auctions. Specifically, with respect to AM applications, a traditional Section 307(b) analysis will be undertaken by the staff prior to conducting auctions of competing applications. If the Section 307(b) determination is dispositive, the staff will grant the application proposing to serve the community with the greater need if there are no competing applications for that community, and dismiss as ineligible any competing applications not proposing to serve that community.[114] If no Section 307(b) determination is dispositive (or if more than one application remains for the community with the greater need), the applicants must then be included in a subsequently scheduled auction. This approach is consistent with our established practice in the commercial FM and television services with allotment tables where, as discussed above, the Section 307(b) analysis customarily precedes the licensee selection process. The number of AM applications subject to such a 307(b) staff analysis should be minimal, as there are relatively few instances of mutual exclusivity among AM applications submitted for new stations and major

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[111] *See Ark-Valley Broadcasting Company, Inc.*, 15 FCC 818 (1951); *North Texas Radio, Inc.*, 11 FCC Rcd 8531, 8535 (1996), *citing Ark-Valley* (Section 307(b) must be considered when a licensee seeks to change its community of license. Applications for the removal of stations from one community to another in effect constitute alternative requests, one for a new license to operate in a new community, and the other for authority to continue operation at the existing location. Hence, there is demand for the station by two communities.).

[112] *See* Comments of New Jersey Television Corporation at 3; Jeffrey Eustis at 2.

[113] *See* Comments of New Jersey Television Corporation at 3.

[114] *See generally Storer Broadcasting, supra* ¶ 44 (holding that the Commission has the statutory authority to prescribe threshold eligibility standards and to dismiss without a hearing applications not meeting such requirements).

modifications.[115] Moreover, this procedure accommodates both Section 307(b) and Section 309(j), and results in a balanced implementation of the two respective sections of the Communications Act.

b. Competitive Bidding Design

(1) Auction Methodology

121. In the *Notice*, 12 FCC Rcd at 22383 (¶ 51), we proposed to conduct all auctions of mutually exclusive broadcast applications in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q of the Commission's rules, subject to any changes made to those rules in the then-ongoing Part 1 rulemaking, and substantially consistent with the bidding procedures that have been employed in previous Commission auctions. Accordingly, we asked that commenters review the proposed changes in the Part 1 rules, identify any rules they believed to be inappropriate for broadcast auctions, and propose alternatives. Commenters advocating different procedures were requested to explain in detail how such procedures would work and why the proposed Part 1 rules would be inappropriate in the broadcast context.

122. The *Notice*, 12 FCC Rcd at 22383-85 (¶¶ 52-55), sought comment on a variety of competitive bidding design options for the auction of broadcast service construction permits. Specifically, we discussed the possibility of using a simultaneous multiple round auction design, similar to that used in many previous auctions, as well as alternate bidding designs that might be appropriate in the broadcast context, including: (1) sequential multiple round auctions, using either oral ascending, remote or on-site electronic bidding; and (2) sequential or simultaneous single round auctions, using either remote and/or on site electronic bidding, or sealed bids. *See generally* 47 C.F.R. § 1.2103. Additionally, we noted that we have the authority under Section 309(j) to explore other auction methodologies.[116]

123. We received a number of comments on the type of auction design that should be utilized for the auction of broadcast construction permits. Several commenters addressing the issue oppose the use of a simultaneous multiple round auction design, arguing that the Commission should employ a simpler auction design.[117] Specifically, simultaneous multiple round bidding is regarded as inappropriate for broadcast auctions because such auctions will be for scattered facilities and there is little likelihood that bidders will seek to acquire groupings of licenses.[118] A small number of commenters specifically favor the use of open outcry for broadcast

[115] We recognize that the Commission will need to request supplemental information from the parties to evaluate the 307(b) considerations of any mutually exclusive AM applications proposing to serve different communities. As in past Section 307(b) proceedings, comparisons of the radio needs of the respective communities will be made by examining factual data submissions such as the area and populations that would gain or lose service from the competing proposals, the availability of other primary service to such area and populations, and particular community attributes. *See, e.g., Elijah Broadcasting Corporation*, 2 FCC Rcd 4468 (ALJ 1987); *Radio Greenbrier, Inc*., 80 FCC 2d 125 (ALJ 1979).

[116] *See* Section 3002(a) of the Budget Act expanding and extending the Commission's auction authority and, *inter alia*, directing the Commission to design and test a combinatorial bidding system.

[117] *See, e.g.,* Comments of National Association of Broadcasters at 3-4; Seven Ranges Radio Co., Inc. at 3; Liberty Productions, LP at 7; Heidelberg-Stone Broadcasting Co. at 13; Rio Grande Broadcasting Co. at 13; Independent Broadcast Consultants, Inc. at 7.

[118] *See* Comments of National Association of Broadcasters at 4.

auctions, due to the simplicity and speed of that auction method.[119] With regard to the auction methodology to be employed in the event we determine to auction ITFS licenses, several commenters express similar reservations about simultaneous multiple round bidding and support open outcry.[120] Another commenter specifically favors the use of multiple round auctions because in single round or sealed bid auctions the successful bidder may be forced either to bid too much for the spectrum or be unable to increase its bid if it is too low.[121]

124. The *Notice*, 12 FCC Rcd at 22386-87 (¶ 58), also sought comment on how the Commission should deal with any "daisy chains" presented in auctions of AM radio, LPTV, or television or FM translator applications. As we discussed, daisy chains occur when an application is mutually exclusive (*i.e.*, would cause interference) with a second application, which is mutually exclusive with a third application in the same or adjacent community, and so on, even though the first application may not be directly mutually exclusive with any application except the second.[122] Due to the possibility of daisy chains in AM, LPTV, and television and FM translator auctions, there may be limited instances in these auctions where, depending on who becomes the winning bidder among a mutually exclusive group, another application (in addition to the auction winner) may become grantable, or another smaller mutually exclusive group will still exist and need to be resolved. We therefore sought comment on appropriate methods for resolving any daisy chains in the auction context. We also suggested that commenters address whether the methods used to resolve daisy chains in the lottery process (such as the holding of "sub-lotteries") are applicable in the auction context, or whether a different method or methods may be more suitable, such as the use of combinatorial bidding.

125. Only two commenters addressed the issues of daisy chains and combinatorial bidding. Specifically, one commenter argues that daisy chains are a problem that should be dealt with by not conducting auctions for AM stations.[123] The other commenter states that combinatorial bidding should be avoided because it is an open invitation to speculators who will then resell licenses to the highest bidder.[124]

126. As we discussed in the *Notice*, because the same type of auction methodology may not be appropriate for all mutually exclusive broadcast and secondary broadcast applications, different approaches may be warranted to resolve mutual exclusivity among certain categories of broadcast applications and for "daisy chain" situations. After considering the comments on this issue, we conclude that the appropriate auction design will vary depending on the type of service involved, the number of construction permits at stake, how many

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[119] *See* Comments of John W. Barger at 5; Seven Ranges Radio Co., Inc. at 2, 5; Independent Broadcast Consultants, Inc. at 7-8.

[120] These commenters contend that, given the lack of interdependence between ITFS licenses, a simultaneous multiple round auction design would be unnecessarily costly and complex, and they instead favor a sequential auction design, such as a sequential open outcry auction. *See, e.g.*, Comments of Wireless Cable Association International, Inc. at 22-23; BellSouth Corporation and BellSouth Wireless Cable, Inc. at 13-14.

[121] *See* Comments of Apache Radio Broadcasting Corporation at 8.

[122] These daisy chains occur due to the contour overlap rules used to determine interference for AM, LPTV, and television and FM translator applications. Because applicants apply for full service FM and television stations pursuant to allotment tables that specifically identify vacant channels, daisy chains do not generally occur in those services.

[123] *See* Comments of JTL Communications Corp. at 7. We note this proposal is contrary to the Commission's statutory mandate in the amended Section 309(j) to auction mutually exclusive broadcast applications.

[124] *See* Comments of Seven Ranges Radio Co., Inc. at 10.

bidders are likely to participate, and the degree to which interdependence may be important to those likely to bid on a particular type of permit. As the record suggests, we believe that a simple, rapid auction design, such as a single round sealed bid auction, will likely be appropriate for those permits that are relatively low-valued or for which there is little likelihood of interdependence (such as translator construction permits). At the same time, however, our auction experience demonstrates that there are instances where a simultaneous multiple round auction design can prove useful in ensuring that an auction progresses as efficiently as possible. In addition, as we discussed in the *Notice*, simultaneous multiple round bidding has the advantage of affording bidders more information during the auction concerning the value that competing bidders place on the permits being auctioned than is the case with single round bidding. For this reason, simultaneous multiple-round bidding is more likely to result in the party that values the spectrum the most acquiring the permit. Therefore, for broadcast construction permits that are more highly valued, or for which there is a greater likelihood of interdependence among the permits, we will likely use simultaneous multiple round auctions.

127. Consistent with our Part 1 rules, we therefore delegate authority to the Mass Media Bureau and the Wireless Telecommunications Bureau (hereafter, the Bureaus) to seek comment on and establish an appropriate auction design methodology prior to the start of each broadcast auction or group of broadcast auctions. As we discussed in the *Third Report and Order*, 13 FCC Rcd at 447-449, the Budget Act requires that, "before the issuance of bidding rules" the Commission must provide adequate time for parties to comment on proposed auction procedures, and that "after issuance of bidding rules," the Commission must provide adequate time "to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment."[125] Consistent with these provisions, in the *Third Report and Order* we directed the Wireless Telecommunications Bureau, under its existing delegated authority,[126] to seek comment on a variety of auction-specific issues prior to the start of each auction.[127] Specifically, we directed the Wireless Telecommunications Bureau to consider a variety of mechanisms relating to day-to-day auction conduct, including the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices, minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension, or cancellation. *See Third Report and Order*, 13 FCC Rcd at 448. We also directed the Wireless Telecommunications Bureau to afford interested parties a reasonable time, in light of the start date of each auction and relevant pre-auction filing deadlines, to comment on auction-specific issues. *Id*.

128. As we indicated in the *Third Report and Order*, we believe that this process is consistent with the requirements of Section 309(j)(3)(E), as added by the Budget Act, and will afford potential bidders adequate notice, as well as an opportunity to comment on issues relating to the day-to-day conduct of each auction. *See* 47 U.S.C. § 309(j)(3)(E). Although we did not specifically propose to employ this practice for broadcast auctions, we conclude that it should apply in this context as well. Therefore, consistent with our decision in the *Third Report and Order* and the guidance we provide herein, we direct the Bureaus to seek comment on the types

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[125] Balanced Budget Act of 1997, § 3002(a)(1)(B)(iv); 47 U.S.C. § 309(j)(3)(E).

[126] *See* 47 C.F.R. §§ 0.131(c), 0.331, 0.332.

[127] *See Third Report and Order*, 13 FCC Rcd at 448. *See also Comment Sought on Balanced Budget Provisions Calling For Reserve Prices or Minimum Opening Bids in FCC Auctions, Public Notice*, DA 97-1933 (rel. Sept. 5, 1997); *Comment Sought on Reserve Prices or Minimum Opening Bids for LMDS Auction, Public Notice*, DA 97-2224 (rel. Oct. 17, 1997); *Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues for the Phase II 220 MHz Service, Public Notice*, DA 98-48 (rel. Jan. 13, 1998).

of auction-specific issues raised in the *Notice* prior to the start of each auction or group of auctions for particular broadcast services.

(2) Upfront Payments, Minimum Opening Bids and Reserve Prices

129. The general Part 1 auction rules provide for the submission of upfront payments by prospective bidders prior to the commencement of an auction, the amount of which generally determines a bidder's eligibility to bid on any license or combination of licenses in each round of the auction. *See* 47 C.F.R. § 1.2106. In the *Notice*, 12 FCC Rcd at 22385 (¶ 56), we proposed that the Bureaus should establish the upfront payments applicable in broadcast service auctions, which would be announced by public notice prior to any auction. We sought comment on the appropriate amount, or method of determining an appropriate amount, of this upfront payment for bidders in broadcast auctions. While in previous auctions we have typically based the upfront payments upon the amount of spectrum and population (or "pops") covered by the licenses or permits for which parties intend to bid, we noted that in the broadcast area there is other data, such as market size, market ratings, advertising rates and broadcast transactions, that might prove more useful than the MHz-pop formula utilized in valuing other, less established telecommunications services. We therefore sought comment on alternate valuation formulas.

130. As we recognized in the *Notice*, 12 FCC Rcd at 22381 (¶ 57), Congress in the Budget Act directed the Commission to prescribe methods by which a reasonable reserve price or a minimum opening bid will be established for any license that is to be assigned by competitive bidding, unless such reserve prices or minimum opening bids would be contrary to the public interest.[128] In response to this legislative directive, we proposed that the Bureaus consider the use of reserve prices and minimum opening bids for auctionable commercial broadcast construction permits. We sought comment on the methodology to be employed in establishing each of these mechanisms, and noted the possibility of establishing minimum opening bids at the same level as upfront payments, as was done in connection with the auction for the 800 MHz Specialized Mobile Radio service, and of using a MHz-pop formula, as was done in the recently-completed Local Multipoint Distribution Service auction.[129] We also sought comment on a variety of alternative methods for estimating the value of the relevant construction permits and thus for providing a basis for estimating reserve prices or minimum opening bids. Finally, we proposed to announce any reserve prices or minimum opening bids established for broadcast construction permits by public notice prior to auction, unless, based upon the record with respect to a particular auction or service, it is determined that a reserve price or minimum opening bid would not be in the public interest.

131. A number of commenters addressed the issues of upfront payments, minimum opening bids, and reserve prices in the broadcast auction context. With regard to upfront payments, commenters argue that while upfront payments are useful to ensure that only serious applicants participate in broadcast auctions,[130] upfront

[128] *See* 47 U.S.C. § 309(j)(4)(F). A "reserve price" is a price below which a license subject to auction will not be awarded. A "minimum opening bid" is a minimum value below which bids will not be accepted in the first round of an auction.

[129] *Public Notice, Auction of 800 MHz Specialized Mobile Radio Upper 10 MHz Band*, DA 97-2147 (rel. Oct. 6, 1997), 62 Fed. Reg. 55251 (Oct. 23, 1997) (establishing minimum opening bids that are subject to reduction and setting the initial amounts at the level of upfront payments). *See also Auction of Local Multipoint Distribution Service (LMDS), Minimum Opening Bids or Reserve Prices, Order*, 13 FCC Rcd 782 (WTB 1998) (establishing minimum opening bids for LMDS auction and stating that Wireless Telecommunications Bureau has discretion to lower minimum opening bids as it deems appropriate).

[130] *See* Comments of Thomas C. Smith at 10.

payments should be small to allow small businesses to compete effectively.[131] Commenters differ, however, on how upfront payments should be determined, and suggest a variety of factors, including: (1) the population served and the class of station;[132] (2) data drawn from station transactions and the performance of operating stations in the market that the applicant hopes to serve;[133] (3) current permit costs;[134] and (4) a flat upfront payment amount such as $100,000.[135] At least one commenter believes that pending applicants who filed prior to July 1, 1997, should only be required to submit a nominal upfront payment, while other applicants should be required to demonstrate a greater financial commitment.[136] Other commenters oppose an upfront payment requirement for broadcast auctions, arguing that upfront payments are contrary to the public interest,[137] or that the Commission's existing default and bid withdrawal payments alone are sufficient to discourage insincere bidders.[138]

132. Several commenters also discussed the Commission's tentative conclusions regarding minimum opening bids and/or reserve prices. Those commenters who support their use make a variety of suggestions as to how such mechanisms should be established. One commenter contends that the minimum opening bid should be equal to the upfront payment and based upon the population proposed to be served.[139] In contrast, another commenter argues that minimum opening bids, like upfront payments, should be determined using data based upon station transactions and the performance of operating stations in the market that the applicant hopes to serve, particularly in smaller market areas for which there is no comparable market data that could fairly be used to estimate license value.[140] Other commenters oppose the establishment of a minimum opening bid and/or reserve price for the auction of broadcast construction permits, arguing that (1) the Commission, Mass Media Bureau and Wireless Telecommunications Bureau lack the expertise and/or staff resources necessary to establish

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[131] *See, e.g.*, Comments of JTL Communications Corp. at 4; Independent Broadcast Consultants, Inc. at 8-9.

[132] *See* Comments of Apache Radio Broadcasting Corporation at 2, 6-7; Kidd Communications at 8; Thomas Desmond at 9.

[133] *See* Comments of Tanana Valley Television Co. at 2. However, this use of market data to establish an appropriate upfront payment is opposed by several other commenters addressing the issue. *See* Comments of Kidd Communications at 8-9; Independent Broadcast Consultants, Inc. at 8-9; JTL Communications Corp. at 5. In particular, Kidd Communications (at 8-9) opposes this method of setting the upfront payment, arguing that it would be unfair to base the upfront payment on existing competitors' revenues in the market because a "start-up station" might never be able to achieve the same financial results.

[134] *See* Comments of JTL Communications Corp. at 4.

[135] *See* Comments of J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 16.

[136] *See* Comments of John W. Barger at 4.

[137] *See* Comments of Michael R. Ferrigno at 8; Terry A. Cowan at 4.

[138] *See* Comments of Liberty Productions, LP at 7; Heidelberg-Stone Broadcasting Co. at 14; Rio Grande Broadcasting Co. at 14.

[139] *See* Comments of Apache Radio Broadcasting Corporation at 2. *Accord* Comments of JTL Communications Corp. at 6 (set opening bid amount at same level as upfront payment).

[140] *See* Comments of Tanana Valley Television Co. at 2.

a minimum opening bid and/or reserve price;[141] (2) a minimum opening bid or reserve price is either unnecessary or not in the public interest because the auction itself will establish the fair market value of the broadcast construction permits;[142] or (3) the purpose of a minimum opening bid or reserve price would only be to generate funds for the U.S. Treasury.[143] Two commenters also contend that, for pending applications filed before July 1, 1997, minimum opening bids or reserve prices would be particularly inequitable.[144]

133. We disagree with those commenters who contend that the Commission lacks expertise to establish upfront payments, minimum opening bids or reserve prices for auctions. The submission of upfront payments prior to auction has been provided for in our general Part 1 auction rules since they were first promulgated, and the staff of the Wireless Telecommunications Bureau has established upfront payments for most of the Commission's 16 previously-concluded spectrum auctions. That Bureau has also accurately evaluated such disparate services as Direct Broadcast Satellite, Digital Audio Radio Satellite Service, 800 MHz Specialized Mobile Radio and the Local Multipoint Distribution Service to establish minimum opening bids. Moreover, Congress in the Budget Act explicitly directed us to prescribe methods by which reserve prices or minimum opening bids will be established, unless we specifically determine that doing so would not be in the public interest. *See* 47 U.S.C. § 309(j)(4)(F).[145] General assertions by some commenters that establishment of a minimum opening bid or reserve price would not be in the public interest for broadcast auctions are unpersuasive, given the terms of Section 309(j)(4)(F) and the successful use of minimum opening bids in previous Commission auctions.

134. As discussed above (*see supra* ¶¶ 127-128), we will, for auctions of broadcast construction permits, employ the procedure adopted in the *Third Report and Order*, whereby we will seek comment on a variety of auction-specific issues prior to the start of the auction. Therefore, consistent with the Budget Act, our treatment of these issues in the *Third Report and Order*, and our proposals in the *Notice*, we delegate to the Bureaus authority to seek comment on and, as appropriate, to establish upfront payments, minimum opening bids and/or reserve prices for each auction or group of auctions of broadcast service construction permits. In formulating proposals regarding upfront payments, reserve prices and minimum opening bids, we believe that both Bureaus should consider the issues raised by commenters in this proceeding. With respect to the methodology to be employed in establishing each of these mechanisms, among the factors the Bureaus may consider are the type of service that will be offered, the amount of spectrum being auctioned, the degree of competition from incumbent providers, the size of the geographic service areas, potential advertising revenue, unalterable limitations due to physical phenomena (*e.g.*, propagation losses), equipment design limitations, issues of interference with other spectrum bands, and any other relevant factors that could reasonably have an impact on valuation of the spectrum being auctioned.

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[141] *See* Comments of Liberty Productions, LP at 7-8; Heidelberg-Stone Broadcasting Co. at 14-15; Rio Grande Broadcasting Co. at 14-15.

[142] *See* Comments of Seven Ranges Radio Co., Inc. at 4; Liberty Productions, LP at 8; KM Communications, Inc. at 7; James G. Cavallo at 6-7; Heidelberg-Stone Broadcasting Co. at 15; Rio Grande Broadcasting Co. at 15.

[143] *See* Comments of Terry A. Cowan at 4.

[144] *See* Comments of KM Communications, Inc. at 7; J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 16.

[145] The Conference Report to the Budget Act also indicates that Congress generally intended for the Commission to establish such minimum opening bids or reserve prices for future auctions. *See* H.R. Rep. No. 217, 105th Cong., 1st Sess. 573 (1997) ("the Commission *must* also prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, for any license or permit assigned by means of auction") (emphasis added).

c. Auction Application and Payment Procedures

135. In the *Second Report and Order*, the Commission initially established general competitive bidding rules and procedures for all auctionable services, but indicated that such rules could be modified on a service-specific basis. More recently, in the *Third Report and Order*, the Commission substantively amended these general competitive bidding rules in an effort to streamline regulation, increase the efficiency of the auction process, and provide more specific guidance to auction participants. Based on the experience gained in the course of conducting numerous auctions and to provide for a more consistent and efficient competitive bidding process, the *Third Report and Order* modified the general Part 1 auction rules, and stated that these uniform rules would govern all future auctions, unless the adoption of service-specific rules was determined to be warranted with regard to particular matters. *Id.*, 13 FCC Rcd at 382. Accordingly, we will follow for all broadcast services the procedural and payment rules established in the *Second Report and Order* and *Third Report and Order*, set forth at 47 C.F.R. Chapter I, Part 1, Subpart Q, with certain modifications, as specifically indicated below. Our objective has been to design rules and procedures that will reduce administrative and financial burdens on bidders and the Commission, ensure that bidders and licensees are qualified, and minimize the delays in the authorization and construction of new or expanded broadcast facilities to serve the public. *See* 47 U.S.C. § 309(j)(3)(A) (in designing auction rules, the Commission should seek to promote development and rapid deployment of new technologies, products and services for public benefit, without administrative or judicial delays).

(1) Pre-Auction Application Procedures

136. ***Window Filing Approach.*** As described in the *Notice*, 12 FCC Rcd at 22387 (¶ 60), the broadcast and secondary broadcast services currently all have differing filing procedures, and none of these procedures was designed to work in conjunction with the auction of mutually exclusive applications. In this *First Report and Order*, we replace these disparate filing procedures for the various services with a uniform window filing approach that will facilitate the efficient determination of groups of mutually exclusive applications for auction purposes.

137. In the television, AM and FM translator services, the new window filing approach will replace the existing two-step cut-off list procedures presently utilized. *See* 47 C.F.R. §§ 73.3571; 74.1233.[146] The current LPTV and television translator window filing procedures will be modified to conform with the auction window filing procedures. *See* 47 C.F.R. § 73.3572(g). In the FM service, as discussed in the *Notice*, 12 FCC Rcd at 22390 (¶ 65), the adoption of a fixed period filing window will terminate the ability of applicants to tender new and major change FM applications on a first come/first served basis, as permitted under the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985). *See also* 47 C.F.R. § 73.3573. With regard to the FM allotment process, channels will continue to be assigned to the FM Table of Allotments through our existing rulemaking process, and we will continue to accept and process petitions for rulemaking requesting the allotment of new FM channels to the Table of Allotments at any time. However, we will no longer open filing windows in allotment report and orders for the newly-allotted channel; applicants will, instead, be able to apply for any such allotments during subsequently announced FM auction filing windows. *See* 47 C.F.R. § 73.3564(d).

138. We hereby replace these disparate filing procedures with a specific time period, or auction window,

[146] Under these rules, after an initial review for acceptability, the lead application is placed on an "A" cut-off list by a public notice, which announces a cut-off date by which applications mutually exclusive with, and petitions to deny, the lead application must be filed. Following an initial review of applications filed in response to the "A" cut-off list and a determination as to which of these applications are mutually exclusive with the lead application, a "B" cut-off list, which enumerates such applications and sets the date for filing petitions to deny against them, is released.

during which all applicants seeking to participate in an auction must file their applications for new broadcast facilities or for major changes to existing facilities.[147] Prior to any broadcast auction, the Bureaus will release, pursuant to delegated authority, various public notices concerning the auction and the procedures to be followed in the auction. As indicated in the *Notice*, 12 FCC Rcd at 22389 (¶ 63), an initial public notice will announce an upcoming auction and will specify when the window for filing to participate in the auction will open and how long it will remain open. The filing window will remain open a sufficient period of time so that applicants, such as those for the AM and LPTV services, will be able to prepare and file the engineering information necessary to make determinations of mutual exclusivity. *See infra* ¶ 143. We emphasize that applications filed before or after the dates specified in the public notice will not be accepted. Applications submitted prior to the window opening date identified in the public notice will be returned as premature, and applications submitted after the specified deadline will be dismissed with prejudice as untimely.

139. We will retain the discretion to have combined filing windows allowing the submission of applications for several broadcast services, or to have separate filing windows for each type of broadcast or secondary broadcast service. Although the opening of a combined window for the filing of applications for the various broadcast and secondary broadcast services at the same time may be more efficient, we recognize that opening separate windows for each service may better accommodate the circumstances unique to each service and better allow the Commission to control the filing and processing of applications.[148] We will open filing windows for the broadcast and secondary broadcast services as often as our resources allow, taking into consideration the Commission's need to maintain orderly processing procedures and the frequency with which broadcast auctions may be efficiently conducted, as well as equitable considerations that may warrant conducting auctions for pending applications before opening auction filing windows for new applications. Mutually exclusive broadcast applications filed during these windows may also be included in auctions of unsold or defaulted licenses, particularly if the number and estimated value of the construction permits at issue is low. We feel that the efficiency of the broadcast application and auction process will be best promoted by the Commission retaining discretion to open filing windows and schedule auctions in such a flexible manner.

140. We feel that the uniform window filing approach described above best complements the auction process and, at the same time, provides the staff with a mechanism to control effectively the filing and processing of broadcast applications.[149] In particular, adherence to date certain openings and closings of filing windows (rather than first come/first served processing) will enable the Commission to identify more efficiently discrete groups of mutually exclusive applications for auction purposes. Although a few commenters state that the window filing approach would encourage the filing of large numbers of speculative applications,[150] we have found that speculation is actually greatly reduced in the auction context, given the strict payment and other bidding requirements. Given the paucity of substantive comments even addressing our window filing proposal, we conclude that commenters had no strong objections to the replacement of our existing disparate filing procedures with a uniform window filing approach.

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[147] As discussed in detail in ¶ 177, minor modification applications may continue to be filed at any time.

[148] *See, e.g.*, Comments of Kyle Magrill at 2; Six Video Broadcast Licensees at 4 (supporting separate filing windows for different services).

[149] Thus, we disagree with one commenter who thought that filing windows would be burdensome for Commission staff. *See* Comments of Hatfield & Dawson Consulting Engineers, Inc. at 4.

[150] *See* Comments of Seven Ranges Radio Co. Inc. at 6; Sellmeyer Engineering at 2.

141. ***Short-Form Applications.*** To reduce the burden on bidders and the Commission, and to minimize the potential for delays, broadcast applicants, in accordance with our general Part 1 auction rules, will be required to submit only a short-form application (FCC Form 175) prior to any auction, and only winning bidders will need to file complete long-forms (FCC Form 301 for AM, FM and television stations, FCC Form 346 for LPTV and television translators, or FCC Form 349 for FM translators). Specifically, in response to a public notice announcing a window for the filing of broadcast and/or secondary broadcast applications for new stations and for major changes in existing facilities, we will, as proposed in the *Notice*, 12 FCC Rcd at 22390 (¶ 65), require applicants to file a short-form application, along with any engineering data necessary to determine mutual exclusivity in a particular service.[151]

142. With regard to the FM service, the *Notice* proposed that applicants would apply by submitting the FCC Form 175 application for any vacant FM allotment specified in the public notice announcing the auction filing window. Applications specifying the same vacant FM allotment would be mutually exclusive, and no supplemental engineering data would be necessary to make this determination. Commenters, however, noted that the Commission's proposal would protect from subsequently filed applications (such as minor change applications that may be filed at any time) only the reference points of any vacant allotment. According to these commenters, the reference point of a vacant allotment and an applicant's actual desired location may be separated by a considerable distance, and they argued that FM applicants should be allowed to submit actual site preferences prior to the auction, emphasizing that the ability to protect a specific tower or site from subsequently filed proposals would be a crucial factor in deciding whether to participate in an auction and how much to bid.[152] Accordingly, to address these concerns, we will give FM applicants the opportunity to submit a set of preferred site coordinates as a supplement to the FCC Form 175. We emphasize that FM applicants are not required to submit a set of preferred site coordinates, and may simply indicate the vacant allotment upon which they intend to bid.[153]

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[151] With a single exception involving freeze waivers, applicants will not be permitted to file applications for new analog television stations in these windows because, in the *Sixth Report and Order* concerning advanced television, the Commission essentially ended the licensing of new analog television stations. Specifically, the Commission determined to treat the existing vacant analog television allotments in the Table of Allotments that were not the subject of pending applications as deleted, and stated that we would not accept new applications for new stations on those allotments. With regard to pending applications and petitions for rule making requesting new television allotments, we determined to maintain and protect those vacant allotments that were the subject of such pending applications. *Sixth Report and Order*, 12 FCC Rcd at 14639. In the event we grant a pending freeze waiver request and accept for filing a singleton television application filed prior to July 1, 1997, we will announce a period during which mutually exclusive applications may be filed. *See supra* ¶ 70. Any applicant then filing a competing application against a pending analog television applicant granted a freeze waiver will only need to submit an FCC Form 175 application indicating the specific television allotment at issue.

[152] *See* Comments of Association of Federal Communications Consulting Engineers at 3 (auction participants will likely conduct extensive investigations of potential transmission sites before deciding whether to apply for a vacant allotment, and, unless applicants' site preferences are protected and "cut-off" from subsequently filed applications, auction participants will be exposed to unnecessary risk that, at conclusion of the auction, their preferred sites will no longer be usable); Reynolds Technical Associates at 2 (if only reference coordinates for FM allotments receive protection, then bidders will not know the value of the allocations they are bidding on during the course of an auction); Hatfield & Dawson Consulting Engineers, Inc. at 2 (initial filing for FM stations must be site-specific because subsequently-filed minor change applications by existing stations, while protecting the reference coordinates
of vacant allotments, might not protect actual usable site coordinates, thereby limiting new station applicants to undesirable sites).

[153] Any specific site indicated by FM applicants will be entered into the Commission's database without determining its ultimate acceptability from a technical standpoint, and the site will be protected from subsequently filed applications (such as minor modification applications) as a full-class facility. *See* ¶¶ 180-183 for general discussion of cut-off protection. Requests to upgrade, downgrade or change the channel of the allotment will not be accepted prior to the auction. In addition, we note the possibility that preferred site coordinates filed for two separate FM allotments during the same filing window may conflict, creating cross-allotment mutual exclusivity. In the unlikely event that the preferred site coordinates submitted

143. Applicants for AM stations, LPTV stations, and television and FM translators will be required to file short-form applications specifying a channel or frequency upon which the applicant may operate in accordance with the Commission's existing interference standards for these services, which we are not altering in any way.[154] To determine which AM, LPTV, and television and FM translator applications are mutually exclusive for auction purposes, we will require applicants for these services to file, in addition to their short-form applications, the engineering data contained in the pertinent FCC form (*i.e.*, FCC Form 301, FCC Form 346 or FCC Form 349). Similarly, in those rare instances in which analog television licensees file major modification applications (such as a change in the community of license), we will require that such applicants file both an FCC Form 175 and the engineering data contained in the FCC Form 301. We believe that submission of this technical data with a short-form constitutes the least burdensome means of providing us with the necessary information to make mutual exclusivity determinations.

144. Overall, we conclude requiring prospective bidders to file only short-forms (supplemented for non-table services with engineering information) prior to any auction will enable us to identify the groups of mutually exclusive applications for auction in the most expeditious manner possible.[155] Based on our experience in conducting numerous auctions in different services, we also believe that submission of the FCC Form 175, which requires various certifications as to the legal, technical, financial and other qualifications of the applicant, is sufficient documentation to demonstrate an applicant's qualifications to participate in an auction. We therefore disagree with commenters who argue that merely requiring submission of the short-form prior to auction (as is our practice for all auctions) will invite speculators and insincere applicants.[156] We emphasize that, for broadcast auctions, we will follow the general auction rule, 47 C.F.R. § 1.2105, with regard to completion of the short-form[157] and exhibits to be submitted with the short-form.[158] More detailed information about the completion and submission of the short-form applications will be included in the public notices released prior to the opening of auction filing windows.

145. ***Amendment of Short-Form Applications.*** To encourage maximum bidder participation in broadcast auctions, we will, in accordance with the Part 1 auction rules, provide applicants whose timely-filed short-form applications are substantially complete, but which contain minor errors or defects, with an opportunity

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for two separate FM allotments were to conflict, we will expect the winning bidders for these allotments to resolve such conflict through negotiations after the close of the auction.

[154] *See, e.g.*, 47 C.F.R. §§ 73.37, 73.182, and 73.187 (AM interference rules); 47 C.F.R. §§ 74.703; 74.705, 74.707 and 74.709 (LPTV and television translator interference rules); and 47 C.F.R. §§ 74.1203 and 74.1204 (FM translator interference rules).

[155] *See* Comments of Tri-County Broadcasting, Inc. at 4; KERM, Inc. at 4 (prior to auction, requiring submission of long-forms is unnecessary and preparing long-forms is burdensome and expensive for applicants).

[156] *See* Comments of Williams Broadcasting Co. at 4-5; Todd Stuart Noordyk at 4-5; Donald James Noordyk at 5; Batesville Broadcasting Co., Inc. at 4-5; Positive Alternative Radio, Inc., *et al*. at 5-6; Throckmorton Broadcasting, Inc. at 5.

[157] *See* Section 1.2105(a)(2) for a description of the information required to be submitted on the FCC Form 175. 47 C.F.R. § 1.2105(a)(2). Applicants will also need to indicate whether they are eligible for the new entrant bidding credit adopted herein.

[158] For example, applicants will need to submit exhibits disclosing certain ownership information, identifying all parties with whom the applicant has entered into joint bidding arrangements, and, if seeking any special measures that may be available to small businesses, disclosing gross revenue information. *See* 47 C.F.R. §§ 1.2105(a)(2), 1.2112; *Third Report and Order*, 13 FCC Rcd at 419-420.

to correct and resubmit their applications prior to the auction. However, applicants will not be permitted to make any major changes to their applications after the initial filing deadline (*i.e.*, the close of the filing window), and any application that does not contain the requisite certifications will be dismissed with prejudice and may not be resubmitted. *See* 47 C.F.R. § 1.2105(b)(1). Major amendments include changes in ownership of the applicant that would constitute a change of control, changes in an applicant's size that would affect eligibility for any designated entity provisions, and changes in the license service areas identified in the short-form applications on which the applicant intends to bid. *See* 47 C.F.R. § 1.2105(b)(2). For auctions of broadcast services, we will construe "changes in the license service areas" to encompass changes in the engineering information submitted with short-form applications in non-table services, changes of the vacant allotments specified in short-forms in the FM and television services, or changes in any preferred site coordinates submitted with short-forms in the FM service. Thus, changes in the engineering submissions accompanying a short-form will be regarded as major changes, and cannot be made after the initial filing deadline.[159] Minor amendments include typographical corrections, those reflecting ownership changes or formation of bidding consortia specifically permitted under the anti-collusion rule (*see infra* ¶ 158), and those making other changes not identified as major.

146. After reviewing the short-form applications, the Bureaus will issue a public notice listing all applications containing minor defects, and applicants will be given the opportunity to cure and resubmit defective applications. On the date set for submission of corrected applications, applicants who on their own discover minor errors in their applications also will be permitted to file corrected applications. Following a review of the corrected applications, we will proceed to determine which of the short-form applications accepted for filing are mutually exclusive. *See infra* ¶¶ 149-153.

147. ***Method of Filing Short-Form Applications.*** After requesting comment on the issue, the Commission determined in the *Third Report and Order* to require all short-form applications to be filed electronically beginning January 1, 1999. *See* 47 C.F.R. § 1.2105(a). The *Notice* in this proceeding, 12 FCC Rcd at 22390-91 (¶ 67), anticipated that all broadcast and secondary broadcast applicants would file their FCC Form 175 applications electronically, and requested comment on this proposal. Some commenters oppose requiring electronic filing, stating concerns about technical problems and placing certain applicants, such as LPTV and translator applicants and those who are not computer literate, at a disadvantage.[160] After consideration, we have determined to follow the general auction rule mandating electronic filing, and will therefore require all applicants for broadcast auctions to file their FCC Form 175 applications electronically beginning January 1, 1999, unless it is not operationally feasible. Applicants for non-table services, who, as noted above, must submit engineering information with their short-forms, will be required to file the engineering section of the electronic versions of the FCC Forms 301, 346 and 349, which are currently being developed.[161] More

[159] As discussed in detail below (*see infra* ¶¶ 149-153), to the extent engineering information is required to be submitted with short-forms for certain broadcast services, such information is required only for the staff to utilize in making mutual exclusivity determinations for auction purposes. A comprehensive review of any applicant's technical proposal will be undertaken by the staff only post-auction, and an applicant who becomes a winning bidder will be able to make changes to its technical proposal at that time. We will also, as described above (*see supra* ¶ 17), allow applicants who have filed competing major modification applications, or competing major modification and new applications, to make changes in their engineering submissions following the filing of their short-forms so as to resolve their mutual exclusivities.

[160] *See* Six Video Broadcast Licensees at 6; Kyle Magrill at 3; Thomas C. Smith at 12; Liberty Productions, LP at 8; Rio Grande Broadcasting Co. at 15; Heidelberg-Stone Broadcasting Co. at 15.

[161] If the electronic versions of the FCC Forms 301, 346 and 349 are not available by the time of the first auction filing window opened for new applicants, then the Bureaus will by public notice announce the filing procedures for applicants to follow in submitting the necessary engineering information. We note that this question of the method of filing the engineering data necessary to make mutual exclusivity determinations will not arise in the initial broadcast auctions expected to be

detailed instructions on electronic filing will be provided in the public notices announcing auction filing windows.

148. We believe that requiring electronic filing for broadcast auctions will best serve the interests of the prospective bidders as a whole. Electronic filing does not pose an undue financial burden for applicants, as no fee is assessed for filing the FCC Form 175 electronically. This method of filing also promotes openness in the auction process generally. Competing bidders, as well as the general public, may easily review electronically filed applications by downloading applications, without needing to travel to Commission headquarters or contract for the photocopying of paper applications. To further facilitate public access, the Commission has developed user-friendly electronic filing software and Internet World Wide Web forms to give auction applicants the ability to easily file and review applications. This software also aids applicants in ensuring the accuracy of their applications as they are being completed, and enables applicants to correct errors and omissions prior to submitting their applications. To assist the public, we provide technical support personnel to answer questions and work with callers using the electronic auction system. Especially after the recent enhancements to our electronic filing system, we are confident that the system is reliable and secure, and bidders in previous auctions have apparently agreed, as the vast majority have chosen to file electronically, even when electronic filing was not required.[162] While we are cognizant of the fact that some broadcast applicants may currently lack experience in the filing of electronic applications, we feel, for the reasons described above, that the advantages of electronic filing are significant, and we will therefore, in accordance with the Part 1 auction rules, require short-form applications to be filed electronically.[163] Although we are mandating the electronic filing of the FCC Form 175 in broadcast auctions, we nevertheless reserve the right to provide for manual filing in the event of technical failure or other difficulties.

149. ***Determination of Mutual Exclusivity.*** After receipt of the short-form applications, the Commission must determine which applications are mutually exclusive for auction purposes. In the *Notice*, 12 FCC Rcd at 22391 (¶ 68), we tentatively concluded that, in cases where applicants have submitted engineering data in addition to the FCC Form 175, the Commission would not engage in pre-auction processing of the data, beyond the review necessary to determine mutual exclusivity for auction purposes. We sought comment on an alternate approach whereby the Commission would substantively evaluate the submitted engineering data, noting that this more extensive pre-auction processing could reduce the risk of applicants with defective technical proposals prevailing at auction. We cautioned, however, that evaluating and returning short-form applications with technical problems (such as interference or international coordination) would likely delay the auction process, as a returned applicant could seek reconsideration of the Commission's decision.

150. While some commenters support our alternate approach of conducting an engineering review prior

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conducted by the Commission, which will be limited to pending applicants who have already filed complete long-form applications and who will only need to submit the FCC Form 175.

[162] For example, in the 800 MHz SMR auction, 93% of the qualified bidders filed their short-form applications electronically. Moreover, we required all applicants to file their short-forms electronically in the Wireless Communications Service auction, with no objections from bidders.

[163] The electronic filing of short-form applications is also consistent with the Commission's movement toward electronic filing in the broadcast area generally. *See Notice of Proposed Rulemaking, 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 11349, 11352-55 (1998) (*Nontechnical Streamlining Notice*); *Notice of Proposed Rulemaking, 1998 Biennial Regulatory Review -- Amendment of Part 73 and Part 74 Relating to Call Sign Assignments for Broadcast Stations*, FCC 98-130 (rel. June 30, 1998).

to auction,[164] other commenters addressing this issue support our tentative conclusion to utilize pre-auction engineering submissions solely for the purpose of determining mutual exclusivity.[165] These commenters emphasize that the primary purpose of filing applications prior to auction should be to determine mutual exclusivity, rather than to determine the acceptability of an applicant's engineering proposal or other submissions. According to these commenters, the filing and review of long-form applications *following* the auction would be sufficient for the Commission to determine the acceptability of the applicant's engineering proposal, and, moreover, would relieve the Commission of the burden of reviewing in depth the technical and other qualifications of all potential applicants prior to the auction.

151. We will adopt our tentative conclusion and will accordingly examine the engineering data submitted by applicants for AM and LPTV stations and television and FM translators only to the extent necessary to determine the mutually exclusive groups of applications for auction purposes.[166] In keeping with the Commission's efforts to "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," *Second Report and Order*, 9 FCC Rcd at 2376, we will 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.[167]

152. We observe, however, that by filing the FCC Form 175, broadcast applicants are certifying that they are "legally, technically. . . and otherwise qualified pursuant to Section 308(b) of the Communications Act of 1934," and we expect to be able to rely on applicants' representations in this regard. We also remind 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 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.[168] *See infra* ¶ 161. *See also* 47 C.F.R. §§ 1.2104(g)(2); 1.2107(b); 1.2109. Our general competitive bidding rules also provide that if a winning bidder is found unqualified to be a licensee, the Commission may either reauction the license to existing or new applicants, or offer it to the other highest bidders in descending order at their final bids. *See* 47 C.F.R. § 1.2109(c). These provisions 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

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[164] *See, e.g.*, Comments of Michael Ferrigno at 9; Independent Broadcast Consultants, Inc. at 4; Communications Technologies, Inc. at 2; Hatfield & Dawson Consulting Engineers, Inc. at 2.

[165] *See, e.g.*, Comments of KERM, Inc. at 4; Tri-County Broadcasting, Inc. at 4; John W. Barger at 3.

[166] As noted above, applicants for FM stations need not submit any engineering data in addition to their FCC Form 175 applications because FM applications specifying the same available vacant allotments, as reflected in the FM Table of Allotments, will be mutually exclusive.

[167] *See* 47 U.S.C. § 309(j)(3)(A) (in designing competitive bidding systems, Commission should seek to promote the development and rapid deployment of new services for public benefit).

[168] Several commenters specifically state that the proposal to defer determinations regarding the acceptability or grantability of an applicant's technical proposal until after the auction appears workable, provided that the Commission strictly enforces its post-auction processing rules and assures that winning bidders whose long-form applications cannot ultimately be granted for either legal or technical reasons are subject to default payments under the Commission's general competitive bidding rules. *See* Comments of Liberty Productions, LP at 9; Rio Grande Broadcasting Co. at 15-16; Heidelberg-Stone Broadcasting Co. at 15-16.

would result from the disqualification of winning bidders and the reauctioning of broadcast construction permits. *See Second Report and Order*, 9 FCC Rcd at 2382.

153. Following the determination of mutual exclusivity among the applications filed in an auction window, the Bureaus will issue a public notice identifying the applicants in each mutually exclusive group eligible to bid at auction on the construction permits for the allotments or channels identified in their short-form applications. The public notice may also provide more detailed information regarding the time, place and method of competitive bidding to be used in the upcoming auction, applicable bid submission and payment procedures, the amount of the upfront payments, the procedures and deadline for submitting the upfront payments, and any minimum opening bid or reserve price for the construction permits being auctioned. Mutually exclusive applicants identified by public notice will be required to submit the full amount of their upfront payment to the Commission's lock-box bank by the date specified in the public notice, in accordance with the provisions of 47 C.F.R. § 1.2106. After receiving from the Commission's lock-box bank the names of all applicants who have submitted timely upfront payments, the Bureaus will issue a public notice announcing the names of all applicants determined to be qualified to bid in the broadcast auction. An applicant who fails to submit a sufficient upfront payment will not be identified on this public notice as a qualified bidder, will be ineligible to bid in the auction, and its application will be dismissed. *See* 47 C.F.R. § 1.2106(c). Each applicant identified on this public notice will be issued a bidder identification number that must be used when submitting bids.[169]

154. ***Non-Mutually Exclusive Short-Form Applications.*** If the Commission receives only one acceptable short-form application for any broadcast allotments or channels, then mutual exclusivity is absent and the Commission is precluded from using competitive bidding to award the broadcast construction permits. In these circumstances, the Bureaus will issue a public notice cancelling the auction for those particular construction permits and identifying the non-mutually exclusive applicants, who will then be required to submit the appropriate long-form application within 30 days.[170] The Commission's general rules governing the submission of fees and the filing of applications will apply to the long-form applications submitted by non-mutually exclusive applicants,[171] and these applications will be processed in accordance with our general processing procedures. In particular, the long-form applications will be placed on public notice, and, consistent with the procedures adopted herein, ten days will be allowed for the filing of petitions to deny. *See infra* ¶ 165.

155. ***Anti-Collusion Rule***. In the *Notice*, 12 FCC Rcd at 22393-94 (¶ 73), we sought comment on whether applicants for broadcast auctions should be subject to the Commission's anti-collusion rule, which provides that, after the short-form filing deadline, applicants generally may not discuss the substance of their bids or bidding strategies with other bidders that have applied to bid on the same licenses or permits. *See* 47 C.F.R.

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[169] We decline to follow the suggestion of one commenter that the Commission should require the filing of short-form applications and the submission of upfront payments at the same time, with the number of licenses being applied for restricted to the bidding eligibility limit, as established by the amount of the upfront payment submitted. *See* Comments of American Women in Radio & Television, Inc. at 18. We have rejected similar arguments in previous auction orders, and continue to believe that our established procedures with regard to short-form applications and upfront payments strike the proper balance between deterring speculation, yet still providing bidders with flexibility during the auction. *See Second Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 96-18 and PP Docket No. 93-253, 12 FCC Rcd 2732, 2793-94 (1997).

[170] *See* 47 C.F.R. § 73.3533 for identification of the specific long-forms used in applying for broadcast service construction permits or for modification of construction permits.

[171] *See, e.g.*, 47 C.F.R. §§ 1.1104 (schedule of application filing fees); 1.1111 (filing locations).

§ 1.2105(c).[172] We adopt our proposal to apply the anti-collusion rule to broadcast service auctions. We recognize that a number of commenters oppose this, believing instead that auction applicants should be permitted to conclude settlement agreements following the short-form filing deadline with those applicants with whom they are mutually exclusive.[173] Except to the extent discussed in ¶ 17 with respect to competing major modification applicants, we disagree. The Commission adopted the anti-collusion rule to both prevent and to facilitate the detection of collusive conduct, thereby enhancing the competitiveness of the auction process and the post-auction market structure. *See Second Report and Order*, 9 FCC Rcd at 2386-2388. Although the services subject to auction have increased in number and have become more diverse, we continue to believe that our anti-collusion rule is necessary to deter bidders from engaging in anti-competitive behavior. The rule has proven effective in the 16 spectrum auctions conducted to date, and we conclude that it should apply in the broadcast context as well.

156. Accordingly, applicants in broadcast auctions will be required to identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process. *See* 47 C.F.R. §§ 1.2105(a)(2)(viii); 1.2105(c)(1). Applicants also will be required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bids, bidding strategies, or the particular construction permits on which they will or will not bid. *See* 47 C.F.R. § 1.2105(a)(2)(ix). After short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders that have applied to bid in the same geographic license area, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.[174] Consistent with the anti-collusion rule's prohibition of discussions between competing applicants, we also conclude that we will not permit applicants to modify or amend their technical or engineering data submitted with their short-form applications following the short-form filing deadline so as to eliminate mutual exclusivity, except as previously discussed with regard to the engineering submissions of competing major modification applicants. *See supra* ¶¶ 17, 145. For purposes of the anti-collusion rule, an applicant is defined as the entity submitting a short-form application; all holders of partnership, ownership, and any stock interest amounting to ten percent or more of the applicant; and any holder of a controlling interest in the applicant. 47 C.F.R. § 1.2105(c)(6)(i).

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[172] We noted that this prohibition also prevents the transfer of indirect information which affects, or could affect, bids or bidding strategy, and asked for comment on the effect of the rule. As we have previously explained, the anti-collusion rule may affect the way in which auction participants conduct their routine business during an auction by placing limitations upon an auction participant's ability to pursue business opportunities in the areas in which it has applied to bid for licenses. *See Public Notice, Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rule for D, E and F Block Bidders*, DA 96-1460 (Aug. 28, 1996) *(August 28 Public Notice*); *Public Notice, FCC Staff Clarifies Application of Anti-Collusion Rule to Broadband PCS 'C' Block Reauction*, DA 96-929 (June 10, 1996); *Public Notice*, *Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules*, DA 95-2244 (Oct. 26, 1995); *News Release, Staff Adopts Order and Releases Letters Clarifying Issues on Broadband PCS Auctions* (Oct. 26, 1994); Letter from William E. Kennard, FCC, to Gary M. Epstein & James H. Barker, Oct. 25, 1994; Letter from Rosalind K. Allen, FCC, to R. Michael Senkowski, Dec. 1, 1994; Letter from Rosalind K. Allen, FCC, to Leonard J. Kennedy, Dec. 14, 1994; Letter from Kathleen O'Brien Ham, FCC, to Mark Grady, Apr. 16, 1996; Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, Sept. 17, 1996.

[173] *See, e.g.*, Comments of KM Communications, Inc. at 8; Positive Alternative Radio, Inc., *et al.* at 10; Throckmorton Broadcasting, Inc. at 11; Independent Broadcast Consultants, Inc. at 9; National Translator Association at 8.

[174] *See* 47 C.F.R. § 1.2105(c); *Fourth Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 6858, 6866-69 (1994); *Second Report and Order*, 9 FCC Rcd at 2387-88.

157. In addition, winning bidders in broadcast service auctions will be required to attach as an exhibit to their long-form applications a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they have entered into relating to the competitive bidding process. All such arrangements must have been finalized prior to the filing of the short-form applications. *See* 47 C.F.R. §§ 1.2107(d); 1.2105(c)(1).

158. We also adopt for broadcast auctions the exceptions to the anti-collusion rule, which were recently reaffirmed in the general Part 1 auction rules. Specifically, under Section 1.2105(c)(4) of our rules, a party holding a non-controlling, attributable interest in one applicant will be permitted to acquire an ownership interest, form a consortium with, or enter into a joint bidding arrangement with other applicants for licenses in the same geographic area, provided that (1) the attributable interest holder certifies that it has not and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, has formed a consortium, or has entered into a joint bidding arrangement; and (2) the arrangements do not result in a change in control of any of the applicants. 47 C.F.R. § 1.2105(c)(4)(i) & (ii). In addition, participants in broadcast auctions will be permitted to take advantage of another exception to the general anti-collusion rule, under which a holder of a non-controlling attributable interest in an applicant may obtain an ownership interest in or enter into a consortium arrangement with another applicant for a license in the same geographic area provided that the original applicant has withdrawn from the auction, is no longer placing bids, and has no further eligibility. To meet the requirements of this exception, the attributable interest holder will be required to certify to the Commission that it did not communicate with the new applicant prior to the date the original applicant withdrew from the auction, and that it will not convey bidding information, or otherwise serve as a nexus, between the previous applicant and the new applicant. *See* 47 C.F.R. § 1.2105(c)(4)(iii). These exceptions were adopted to allow holders of non-controlling attributable interests in an applicant greater flexibility to form agreements with other applicants, thereby enabling applicants to acquire additional capital needed to bid at auction.[175] As we previously have stated, we believe that these exceptions will encourage investment in auction applicants without threatening the overall competitiveness of the auction process. *See Third Report and Order*, 13 FCC Rcd at 465-466.

159. We take this opportunity to reemphasize certain aspects of our anti-collusion rule for the benefit of potential broadcast auction applicants. As indicated in the *Notice*, Section 1.2105(c) may affect the way in which auction applicants conduct their routine business during an auction by placing significant limitations upon their ability to pursue business opportunities involving broadcast services in the geographic areas for which they have applied to bid for permits. As a general matter, the anti-collusion rule does not prohibit non-auction related business negotiations between auction applicants that have applied for the same geographic service areas. We caution auction applicants, however, that certain business discussions concerning, but not limited to, issues such as management, sales, local marketing agreements, rebroadcast agreements, and other transactional arrangements may all raise impermissible subject matter for discussion because they may convey pricing information and bidding strategies.[176] Because auction applicants should avoid all discussions with each other that will likely affect bids or bidding strategies, we believe that individual applicants, and not the Commission, are in the best position to determine in the first instance which communications are permissible and which are not.[177]

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[175] *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Memorandum Opinion and Order*, 9 FCC Rcd 7684, 7687-89 (1994).

[176] *See* Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, Sept. 17, 1996, at 1-2.

[177] *See August 28 Public Notice*.

160. As previously indicated, the Commission will aggressively investigate any allegations that an auction participant has violated Section 1.2105(c).[178] Bidders who are found to have violated the Commission's anti-collusion rules may, among other sanctions, have their applications denied, be subject to forfeitures, be subject to the loss of their down payments or their full bid amounts, or face the cancellation of their licenses. In addition, where allegations appear to give rise to violations of the federal antitrust laws, the Commission may investigate and/or refer such cases to the United States Department of Justice for investigation.

161. ***Rules Regarding Bid Withdrawal and Default***. We also sought comments in the *Notice*, 12 FCC Rcd at 22394 (¶ 74), on the advisability of applying in the broadcast context the Commission's general policy of imposing bid withdrawal and default payment requirements in instances where high bids are withdrawn during the course of an auction, where winning bids are withdrawn after an auction has closed, and where winning bidders fail to submit their long-form applications or pay their winning bids. *See* 47 C.F.R. §§ 1.2104(g); 1.2109. All commenters addressing these issues support our proposals.[179] We therefore will apply our Part 1 auction rules regarding bid withdrawal and default to auctions of broadcast construction permits. The Commission has successfully employed these rules in previous auctions, and they have functioned effectively to ensure that only serious, financially qualified bidders participate in our auctions. In the event that a broadcast auction winner defaults or is otherwise disqualified, we will similarly follow the established Part 1 rules regarding the reauctioning of the construction permits at issue. *See* 47 C.F.R. § 1.2109.

(2) Post-Auction Processing Procedures

162. ***Down Payments***. Following the close of bidding in an auction, the Bureaus will issue a public notice announcing the close of the auction and identifying the winning bidders. To provide further assurance that winning bidders will be able to pay the full amount of their bids and construct their facilities, we will, consistent with the Part 1 auction rules, require winning bidders in broadcast auctions to submit a down payment. *See* 47 C.F.R. § 1.2107(a) & (b). Specifically, within ten business days of the public notice announcing the close of the auction, winning bidders will be required to supplement their upfront payments with a down payment amount sufficient to bring their total deposits with the Commission up to 20% of their winning bids. If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal payments due, amounts to 20% or more of its winning bid(s), no additional deposit will be required. To the extent that any upfront payment not only covers, but exceeds, the required down payment, the Commission will refund any excess amount after determining that no bid withdrawal payments are owed by the bidder.[180] The down payment will be held by the Commission until the winning bidder has been issued its construction permit and has paid the remaining balance of its winning bid, or until the winning bidder is found unqualified to be a permittee or has defaulted, in which case it will be returned, less any applicable default payments. All down payments should be submitted to the Commission's lock-box bank in accordance with 47 C.F.R. § 1.2107(b) and any relevant public notices.

163. ***Long-Form Applications.*** A winning bidder that meets its down payment obligations in a timely manner must file an appropriate long-form application for each construction permit for which it was the high

[178] *See Second Report and Order*, 9 FCC Rcd at 2388. *See also August 28 Public Notice* at 3-4.

[179] *See* Comments of Communications Technologies, Inc. at 2; Liberty Productions LP at 9; Heidelberg-Stone Broadcasting Co. at 17; Rio Grande Broadcasting Co. at 17.

[180] The upfront payments submitted by unsuccessful bidders will generally be returned as soon as possible after the close of the auction.

bidder. Under the general Part 1 auction rules, a winning bidder is required, within ten business days after being notified of its winning bidder status, to submit its long-form application. *See* 47 C.F.R. § 1.2107(c). Given the complexity of certain of the technical and legal submissions in broadcast service long-form applications, we suggested in the *Notice* that winning bidders in broadcast auctions should be allowed 30 days to file their long-form applications. A small number of commenters state that winning bidders should be given an even longer period of time, such as 45, 60 or 90 days, to file their long-form applications,[181] although other commenters find 30 days to be sufficient.[182] After consideration, we believe that 30 days should be a sufficient period of time for winning bidders to prepare their long-form applications. In particular, we note that winning bidders in the AM, LPTV, and television and FM translator services will have already prepared engineering data required by long-form applications in connection with their earlier submission of their short-form applications. Even in the FM service, applicants may have already conducted investigations of potential transmission sites and submitted a set of preferred site coordinates as a supplement to the FCC Form 175. Moreover, we are eliminating herein the reasonable assurance of site certification and the financial qualification requirements contained in long-form applications, which may additionally reduce the period of time necessary for winning bidders to complete their long-form applications. *See infra* ¶¶ 172-176. For these reasons, we will adopt our proposal in the *Notice* to require submission of long-form applications by winning bidders within 30 days following the release of the public notice announcing the close of the auction and identifying the winning bidders. We will, however, retain the discretion to extend this 30 day period for the filing of long-form applications upon the showing of good cause by an applicant.

164. Long-form applications filed by winning bidders in broadcast auctions should include, if applicable, the exhibits required by the general Part 1 auction rules,[183] and should be filed pursuant to the rules governing the relevant broadcast service and according to any procedures set out by public notice. The statutorily established application fees will apply to the long-form applications filed by winning bidders.[184] When electronic procedures become available for the submission of broadcast service long-form applications, the Commission may require all winning bidders to file their long-form applications electronically.[185] An applicant that fails to submit the required long-form application will be deemed to have defaulted and will be subject to the default payments set forth in the Part 1 auction rules. *See* 47 C.F.R. §§ 1.2107(c); 1.2104.

165. ***Petitions to Deny***. After the winning bidder's long-form application has been accepted for filing, a public notice will be released announcing this fact, thereby triggering the filing window for petitions to deny. *See* 47 C.F.R. § 1.2108(b). Previously, the Commission has generally provided a 30 day period for the filing of

[181] *See, e.g.*, Comments of Thomas C. Smith at 13; Communications Technologies, Inc. at 2; Seven Ranges Radio Co. Inc. at 13; KERM, Inc. at 4-5; Tri-County Broadcasting, Inc. at 4.

[182] *See, e.g.*, Comments of Michael Ferrigno at 10; JTL Communications Corp. at 10.

[183] *See* 47 C.F.R. §§ 1.2107(d) (concerning bidding consortia or joint bidding arrangements); 1.2110(i) (concerning designated entity status); and 1.2112(a) & (b) (concerning disclosure of ownership and real party in interest information, and disclosure of gross revenue information for small business applicants).

[184] *See* 47 U.S.C. § 8; 47 C.F.R. § 1.1104 (schedule of application fees).

[185] As discussed above (*see* ¶ 147), the electronic versions of the FCC Forms 301, 346 and 349 are currently being developed, and the Commission has requested comment on a range of issues relating to the electronic filing of long-form applications. *See Nontechnical Streamlining Notice*, 13 FCC Rcd at 11352-55.

petitions to deny against broadcast applications.[186] As indicated in the *Notice*, however, in Section 3008 of the Budget Act, Congress granted the Commission the authority to shorten the period for filing petitions to deny, and, as a result, to grant licenses more rapidly.[187] Some commenters objected to the establishment of a petition to deny period as brief as that allowed under Section 3008 (*i.e.*, five days), contending, *inter alia*, that such a short period is insufficient to evaluate the technical proposals and legal information contained in broadcast long-form applications.[188] While recognizing that the Commission relies on petitioners as private attorneys general to assist in overseeing the conduct of applicants and licensees and in the fulfillment of its statutory functions, we also consider expedition of service to the public to be of paramount significance. Delay in awarding a construction permit frustrates the public interest and denies communities new or expanded broadcast service. To expedite service, the Commission was asked to disincent disappointed bidders from raising spurious objections to winning bidders.[189] Accordingly, after careful consideration and in light of Congress' directive in the Budget Act, we believe that a shortened petition to deny period of ten days is appropriate for applications for broadcast and secondary broadcast construction permits obtained through the competitive bidding process. Consistent with the Part 1 auction rules, the time for filing oppositions will be five days from the filing date for petitions to deny, and the time for filing replies will be five days from the filing date for oppositions. *See* 47 C.F.R. § 1.2108(c).

166. If the Commission denies or dismisses all petitions to deny (if any are filed), and is otherwise satisfied that the applicant is qualified, a public notice will be issued announcing that the construction permit is ready to be granted. Auction winners will be required to pay the balance of their winning bids in a lump sum within ten business days following the release of this public notice. If a winning bidder fails to pay the balance of its winning bid in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten business days after the payment deadline, provided that it also pays a late fee equal to 5% 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 and subject to the applicable default payments. *See* 47 C.F.R. § 1.2109(a). We anticipate generally issuing the construction permit to the auction winner within ten business days after receiving full payment.

167. ***Amendments to Long-Form Applications***. To assist winning bidders in resolving Commission concerns relating to their technical proposals or other matters contained in their long-form applications, we specifically proposed to modify our application processing procedures to relax the limitations on the number, and the timing of filing, of curative amendments. The *Notice*, 12 FCC Rcd at 22395 (¶ 78), indicated that such changes would affect the rules for amending applications for all auctionable broadcast services, and would specifically eliminate the tenderability criteria and two-tiered minimum filing requirements currently in effect for

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[186] *See* 47 C.F.R. §§ 73.3584(a); 73.3584(c).

[187] Section 3008 of the Budget Act provides as follows:

> [N]o application for an instrument of authorization for frequencies assigned under this title . . . shall be granted by the Commission earlier than 7 days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereto. Notwithstanding section 309(d)(1) of such Act (47 U.S.C. 309(d)(1)), the Commission may specify a period (no less than 5 days following issuance of such public notice) for the filing of petitions to deny any application for an instrument of authorization for such frequencies.

[188] *See* Comments of KERM, Inc. at 5; Tri-County Broadcasting, Inc. at 5; Communications Technologies, Inc. at 2; Michael Ferrigno at 10; Hatfield & Dawson Consulting Engineers at 3.

[189] *See* Comments of James G. Cavallo at 6.

new full service FM applications.[190] No comments were received regarding this proposal.

168. Under the competitive bidding and processing procedures established herein, only winning bidders and non-mutually exclusive applicants will file long-form applications. We believe the relatively smaller volume of long-forms requiring processing permits us to accomplish our operational goals in a less restrictive manner and warrants liberalization of the procedures now applied to defective broadcast and secondary broadcast service applications.[191] Accordingly, we shall adopt a more lenient approach toward the processing of defective broadcast applications for new facilities and major changes, employing staff deficiency letters, and permitting multiple corrective amendments, if necessary.

169. Applicants must continue to meet the technical and legal requirements of all applicable rules, but we will expand the current limited opportunity to amend defective applications. Long-form applications for new facilities and for major changes in existing facilities in all broadcast services will no longer be immediately returned for defects pertaining to completeness or technical or legal acceptance criteria, without ample opportunity to correct the deficiency. As stated in the *Notice*, however, in relaxing the standards for filing amendments, deficiencies in long-form applications filed by winning bidders will not be curable by major amendment. As they significantly change the long-form application as originally filed, major amendments must be filed in accordance with the window filing procedures discussed above. Moreover, winning bidders in all broadcast and secondary broadcast services who file long-form applications with waiver requests that cannot be granted, and who cannot provide timely alternate proposals consistent with our rules, will be dismissed.

170. With regard to applications for new full service commercial FM stations or for major changes to such facilities, this new process will replace the existing procedure whereby applicants are provided with one opportunity period to correct application defects, and applicants unable to correct all acceptability defects within this time period are dismissed without occasion for reinstatement.[192] The new process will also replace the current AM and FM translator approach to defective applications, where the nature of the defect determines the course of staff action. Currently, if the AM or FM translator application is substantially complete and meets all core technical acceptance criteria, the staff will send a deficiency letter giving the applicant 30 days to correct the defect in question. For more substantial defects, *i.e.*, those going to substantial completeness or technical acceptability, the staff returns the application as either not substantially complete or unacceptable for filing.[193] Similarly, the Commission currently allows LPTV and television translator applicants whose applications are substantially complete but contain defects or omissions 30 days to amend in response to a staff deficiency letter. *See* 47 C.F.R. § 73.3564(a)(2). Unlike these current procedures, the new processing standards for broadcast

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[190] *See* 47 C.F.R. §§ 73.3522; 73.3525; 73.3564.

[191] By contrast, the Commission designed the strict "hard-look" processing approach for commercial FM applicants to, *inter alia*, provide the staff with a mechanism to handle the dramatic increase in applications expected from the allocation of 689 new FM channels pursuant to Docket 80-90. *See Report and Order*, MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), *recon. denied*, 50 Fed. Reg. 43157 (Oct. 24, 1985), *aff'd sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987).

[192] *See Report and Order, Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, MM Docket No. 91-347, 7 FCC Rcd 5074 (1992); 47 C.F.R. § 73.3522(b)(2).

[193] However, the AM or FM translator applicant is provided with an opportunity to have its application reinstated *nunc pro tunc* if the applicant submits a petition for reconsideration together with an amendment curing the defect in substantial completeness or in acceptability within 30 days. *See Public Notice*, Patently Defective AM and FM Construction Permit Applications, FCC 84-366, 49 Fed. Reg. 47331 (December 3, 1984).

long-form applications will enable applicants for new facilities and for major changes to avoid dismissal and to liberally correct heretofore fatal defects in application information. We will, however, retain the amendment filing procedures presently used for applicants for minor modification of facilities in all broadcast services.

171. For all full service FM applications for new facilities and major changes, we will also abolish the two-tiered minimum filing requirement, regardless of whether the long-form application is submitted post-auction by a winning bidder, or by an applicant determined to be non-mutually exclusive.[194] In essence, the short-form application previously submitted at the initial stage of the competitive bidding process serves this function. Having established through the short-form that the applicant has met the minimum filing requirements prior to auction, the Commission need not repeat the exercise upon the subsequent filing of the long-form application. Applications for minor modification of FM facilities, however, will continue for the present to be processed under existing procedures, including the employment of the two-tiered minimum filing requirements.[195]

172. ***Elimination of Reasonable Assurance of Site Certification.*** In the *Notice*, 12 FCC Rcd at 22396 (¶ 81), we proposed to eliminate the requirement that applicants certify they have a "reasonable assurance" that the site or structure proposed as the location of their transmitting antennas will be available. We requested comment on our proposal to delete the reasonable assurance of site certification from the FCC Forms 301, 346 and 349, and to rely on the strict enforcement of our existing construction requirements to ensure that winning bidders in future broadcast auctions construct their facilities in a timely manner.[196] Given the relatively brief time period that winning bidders will have to prepare and file their long-form applications following the close of a broadcast auction, we surmised that elimination of the requirement of reasonable assurance of site availability was appropriate.

173. A certification of site availability, requiring that an applicant certify that reasonable assurance has been obtained from the property owner that the site will be available, was added to the FCC Form 301, at the request of commenters, as a component of the "hard look" processing approach.[197] The certification provided verification of existing Commission policy and was implemented as a deterrent to the filing of frivolous and speculative applications that frustrated our processing goals.

174. We believe that the competitive bidding process itself serves to lessen the incentive for insincere application filings and provides a strong stimulus for timely station construction, so to recapture bidding investments.[198] We therefore will eliminate the reasonable assurance of site certification requirement for all

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[194] As an indication that the listed applications satisfied the minimum filing requirements, the staff would issue a Notice of Tender. The staff will discontinue the issuance of such Notices of Tender for all new and major modification FM applications. We will, however, continue to issue Notices of Acceptance. These Notices will not indicate compliance with our acceptance criteria, but will continue to serve as the mechanism for permitting petitions to deny. *See supra* ¶ 165.

[195] In the *Nontechnical Streamlining Notice*, 13 FCC Rcd at 11367 n. 68, the Commission has invited comment on whether we should modify the tenderability and two-tier processing standards for minor change FM applications.

[196] *See* 47 C.F.R. § 73.3598 (establishing a two-year construction period for television stations and an 18-month construction period for AM, FM and LPTV stations, as well as television and FM translators).

[197] *See Report and Order* in MM Docket No. 84-750 at ¶ 22.

[198] *See, e.g.*, Comments of J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 17; Liberty Productions, LP at 10; Thomas Desmond at 9; JTL Communications Corp. at 11 (agreeing with proposal to eliminate site certification requirement).

broadcast and secondary broadcast new and major change applicants, regardless of whether the long-form application is submitted post-auction by a winning bidder, or by an applicant determined to be non-mutually exclusive.

175. Furthermore, our construction period requirements provide the Commission with an additional safeguard to ensure that winning bidders construct their authorized facilities in a timely manner. The Commission has found that the strict enforcement of such build-out requirements, in conjunction with the employment of competitive bidding procedures, best promote the rapid deployment of service to the public.[199] Although some commenters urge the Commission to retain the site certification requirement,[200] we no longer find it vital to our pursuit of prompt initiation of service to the public.

176. ***Elimination of Financial Qualification Certification Requirement***. After consideration, we will also eliminate from the broadcast long-form applications the requirement for the applicant to certify as to its financial qualifications, estimate the total funds necessary to construct and operate the broadcast facility for three months, and to identify each source of funds. We believe that our competitive bidding procedures provide adequate assurance that applicants will be financially qualified. Any winning bidder submitting a long-form application will have, prior to filing its application, already submitted a timely upfront payment and down payment, and will also be required to pay the full amount of its winning bid to obtain its construction permit. We think it unlikely that bidders, who must construct their facilities to recoup the expenditures made in obtaining their construction permits via auction, will have the incentive to participate in and prevail at auction if they lack the financial wherewithal to construct their facilities. Accordingly, we agree with the few commenters who address this issue,[201] and eliminate the financial qualification requirements from the FCC Forms 301, 346 and 349.

(3) Additional Application Processing Issues

177. ***Minor Modification Applications.*** Although, under the window filing approach adopted herein, applications for new and major changes in the broadcast and secondary broadcast services must be filed in an announced filing window, applications for minor modifications of existing facilities will not be restricted to announced window filing periods and may continue to be filed at any time in accordance with existing procedures.[202] Minor modification applications will continue to be governed by first come/first served processing procedures, whereby priority rights are determined by the filing date of the minor modification application and such filing will cut-off the filing rights of all subsequent applicants. To avoid the possibility of the filing of minor

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[199] *See, e.g., Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5815 (1997); *Second Report and Order*, 9 FCC Rcd at 2358. In addition, the Commission has proposed to eliminate, to the extent permitted by statute, the circumstances under which the time for construction will be extended, and to make the construction permits subject to automatic forfeiture upon expiration. To compensate for the proposed "no extension" policy, the Commission has proposed to issue permits that would provide an increased and uniform construction period of three years. *See Nontechnical Streamlining Notice*, 13 FCC Rcd at 11371-73.

[200] *See, e.g.*, Comments of Rio Grande Broadcasting Co. at 17; Heidelberg-Stone Broadcasting Co. at 17; Independent Broadcast Consultants, Inc. at 5; Jeffrey Eustis at 2; Communications Technologies, Inc. at 3; Michael Ferrigno at 10; Todd Stuart Noordyk at 9; Batesville Broadcasting Company, Inc. at 9; Williams Broadcasting Company at 9; Throckmorton Broadcasting, Inc. at 11; Donald James Noordyk at 9; Positive Alternative Radio, Inc., *et al.* at 11.

[201] *See* Comments of J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 17-18; Thomas Desmond at 9.

[202] Thus, applicants proposing minor modifications will continue to file the appropriate long-form application, rather than a short-form.

modifications that are mutually exclusive with the applications submitted by auction applicants during general auction filing windows, we will retain the discretion to impose temporary freezes on the filing of minor modifications in particular services during the brief periods that auction filing windows are open for such services.[203]

178. In rare instances, two or more FM, AM, television or LPTV minor modification applications can be mutually exclusive.[204] As discussed above and as the commenters urge, we will generally not subject mutually exclusive minor modification applications to competitive bidding, but expect the parties to use engineering solutions and negotiations to resolve the mutual exclusivities. *See supra* ¶ 19. However, we note one situation in which many minor modification applications have recently been filed on the same day, with the potential to create an unusually large number of mutual exclusivities. On June 1, 1998, we received over one thousand LPTV and television translator applications requesting replacement channels due to displacement by new DTV stations.[205] As with other competing minor modification applications, we expect these LPTV applicants to use engineering solutions and negotiations to resolve any mutual exclusivities. But we note in this situation, due to the large number of applications filed on the same day all seeking a limited number of replacement channels, that the applicants may experience greater difficulties in resolving the mutual exclusivities. If we find that, following a reasonable period after release of a public notice identifying any mutually exclusive LPTV displacement applicants, a significant number of these applicants have been unable to resolve their mutual exclusivities, then the Commission reserves the right to subject these competing displacement applications to competitive bidding.[206]

179. ***Cross-Band Mutual Exclusivity in FM Service***. Mutual exclusivity may also arise between applications filed for channels in the FM reserved band (Channels 200-220) and applications filed for non-reserved FM channels.[207] Given the lack of statutory authority to auction applications for channels reserved for noncommercial educational use (*see supra* ¶ 24), we will not subject these cross-band mutually exclusive applications to competitive bidding. In the rare instances in which cross-band conflicts arise, we will, as in the

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[203] *See Robert M. Richmond*, 8 FCC Rcd 471 (1993) for an example of the complications that may occur when a modification application filed during a window filing period for new facilities is mutually exclusive with certain of those applications for new facilities.

[204] With regard to LPTV and television translators, applications by two or more licensees seeking displacement relief under 47 C.F.R. § 73. 3572(a)(2) are the only types of minor modifications that can create mutual exclusivity. FM minor modification applications may become mutually exclusive only when conflicting applications are filed on the same day. Currently, television, AM and FM translator minor modification applications can become mutually exclusive until grant by the filing of a conflicting application. *See infra* ¶¶ 180-183 for a discussion of cut-off rules.

[205] June 1, 1998 was the first day for filing DTV displacement relief applications by LPTV and television translator licensees and permittees who face *eventual* channel displacement by DTV stations. (In contrast, operators facing *imminent* channel displacement, for example due to the filing of an application for a conflicting DTV station, were allowed to apply for such displacement relief at any time.) Because displacement applications are filed on a first-come, first-served basis and because there may not be enough channels to accommodate all displaced stations, there was a premium on filing applications on this initial June 1st filing date. *See Public Notice, Commission Postpones Initial Date for Filing TV Translator and Low Power TV Applications for Displacement Channels*, Mimeo No. 82914 (rel. April 16, 1998).

[206] Given Congress' termination of our lottery authority in the Budget Act, there is no efficient method other than auctions to select the licensee, if the parties themselves cannot resolve the mutual exclusivities. Also, although technically regarded as "minor" modifications, LPTV displacement applications are akin to new applications in that they generally propose operations on new channels at new locations.

[207] Specifically, an application for a new facility in the FM reserved band that has not yet been cut-off may be mutually exclusive with the preferred site indicated by an auction winner for a vacant allotment in the FM non-reserved band.

case of competing minor modification applications, expect the parties concerned to use engineering solutions and negotiations to resolve the mutual exclusivities.

180. ***Cut-Off Protection for Auction Applicants***. Pursuant to the window filing procedures adopted herein, applicants for new broadcast facilities or for major modifications to existing facilities must file short-form applications during specified window filing periods. After the closing date of any window, no applications (such as minor modification applications) may be filed that would conflict with the short-form applications filed during the window. Accordingly, under the new window filing procedures, short-form applications for all services will receive cut-off protection as of the close of the window filing period.[208] FM applicants supplementing their FCC Form 175 applications with a set of preferred site coordinates will be protected at that site from subsequently filed applications. *See supra* ¶ 142. All FM applicants, including those choosing not to supplement the FCC Form 175 with preferred site coordinates, will receive full class facility protection at the reference points of the vacant allotment.[209] As described above, applicants for AM and LPTV stations and for television and FM translators must submit with their short-form applications the engineering data from the appropriate long-form application to provide us with the information necessary to make mutual exclusivity determinations. *See supra* ¶ 143. The specific facilities proposed in these engineering supplements will be protected pursuant to our existing interference rules as of the date of the closing of the auction window.[210]

181. In addition to protecting the sites specified in short-form applications, long-form applications will also be afforded cut-off protection. All long-form applications for new facilities and for major modifications to existing facilities (whether filed by winning bidders or non-mutually exclusive applicants) will be cut-off as of the date of filing with the Commission, and will be protected from subsequently filed long-form applications and rulemaking petitions. All long-form applicants will be required to protect all previously filed commercial and noncommercial applications.

182. Winning bidders (or non-mutually exclusive applicants) filing long-form applications may change the technical proposals that they specified in their short-form applications. A winning bidder may not, however, specify in its long-form application a change in its proposed facility that constitutes a major change from the facility specified in its short-form. With respect to the FM service, if an FM applicant specifies a preferred site in its short-form application, and specifies a different site in its long-form, the site specified in the short-form will no longer receive cut-off protection. However, the reference points of the vacant allotment will remain protected until a construction permit is granted, even if the site specified in the applicant's long-form and the allotment site differ. In the non-table AM, LPTV, and television and FM translator services, if the facilities specified in the long-form differ from those previously specified in the short-form, both facilities will receive protection until grant of the long-form application.

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[208] In *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 663 (D.C. Cir. 1984), the Court recognized that a cut-off procedure basically serves two purposes. "First, it advances the interest of administrative finality . . . . Second, it aids timely broadcast applicants by granting them a 'protected status,' . . . that allows them to prepare for what often will be an expensive and time-consuming contest, fully aware of the competitors they will be facing."

[209] The allotment will be protected until the grant of a long-form application for a construction permit for that allotment.

[210] This approach will therefore alter the current practice of affording cut-off protection to AM and FM translator applications on a date specified by Commission public notice. Minor amendments to the engineering submissions accompanying short-form applications that are filed so as to resolve mutual exclusivities among competing major modification applications, or competing major modification and new applications (*see supra* ¶¶ 17, 145), will be considered on a first come/first served basis, as are minor amendments to long-form applications.

183. Furthermore, we note our proposal in another proceeding to conform the processing procedures for AM and FM translator minor modification applications to those currently used for commercial FM minor modification applications by providing cut-off protection. *See Technical Streamlining Notice*, FCC 98-117 at ¶¶ 46-47. This represents a departure from our current procedures, as AM and FM translator minor change applications currently receive no cut-off protection from competing applications until the date the application is granted. It is therefore not unusual for a minor change application in the AM service, which had no conflicts as of the date of its filing, to conflict with a subsequently filed application.[211] If ultimately adopted, our proposal to provide cut-off protection for AM and FM translator minor modification applications as of the date of filing with the Commission should reduce the potential for mutual exclusivity between minor modification applications.[212]

184. ***Transfer and Assignment of Broadcast Permits Awarded by Auction.*** Under Section 1.2111(a) of the general auction rules, an applicant seeking approval of a transfer of control or assignment of a license within three years of receipt of such license by means of competitive bidding must, together with its transfer or assignment application, file with the Commission a statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the consideration that the applicant would receive in return for the transfer or assignment of the license. 47 C.F.R. § 1.2111(a). These transfer disclosure requirements are intended to aid the Commission in monitoring whether abuses relating to trafficking in licenses have occurred,[213] and we see no reason to deviate from our general auction rules in the broadcast context. Accordingly, we will require broadcast service auction winners to comply with these disclosure requirements if they apply to assign or transfer their construction permits or licenses within the relevant three-year period.

185. As part of the Commission's current, wide ranging efforts to streamline Mass Media Bureau procedures and initiate the electronic filing of applications, we have, however, proposed in another proceeding to eliminate entirely the requirement to submit contracts with any broadcast assignment or transfer applications,[214] contrary to the provisions of Section 1.2111(a). If the Commission were ultimately to adopt this proposal with regard to broadcast assignment and transfer applications generally, we will at that time revisit the requirements imposed by Section 1.2111(a) on broadcast auction winners who apply to assign or transfer their licenses so as to make the broadcast auction rules consistent with the general broadcast service rules.[215]

4. Designated Entities

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[211] If the mutually exclusivity was not eliminated through settlement or technical amendment, the minor AM modification application would have been designated for comparative hearing.

[212] *See supra* ¶¶ 177-178 for a discussion of minor modification applications and filing procedures.

[213] *See Second Report and Order*, 9 FCC Rcd at 2385.

[214] *See Nontechnical Streamlining Notice*, 13 FCC Rcd at 11362.

[215] Similarly, if we ultimately adopt our streamlining proposals in the *Nontechnical Streamlining Notice*, we will revisit the issue of requiring applications for assignment or transfer of control of broadcast licenses held by auction winners to include an exhibit disclosing the ownership information set forth in Section 1.2112(a) of the Part 1 auction rules. *See* 47 C.F.R. § 1.2112(a). We note this same ownership information is already required to be submitted by all prospective bidders with the short-form applications and by all winning bidders as an exhibit to their long-form applications, and any changes in such information must also be reported within 30 days.

186. Section 309(j) of the Communications Act provides that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). To achieve this congressional goal, the statute directs the Commission to "consider the use of tax certificates, bidding preferences, and other procedures."[216] *Id.* In addition, Section 309(j)(3)(B) instructs the Commission, in establishing eligibility criteria and bidding methodologies, to promote "economic opportunity and competition . . . 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," which are collectively referred to as "designated entities." 47 U.S.C. § 309(j)(3)(B). Section 309(j)(4)(A) further provides that to promote these objectives, the Commission shall consider alternative payment schedules, including lump sums or guaranteed installment payments. 47 U.S.C. § 309(j)(4)(A).[217] In addition to the statutory directive to "ensure" opportunities for designated entities in spectrum auctions, the Commission has had a long-standing commitment to promoting the diversification of ownership of broadcast facilities. Indeed, "a maximum diffusion of control of the media of mass communications" was one of the two primary objectives of the traditional comparative broadcast licensing system. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965).[218] Section 257 of the Telecommunications Act of 1996,[219] moreover, directed the Commission to identify and eliminate market entry barriers for small and entrepreneurial telecommunications businesses.[220]

187. To fulfill our obligations under Section 309(j), the *Notice*, 12 FCC Rcd at 22397-22404 (¶¶ 83-97), sought comment on whether bidding credits or other special measures were necessary to encourage participation by rural telephone companies, small businesses, and minority- and women-owned businesses in the provision of broadcast services, and, if so, how eligibility for any such special measures should be established. In particular, we requested comment on how special measures for minority- and women-owned entities could be developed consistent with applicable constitutional standards. The *Notice* also asked for comment on the advisability of adopting bidding credits or other measures to promote diversification of ownership, and on the appropriateness of adopting rules to prevent unjust enrichment in connection with the special measures approved for designated entities.

188. Many commenters argue that the present record is insufficient to support the adoption of bidding credits for women and minorities under the standards enunciated in *United States v. Virginia, et al.*, 518 U.S.

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[216] Congress repealed, as of January 17, 1995, that portion of Section 1071 of the Internal Revenue Code, 26 U.S.C. § 1071, under which the Commission administered the tax certificate program.

[217] In the *Third Report and Order*, the Commission determined that, until further notice, installment payments should not be offered in auctions as a means of promoting participation by small businesses and other designated entities. To ameliorate the impact on small businesses of this decision to discontinue the use of installment payments in the near future, the Commission approved the use of higher bidding credits for designated entities. *See Third Report and Order*, 13 FCC Rcd at 398-400.

[218] *See also Notice of Proposed Rulemaking* in MM Docket Nos. 94-149 and 91-140, 10 FCC Rcd 2788 (1994) (inviting comment on initiatives to increase ownership of mass media facilities by minorities and women to further a "core" Commission goal of maximizing diversity of points of view available to public).

[219] Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996).

[220] *See Report, Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 12 FCC Rcd 16802 (1997).

515 (1996) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).[221] Some commenters urge that we delay the adoption of competitive bidding procedures for broadcast auctions until completion of studies already in progress that may shed light on these questions.[222] And, although a number of commenters support the adoption of bidding credits for small businesses, they have supplied relatively little information regarding the capital requirements of, or the characteristics of the expected pool of bidders for, the various broadcast services.[223] Determining the details of any small business credit is also complicated in the broadcast context by the fact that, at least traditionally, most applicants for new broadcast stations are in fact small businesses under almost any reasonable definition, particularly in the context of radio. Pursuant to our Section 257 proceeding, we have commenced a series of studies to examine the barriers encountered by small, minority- and women-owned businesses in the secondary markets and the auctions process.[224] We believe it is important to complete these studies and provide for an opportunity for public comment before any ultimate determination of what rules we should have for designated entities. At the same time, we believe that it is important to move forward promptly with auctions. Particularly with regard to pending cases, considerations of fairness demand that no further delays occur and that we proceed expeditiously to licensing.

189. In proceeding with auctions before determining what rules we may ultimately adopt for small, minority- or women-owned businesses, we are, of course, sensitive to our statutory obligations regarding designated entities. As a preliminary matter, we note that, based on our experience in conducting comparative hearings under the 1965 *Policy Statement on Comparative Broadcast Hearings*, it is likely that the vast majority of the pending pre-July 1st applicants are small businesses,[225] and indeed likely very small businesses. With respect to specific measures that may further assist designated entities, we note that all of the commenters who addressed the question supported a bidding credit or other special measure for applicants with no or few other media interests.[226] We conclude that, based on the record to date, adopting such a "new entrant" bidding credit

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[221] *See, e.g.*, Comments of Cook Inlet Region, Inc. at 6, 14-15; J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc. at 23. *See also Lutheran Church-Missouri Synod v. FCC*, No. 97-1116 (D.C. Cir. April 14, 1998), *petition for rehearing pending*.

[222] *See* Comments of American Women in Radio & Television, Inc. at 3, 16; Reply Comments of United Church of Christ, Office of Communications, *et al*. at 2-3, 18-19; Reply Comments of NOW Foundation at 1.

[223] Only one commenter provided any specific information as to the capital requirements of any of the broadcast services. *See* Comments of Danbeth Communications, Inc. at 2-3 (providing information as to the estimated capital required to construct a television station in one North Carolina market).

[224] Studies have been commenced examining the following: (i) barriers to acquisition of cellular, paging and Specialized Mobile Radio licenses on the secondary market, and barriers to entry or growth, comparing small, large, minority- and women-owned licensees; (ii) barriers to acquisition of broadcast licenses on the secondary market, and barriers to entry or growth, comparing small, large, minority- and women-owned licensees; (iii) barriers to entry or growth due to advertising industry practices such as paying less to advertise on stations targeting minority communities, and the impact of such practices on ownership opportunities and viewpoint diversity; (iv) the impact of duopoly and multiple ownership rules on broadcast station ownership; and (v) the impact of small, minority and women ownership of broadcast stations on service. The Commission is also planning to undertake a comprehensive study on the experiences of small, minority- and women-owned businesses in the auctions process.

[225] As we stated in the *Notice*, "[o]ur experience has been that most applicants for new broadcast stations are small businesses." 12 FCC Rcd at 22397 (¶ 85).

[226] *See, e.g.*, Comments of Grace Communications L.C. at 9; Kidd Communications at 9; JTL Communications Corp. at 14-15; Danbeth Communications, Inc. at 4-5; James G. Cavallo at 9-11; Thomas Desmond at 5-6; Kyle Magrill at 3; Throckmorton Broadcasting, Inc. at 12; Reply Comments of United Church of Christ, Office of Communications, *et al*. at 15-16.

would be the most appropriate way to implement the statutory provisions regarding opportunities for small, minority- and women-owned businesses before the completion of the studies mentioned above and related public comment.[227] Providing bidding credits to entities holding no or few mass media licenses will promote opportunities by minorities and women consistent with congressional intent without implicating prematurely the constitutional issues raised in ¶ 188.[228] While such an approach may not be as direct and fine-tuned as measures we may ultimately adopt after further development of the record, we believe a bidding credit for entities who have no or few other media interests will work to give these groups the additional opportunities intended by Congress, in furtherance of the statutory objectives. Because the record regarding small businesses is not well developed and existing size standards seem ill-suited to the broadcast auction context, we do not believe it is appropriate, as we did for certain other auctions, merely to adopt bidding credits for small businesses. In these circumstances, we conclude that the best approach is to commence the auction process utilizing this "new entrant" bidding credit.[229] We hereby instruct the staff to complete expeditiously all necessary *Adarand* studies, and we anticipate the release of a further notice considering designated entity issues in the broadcast context following completion of these studies. If additional or alternative designated entity measures are ultimately adopted in a further report and order released following completion of our evidentiary studies, then any such measures will be applicable to the auction of any broadcast and ITFS applications then on file with the Commission.

190. With respect to the details of our new entrant bidding credit, we believe an appropriate model that has worked well exists in our lottery rules for mass media services. Those rules have been used for several years for LPTV, television translator and Multipoint Distribution Service licenses. The rules take a two-tiered approach. Specifically, applicants whose owners in the aggregate hold more than 50% of the ownership interests in no other media of mass communications receive a two-to-one lottery preference, and applicants whose owners in the aggregate hold more than 50% of the ownership interests in one, two or three other media of mass communications receive a one and a half to one lottery preference. *See* 47 C.F.R. § 1.1622(b).[230] These preferences are not available to entities holding more than 50% of the ownership interests in certain local media services.[231] We will use these rules with two adjustments: (1) we will add an explicit requirement that the rules cover *de facto* controlling interests, as well as interests of more than 50% of the ownership interests; and (2) to

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[227] Rural telephone companies appear less relevant in the context of these pending comparative broadcast cases. *See infra* ¶ 191.

[228] *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding (Sixth Report and Order)*, 11 FCC Rcd 136 (1995), *aff'd sub nom. Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996) (Commission complied with statutory mandate to create opportunities for small, women- and minority-owned businesses, yet avoided the *Adarand* constitutional issue, because expanding the special measures available for small businesses would incidentally benefit businesses owned by minorities and women, many of which also qualified as small businesses).

[229] At this time, we are not utilizing an asset or gross revenue standard in conjunction with the new entrant bidding credit. If it appears, however, after some experience with implementing the new entrant credit in broadcast auctions that such a standard is necessary and appropriate to effectuate congressional intent with regard to designated entities, then we may revisit this question.

[230] In accordance with the definition previously employed in lotteries, a "medium of mass communications" for purposes of the new entrant credit means a daily newspaper; a cable television system; or a license or construction permit for a television station, a low power television or television translator station, an AM, FM or FM translator station, a direct broadcast satellite transponder, or a Multipoint Distribution Service station. *See* 47 C.F.R. § 73.5008(b) of our amended rules, attached as Exhibit C.

[231] *See* 47 C.F.R. § 73.5007(a)(1) of our amended rules.

conform the approach to the existing tiered approach taken with auction bidding credits, *see* 47 C.F.R. § 1.2110(e)(2), we will adopt bidding credits of 35% and 25%, respectively.[232]

191. ***Other Designated Entity Issues.*** Although we are deferring a final decision regarding any additional or alternative special measures for small, minority- and women-owned businesses until the completion of the various pending studies relating to these entities, we determine here certain other designated entity issues. We conclude that the provision of additional measures for rural telephone companies is unnecessary in broadcast auctions. The record does not indicate that rural telephone companies have any particular interest in providing broadcast services.[233] Indeed, no commenter supports providing bidding credits or other incentives to rural telephone companies. As we have previously noted, Congress included rural telephone companies among the categories of designated entities because it was "concerned with assuring rural consumers the benefits of new technologies and providing opportunities for participation by rural telephone companies in the provision of wireless services that supplement or replace their landline facilities." *Second Report and Order*, 9 FCC Rcd at 2391-92. We do not believe that bidding credits or other special measures for rural telephone companies are needed to assure that rural consumers receive new broadcast service or that rural telephone companies have the opportunity to participate in broadcast service auctions. We accordingly decline to adopt special measures for rural telephone companies in particular, although those companies will be eligible for bidding credits if they qualify as new entrants or, if such bidding credits are ultimately adopted in our further report and order, as small, minority- or women-owned businesses.

192. We also decline to adopt bidding credits, as urged by a small number of commenters, for various other entities, including: (1) applicants who would have qualified for an AM daytime-only preference in an FM comparative hearing;[234] and (2) a "pioneer's" or "finder's" preference for the applicant who successfully petitioned for the allotment when a newly-allotted FM channel is auctioned.[235] We decline to adopt bidding credits or other special measures for these categories of entities, which, unlike the case with the likely recipients of the "new entrant" credit, are not among the entities specifically designated by Congress in our competitive bidding authority. We are also reluctant to replicate, in the guise of bidding credits, specific comparative criteria (such as the AM daytime-only preference), given our past difficulties with the criteria employed in comparative hearings.[236] We note, moreover, that the grant of a bidding credit to an FM applicant who petitioned for the allotment of a channel being auctioned is analogous to the pioneer preferences that Congress has specifically eliminated.[237]

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[232] *See* 47 C.F.R. § 73.5007(a) of our amended rules.

[233] *See* Comments of De La Hunt Broadcasting Corporation at 3; J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc., at 22-23; James G. Cavallo at 8.

[234] *See* Comments of JEM Broadcasting Co., Inc. at 3-4; Pacific Radio Engineering at 1; KERM, Inc. at 7-8. In the past, the Commission gave special consideration to daytime-only AM licensees in comparative hearings for FM allotments in their community of license.

[235] *See* Comments of JEM Broadcasting Co., Inc. at 4; Sound Broadcasting, Inc. and Regency Broadcasting, Inc. at 3-4; Reynolds Technical Associates at 4; Kidd Communications at 10-11.

[236] *See* Comments of James G. Cavallo at 11-12 (opposes awarding bidding credits for factors that were previously credited under Commission's comparative hearing criteria, as that risks "turning the auction into a mini-comparative hearing").

[237] *See* 47 U.S.C. § 309(j)(13)(F) (eliminating pioneer preferences for persons who make significant contributions to development of new service or new technologies, as of August 5, 1997).

193. ***Unjust Enrichment***. In designing competitive bidding systems, the Commission has a statutory obligation to require "antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment." 47 U.S.C. § 309(j)(4)(E). Accordingly, the *Notice* sought comment regarding the appropriate approach to prevent unjust enrichment by designated entities that acquire broadcast licenses through the use of bidding credits or other special measures. To fulfill our statutory obligations and ensure that the new entrant bidding credit measure we adopt herein has the intended effect of aiding eligible entities to participate in broadcast auctions, we adopt the unjust enrichment provisions described below. Provisions to prevent unjust enrichment in the context of any additional or alternative designated entity measures will be considered if any such measures are adopted in our further order specifically addressing such issues.

194. Specifically, we will follow the general Part 1 auction rules in requiring, under certain circumstances, reimbursement of bidding credits utilized to obtain broadcast licenses. A broadcast licensee, or the holder of a construction permit, who utilized a new entrant bidding credit will be required to reimburse the government for the amount of the bidding credit, plus interest based on the rate for ten-year U.S. Treasury obligations applicable on the date the construction permit was granted, as a condition of Commission approval of the assignment or transfer of that license or construction permit, if the licensee or permittee seeks to assign or transfer control of the license or construction permit to an entity that does not meet the eligibility criteria for the bidding credit. *See* 47 C.F.R. § 1.2111(d)(1).[238] The amount of this repayment will be reduced over a five-year period, as set forth in 47 C.F.R. § 1.2111(d)(2).[239] This unjust enrichment provision also responds to the concerns expressed by the court in *Bechtel II* regarding the ephemeral nature of comparative preferences and the need for post-grant enforcement. *See* 10 F.3d at 879-880.

195. However, if a permittee or licensee who utilized a new entrant bidding credit to obtain a broadcast license simply acquires within the five-year reimbursement period an additional broadcast facility or facilities, such that the licensee would not have been eligible for the new entrant credit, the licensee will not be required to reimburse the government for the amount of the bidding credit. To require reimbursement in such a situation would discourage new entrants from attempting to obtain another broadcast facility and would, in effect, punish the most successful new entrants into the broadcast industry. We believe such a result would be contrary to the basic purpose of the new entrant bidding credit, which is to encourage new entities to not only enter, but to remain and succeed, in the broadcast industry. We note this approach is in accord with existing Commission rules as to certain small business special measures.[240] Accordingly, we will not, as proposed for designated entities generally in the *Notice*, require broadcast permittees and licensees granted a license through a new entrant credit

[238] If the construction permit or license is transferred to an entity that is eligible for a lower bidding credit than the permittee or licensee, then the reimbursement is the difference between the amount of the bidding credit originally utilized and the amount of the bidding credit for which the transferee/assignee would qualify.

[239] A transfer within the first two years after grant of the construction permit will result in a forfeiture of 100% of the value of the bidding credit; during year three, of 75% of the bidding credit; in year four, of 50%; in year five, of 25%; and thereafter, no forfeiture. We will follow the Part 1 auction rules in establishing this five-year reimbursement period, rather than the shorter two- or three-year period supported by one commenter. *See* Comments of KM Communications, Inc. at 10.

[240] *See, e.g.*, 47 C.F.R. § 1.2111(c)(2) (a licensee, such as a small business, paying for licenses obtained by auction through installment financing does not lose its small business status and its eligibility for such financing due to an increase in annual gross revenues resulting from operations, business development or expanded service.)

to certify annually their continuing eligibility for the credit under the new entrant rule in effect when the permit or license was awarded.[241]

196. Based on our experience conducting numerous auctions, we believe that these reimbursement requirements are sufficient to preserve the integrity of the designated entity measures adopted herein, and we note that the few commenters who addressed unjust enrichment issues generally agree.[242] To improve our ability to enforce these reimbursement requirements, we also intend to amend our broadcast transfer and assignment applications to include questions as to whether the construction permit or license at issue was obtained via competitive bidding and whether the licensee used a new entrant bidding credit.

D. Auction Authority for Instructional Television Fixed Service

197. ***Statutory Authority***. The Instructional Television Fixed Service (ITFS) is a point-to-point or point-to-multipoint microwave service whose channels are allocated to educational organizations and are used primarily for the transmission of instructional, cultural and other types of educational material.[243] An described above, Section 309(j) of the Communications Act, as amended by the Budget Act, mandates the utilization of competitive bidding to resolve mutually exclusive applications, with certain specified exemptions. *See* 47 U.S.C. § 309(j)(1) & (2). Although the spectrum reserved for ITFS, an instructional microwave service, is not specifically exempted from the Commission's expanded general auction authority, the channels reserved for noncommercial educational and public broadcasters, as discussed above, are so exempt under Section 309(j)(2)(C). *See supra* ¶ 24. Given this apparent disparity between the treatment of spectrum similarly reserved for educational purposes, we sought comment on whether, under the terms of the amended Section 309(j), we must, and if not, whether we should, apply competitive bidding to mutually exclusive ITFS applicants. *See Notice*, 12 FCC Rcd at 22404-22405 (¶¶ 98-100). Based on our further review of the express terms of the amended Section 309(j), we conclude that channels reserved for ITFS are not exempt from competitive bidding under Section 309(j)(2)(C).

198. As originally provided in 1993, the Commission's initial auction authority was limited to services where licensees received compensation in exchange for providing transmission or reception capabilities to subscribers. Thus, the Commission at that time lacked the authority to auction the broadcast services as well as ITFS, and Congress specifically indicated that the Commission was not to construe payments received by ITFS

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[241] We will consider the appropriateness of such a five-year certification requirement in the context of other designated entity measures, such as bidding credits for minority- or female-owned businesses, if such measures are adopted in our further report and order on designated entities.

[242] *See* Comments of Tri-County Broadcasting, Inc. at 7-8; KERM, Inc. at 8-9; Thomas Desmond at 7. Only one commenter called for additional enforcement actions, including short-term renewals, forfeiture and revocation proceedings, in addition to the monetary reimbursement of the bidding credit, but offered no explanation as to why such additional measures were needed to preserve the integrity of our designated entity policies. *See* Comments of Kidd Communications at 11. We similarly believe that imposing a holding period on broadcast permittees and licensees who obtain their permits through the use of a new entrant bidding credit would be inappropriate, as prohibitions on permit transfers are "likely" to delay service to the public, contrary to the purpose of Section 309(j). *Second Report and Order*, 9 FCC Rcd at 2385.

[243] Authorized ITFS "channels must be used to transmit formal educational programming offered for credit to enrolled students of accredited schools," with certain exceptions. 47 C.F.R. § 74.931(a)(1). Specifically, ITFS licensees may lease excess capacity on their channels to Multipoint Distribution Service (MDS) operators, which have generally used such excess capacity to transmit multichannel video programming to subscribers. An ITFS licensee who leases excess channel capacity to an MDS operator must still provide a total average of at least 20 hours per channel per week of ITFS programming on its authorized channels, and must also retain the right to recapture an additional 20 hours per channel per week for its ITFS programming. *Id*.

licensees for leasing excess capacity to MDS operators as constituting compensation from "subscribers," as that term was used in the initial auction statute.[244] The Budget Act, however, amended Section 309(j) so as to eliminate the subscriber limitation from the Commission's auction authority and to *mandate* the use of competitive bidding to resolve mutually exclusive applications, with certain specific exceptions.[245] The exceptions to this general auction mandate are set forth in Section 309(j)(2), which provides that the Commission's competitive bidding authority "shall not apply to licenses or construction permits issued" in three specific services, of which ITFS is not one. 47 U.S.C. § 309(j)(2).[246]

199. Because Section 309(j) generally requires the use of competitive bidding to resolve mutually exclusive applications with only certain specified exemptions, the Commission does not have the discretion to create another exemption for ITFS. When Congress explicitly enumerates certain exceptions to a general requirement, additional exceptions should not be implied.[247] The list of exemptions from our general auction authority set forth in Section 309(j)(2) is clearly exhaustive, rather than merely illustrative, of the types of licenses or permits that may not be awarded through a system of competitive bidding. By its express terms, Section 309(j)(1) requiring the use of auctions to award licenses or permits applies to all situations in which mutually exclusive applications are filed *except as provided in paragraph (2)*. Nothing in the language of Section 309(j)(2) enumerating three types of licenses or permits not included in our general auction authority, nor in the accompanying legislative history, suggests that Congress intended to authorize the creation of additional categories of licenses that would not be awarded by a system of competitive bidding.

200. We also decline to interpret the noncommercial educational *broadcast* exemption from competitive bidding contained in Section 309(j)(2)(C) to include ITFS, as urged by many commenters.[248] As the Commission has stated and the courts have recognized, ITFS is not a broadcast service. The primary use of ITFS, delivery of educational materials to a limited audience (students pursuing academic credit), does not constitute a broadcast

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[244] *See* H.R. Rep. No. 213, 103d Cong., 1st Sess. 481-482 (1993).

[245] *See* 47 U.S.C. § 309(j)(1) (if "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") (emphasis added).

[246] Section 309(j)(2) states that the Commission shall not apply competitive bidding to the public safety radio services; to the initial digital television licenses given to existing broadcast licensees to replace their analog television licenses; and to stations described in Section 397(6), which defines "noncommercial educational broadcast" and "public broadcast" stations. 47 U.S.C. § 309(j)(2)(A)-(C).

[247] *See Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-617 (1980). *See also* 2A N. Singer, *Sutherland Statutory Construction* §§ 47.11, 47.23 (5th ed. 1992).

[248] The following commenters and reply commenters all oppose subjecting ITFS to competitive bidding under Section 309(j), generally arguing that ITFS falls within the noncommercial educational exemption from auctions set forth in Section 309(j)(2)(C): ITFS Parties; BellSouth Corporation and BellSouth Wireless Cable, Inc.; Indiana Higher Education Telecommunications System; School District of Palm Beach County, Florida; Wireless Cable Association International, Inc.; National ITFS Association; College of the Albermarle, *et al*.; Corporation for Public Broadcasting; Board of Trustees of Community-Technical Colleges (Connecticut), *et al*.; Rocky Mountain Corporation for Public Broadcasting; Edward Czelada; University of North Carolina, *et al*.; Community Telecommunications Network; Ball State University, *et al*.; ITFS Coalition; Throckmorton Broadcasting, Inc.; Board of Education of the City of Atlanta, *et al*.; Mitchell Community College; Rowan-Cabarrus Community College; and Association of America's Public Television Stations. One commenter supports competitive bidding for ITFS, stating that, because ITFS is not specifically exempted from Section 309(j)'s broad general auction authority, the Commission must auction mutually exclusive ITFS applications. *See* Comments and Reply Comments of Hispanic Information and Telecommunications Network.

use because the communications are not intended to be received by the general public.[249] Moreover, excess capacity use of ITFS channels (such as by MDS operators) is typically provided on a subscription basis, and the Commission has clearly determined that subscription video services are not broadcast.[250]

201. Because the exemption from competitive bidding set forth in Section 309(j)(2)(C) specifies only Section 397(6) of the Communications Act, which refers to only noncommercial educational and public broadcast stations, we have no authority to exempt a nonbroadcast service such as ITFS. As the Supreme Court has repeatedly emphasized, there is one "cardinal canon" in interpreting a statute -- a presumption "that a legislature says in a statute what it means and means in a statute what it says there."[251] Moreover, Congress could have simply and clearly made that exemption include ITFS by referencing Section 397(7) of the Communications Act, as well as Section 397(6). Section 397(7) defines the term "noncommercial telecommunications entity," which would include ITFS licensees.[252] The fact that Congress chose not to reference Section 397(7), in addition to Section 397(6), in the Section 309(j)(2)(C) exemption from competitive bidding further supports the conclusion that Congress did not intend to exempt ITFS from competitive bidding.

202. Given the explicitness of the statutory mandate to utilize competitive bidding and the limited nature of the statutory exemptions from competitive bidding set forth in Section 309(j)(2), examining the legislative history of the Budget Act as a guide to interpretation of the amended Section 309(j) appears unnecessary.[253] In any event, in this case recourse to the legislative history of the Budget Act is not particularly enlightening, as it contains no discussion whatsoever concerning ITFS. Furthermore, the policy arguments set forth by various commenters against auctioning ITFS cannot override Section 309(j)'s statutory mandate to utilize competitive bidding for competing applications in all services, except those specifically exempted.[254]

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[249] Section 3(6) of the Communications Act defines broadcasting as the "dissemination of radio communications intended to be received by the public." 47 U.S.C. § 153(6). *See also Memorandum Opinion and Order* in MM Docket No. 83-523, 59 RR 2d 1355, 1376 (1986) (classifying ITFS as nonbroadcast); *Telecommunications Research and Action Center*, 836 F.2d 1349, 1354 (D.C. Cir. 1988) (ITFS used for the precise purpose of providing educational programming to a narrow group of students is clearly not broadcasting, as defined by Communications Act).

[250] In *Subscription Video Services*, 2 FCC Rcd 1001 (1987), the Commission held that subscription video services are not broadcasting services, and this determination was subsequently affirmed on appeal. *See National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988). We have also recently reaffirmed the classification of subscription MDS as a non-broadcast service. *See Second Report and Order* in CC Docket No. 86-179, FCC 98-70 (rel. May 4, 1998).

[251] *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

[252] Under Section 397(7), a "noncommercial telecommunications entity" means any enterprise that (i) is owned and operated by a state or a subdivision thereof, a public agency, or a nonprofit private foundation, corporation or association; and (ii) has been organized primarily for the purpose of disseminating audio or video noncommercial educational and cultural programs to the public by means other than a primary television or radio broadcast station, including microwave. 47 U.S.C. § 397(7).

[253] *See Darby v. Cisneros*, 509 U.S. 137, 147 (1993) (recourse to legislative history found unnecessary in light of plain meaning of statutory text); *Connecticut National Bank*, 503 U.S. at 254 (when words of a statute are unambiguous, then inquiry into the meaning of a statute is complete).

[254] These commenters contend that subjecting ITFS to competitive bidding would, *inter alia*, divert the limited funds of educators away from educational purposes to purchasing licenses, favor ITFS applicants most closely tied to commercial excess capacity users and disfavor those applicants most focused on providing educational services to the community, and perhaps even discourage educators from applying for licenses. *See* Comments of Corporation for Public Broadcasting at 4-7; ITFS Parties at 5-6; BellSouth Corporation and BellSouth Wireless Cable, Inc. at 7-8; Indiana Higher Education Telecommunications System at 3; School District of Palm Beach County, Florida at 3.

203. ***Congressional Clarification of Section 309(j).*** Several commenters argue that, despite the absence of an express exemption for ITFS from competitive bidding in Section 309(j), Congress would not have made such a fundamental shift in its treatment of ITFS without some explicit discussion of the service in the text or the legislative history of the Budget Act.[255] These commenters contend that the Commission should not infer from the omission of a specific statutory exemption for ITFS an intent by Congress to ignore the long-standing reservation of ITFS spectrum for noncommercial educational purposes, and urge the Commission to seek a clarifying amendment of Section 309(j) from Congress.[256]

204. Although we understand and sympathize with commenters' concerns about subjecting ITFS to competitive bidding, we, as discussed in detail above, feel compelled to conclude, based on the express terms of Section 309(j), that competing ITFS applications are subject to auction. We are concerned, nonetheless, that Section 309(j), as adopted, may not reflect Congress' intent with regard to the treatment of competing ITFS applications. Given the instructional nature of the service and the long-standing reservation of ITFS spectrum for noncommercial educational use, it is possible, as commenters argue, that Congress did not intend its expansion of our auction authority in the Budget Act to include ITFS. Accordingly, we will request that Congress amend Section 309(j) so that the statute clearly reflects its intent with regard to ITFS. Absent a clear statement from Congress that it means to exempt ITFS from competitive bidding, then the Commission will proceed with the auction of mutually exclusive ITFS applications, as described below. We will not commence ITFS auctions immediately, however, in order to allow sufficient time for us to obtain Congressional guidance.

205. ***Pending Mutually Exclusive ITFS Applications***. Pending ITFS applications are outside the scope of new Section 309(l) of the Communications Act, which provides that the Commission has discretion regarding the resolution of pending comparative licensing proceedings involving pre-July 1, 1997 applications for commercial radio and television stations. Accordingly, pending mutually exclusive ITFS applications, although pending since at least the last ITFS filing window in October 1995, must be resolved by competitive bidding pursuant to Section 309(j)(1).[257] As we concluded, however, with respect to pending broadcast applications that are outside the scope of Section 309(l) (*see supra* ¶¶ 105-109), we believe it would not serve the public interest to accept additional competing ITFS applications despite our authority to do so under Section 309(j)(1), and we will therefore limit the eligible bidders in any auction of the pending ITFS applications to those with applications already on file.

206. We realize that the pending ITFS applicants filed their applications under our current rules, with the expectation that any mutually exclusive applications would be resolved pursuant to the Commission's established point system. These applications have, moreover, been pending since at least October 1995, and some for an even longer period of time. For these reasons, we believe that the pending competing ITFS

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[255] *See, e.g.*, Comments of Wireless Cable Association International, Inc. at 5; BellSouth Corporation and BellSouth Wireless Cable, Inc. at 9.

[256] *See, e.g.*, Comments of Indiana Higher Education Telecommunications System at 7; ITFS Parties at 8; School District of Palm Beach County, Florida at 7.

[257] Thus, we cannot agree with the commenters, who generally oppose auctioning pending ITFS applications. *See, e.g.*, Comments of College of the Albermarle, *et al*. at 2-3; BellSouth Corporation and BellSouth Wireless Cable, Inc. at 10; Wireless Cable Association International, Inc. at 14-18; National ITFS Association at 6-7. One commenter supports auctioning pending ITFS applications. *See* Comments of Hispanic Information and Telecommunications Network at 10.

applicants should be given an opportunity to settle, without any limitations on payments to withdrawing applicants. For a 120-day period following the publication of this *First Report and Order* in the Federal Register, the Commission will accordingly waive any of its rules (such as 47 C.F.R. § 73.3525(a)(3)) that precludes the receipt of any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal of an application, and will also waive our policy against "white knight" settlements involving the award of a license to a non-applicant third party. Given the congressional directive in Section 309(l)(3) to waive such limitations on settlement prior to any auction of the pending pre-July 1, 1997 broadcast applications, we believe it appropriate to provide a similar period for pending competing ITFS applicants to settle prior to the scheduling of any auction.

207. ***Competitive Bidding Procedures Applicable to ITFS***. As we proposed in the *Notice*, the same application and competitive bidding procedures that we are adopting herein for the broadcast services will also apply to ITFS. Applications for new ITFS facilities or for major changes to existing facilities may only be submitted during an announced auction window; ITFS minor modification applications may continue to be filed at any time and will not be subject to competitive bidding. To apply during an announced auction window, ITFS applicants should submit an FCC Form 175 and the engineering data contained in the FCC Form 330. Applicants who submit mutually exclusive short-form applications for ITFS licenses will be subject to auction, and will be required to make all upfront, down and full payments, as set forth in our general auction rules. Only winning bidders or non-mutually exclusive applicants will be required to file complete long-form applications, and petitions to deny against ITFS long-form applications must be filed within the same ten-day period as adopted herein for broadcast long-form applications. As with the broadcast long-form applications, we are deleting the financial certification requirement from the FCC Form 330.[258]

208. We emphasize that the adoption of competitive bidding procedures for ITFS will not alter the current technical requirements, interference protection rules, or eligibility criteria for the service. Thus, to apply to participate in any future ITFS auction, the applicant must be eligible under our existing rules to hold an ITFS license.[259] Similarly, ITFS licensees who obtain their licenses via competitive bidding will be subject to our existing rules regarding use of ITFS channels. *See supra* ¶ 197.[260] Thus, we are not altering in any way the basic requirements and characteristics of ITFS, but are merely altering the method through which we resolve competing applications in that service.

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[258] The FCC Form 330 does not contain a reasonable assurance of site certification requirement.

[259] ITFS station licenses are "issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations." 47 C.F.R. § 74.932(a).

[260] Under the Commission's rules, wireless cable operators are permitted to apply for ITFS channels under certain conditions. *See Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 6 FCC Rcd 6792, 6801-06 (1991). In allowing the utilization of available ITFS frequencies by wireless cable ventures, the Commission emphasized that it would adopt procedural rules which "provide for the absolute primacy of ITFS applications vis-a-vis wireless cable applications where the two may be mutually-exclusive." *Id.* at 6805. Accordingly, Section 74.990(e) provides that "[i]f an [ITFS] application and a wireless cable application for available [ITFS] facilities are mutually-exclusive . . . the [ITFS] application will be granted if the applicant is qualified." 47 C.F.R. § 74.990. Thus, consistent with our commercial ITFS processing rules, a qualified ITFS application which is mutually exclusive with an application filed by a qualified wireless cable operator, will not be subject to competitive bidding, but will be granted as required by Section 74.990(e). In the event that more than one ITFS application is mutually exclusive with a commercial ITFS application, the ITFS applications will be resolved by competitive bidding only to the extent that they are directly mutually exclusive.

E. Resolution of Pending Comparative Renewal Proceedings

209. In the *Notice*, 12 FCC Rcd at 22406 (¶ 102), we proposed that, if the Commission did not adopt a revised comparative hearing system for pending comparative cases for new stations, and if comparative renewal cases where the comparative issue was decisionally significant did not settle,[261] we would instead use a two-step procedure. Under this approach, a renewal application would be granted if we determined, after a threshold hearing, that the renewal applicant deserved a renewal expectancy for "substantial performance."[262] As part of the two-step procedure (*i.e.*, in connection with those cases where the renewal applicant did not receive a renewal expectancy) or as an alternative, we asked for comment on whether we should consider any comparative factors raised by the applicants on a case-by-case basis. *See Notice*, 12 FCC Rcd at 22406-07 (¶ 103). We recognized that the two-step process had been determined to be unlawful by the United States Court of Appeals for the District of Columbia Circuit,[263] but indicated that we believed the court could be persuaded to change its mind in light of subsequent case law.

210. We continue to believe that a two-step renewal procedure is consistent with the Communications Act and that we could convince the court to overrule its decision to the contrary.[264] We also believe that the two-step procedure would be a quicker system for resolving these cases, at least for those cases where a renewal expectancy is granted and the hearing concludes after the first step. (We would anticipate, based on past experience, that this would be the outcome in most cases.) Indeed, we think this approach would be faster (at least for the one-step hearings) even if we stayed our decision to adopt the two-step approach pending the outcome of judicial review. Nevertheless, we have decided not to adopt the two-step procedure. We do not believe it would best serve the public interest to expend the resources of the Commission, private parties and the courts to litigate (at what would presumably have to be the *en banc* level) the lawfulness of a procedure previously found to be unlawful when the new procedure would apply to only a handful of cases (roughly eight) and would have no future applicability. In addition, we note that even under the two-step procedure, we could not avoid full comparative hearings for those cases that reach the second stage because the renewal applicant does not qualify for a renewal expectancy. And, for those cases, the two-step approach would be slower since, assuming we stayed this part of our order pending judicial review, the process could not get underway until after a decision by the court.

211. As we discussed at length above, having comparative hearings for pending cases is far from the most desirable result. Indeed, our experience with the comparative hearing process has been that it tends to produce protracted litigation over minutiae of questionable public interest significance. Nevertheless, having rejected the two-step approach, we have no choice here other than to use comparative hearings. The Commission has traditionally used for comparative renewals the same standard comparative issue used in connection with

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[261] In this regard, we note that the Commission has waived the monetary limits on settlements in the comparative renewal context to facilitate settlements. *See, e.g., EZ Communications, Inc.*, 12 FCC Rcd 3307 (1997).

[262] *See Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 509 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983).

[263] *Citizens Communications v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972).

[264] *See Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, 8 FCC Rcd 2834 (1993), *recon. denied*, 8 FCC Rcd 6288 (1993).

mutually exclusive applications for new commercial broadcast stations.[265] In addition, as part of the standard comparative issue in renewal proceedings, the Commission awards a renewal expectancy to renewal applicants whose performance has been "substantial."[266] The renewal expectancy has been the most important comparative factor in a comparative renewal proceeding; integration (and diversification) have been factors of lesser weight.[267] Although integration was less important in comparative renewal proceedings than comparative proceedings involving new applications (in those instances where the renewal applicant received a renewal expectancy), it nevertheless was one of the relevant factors. Indeed, if no renewal expectancy were awarded, it would have become a key factor. Because the court found integration to be unlawful in *Bechtel II* and prohibited its further use, any system of comparative renewal hearings we adopt here must, by definition, be different than the system we have used in the past.

212. As noted above, it is a difficult task, open to significant potential legal challenge, to attempt to craft a revised set of comparative criteria or even to establish a revised weighting system using the existing criteria other than integration and the integration enhancements as stand-alone factors. While we do not have the option of auctions in this context, we continue to believe that it does not serve the public interest to develop such a revised or newly weighted system that would apply only to a small number of cases. Developing legally sustainable criteria that would reliably predict future performance is particularly problematic when the universe to which it applies will be so small and where there will be no future applicability.

213. We think the most equitable and expeditious approach here would be simply to permit the renewal applicants and their challengers, within the confines of the generally phrased standard comparative issue, to present the factors and evidence they believe most appropriate. As noted above, this is what we suggested as an alternative approach to the two-step procedure in the *Notice*, and no commenters have provided any persuasive arguments against such an approach to comparative hearings if we reject the two-step procedure.[268] Of course, if the renewal applicant can demonstrate substantial performance and thus an entitlement to a renewal expectancy, this will continue to be the most important factor and can be expected in most cases to outweigh other considerations in favor of the challenger.

214. In so concluding, we acknowledge that comparative renewal hearings tend to be time-consuming and expensive for both the Commission and the private parties, and to disserve the public interest by prolonging

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[265] *See, e.g., Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), *aff'd sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983).

[266] *See, e.g., Cowles Broadcasting, Inc*, 86 FCC 2d 993, 1006-1008 (1981), *aff'd sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). *See also United Broadcasting Co., Inc.*, 100 FCC 2d 1574, 1576-81 (1985); *Radio Station WABZ, Inc.*, 90 FCC 2d 818, 836-43 (1982), *aff'd sub nom. Victor Broadcasting, Inc. v. FCC*, 722 F.2d 756 (D.C. Cir. 1983). A licensee that has provided "meritorious service" has a "legitimate renewal expectanc[y]" that is "implicit in the structure of the Act" and that "should not be destroyed absent good cause." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 805 (1978) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)). *Accord Central Florida Enterprises*, 683 F.2d at 506.

[267] *See, e.g., National Citizens Committee for Broadcasting*, 436 U.S. at 806; *Victor Broadcasting*, 722 F.2d at 765; *Central Florida Enterprises*, 683 F.2d at 509.

[268] One commenter urges that in cases in which the renewal applicant is not awarded a renewal expectancy the Commission should rely on diversification. *See* Comments of Lawrence Brandt at 2-3. Another commenter recommends that the Commission resolve these cases on a case-by-case basis, consider all comparative criteria except for integration, and accord comparative credit for the incumbent's past record based on the strength of the station's performance during the license period. *See* Reply Comments of Simon T. at 16-19.

the period during which a renewal applicant operates under a cloud. In these circumstances, we remain willing, where the circumstances afford assurance that the competing applications were not filed for speculative or other improper purpose, to waive the limitations on payments to dismissing applicants in comparative renewal proceedings, and we will, as commenters suggest, expeditiously consider such settlement agreements.[269] This will serve the public interest by expediting the resolution of proceedings that were prolonged as a result of the court's decision in *Bechtel II*. Although we are sympathetic to the unusual delays occasioned in these cases by the comparative freeze, we decline to consider the licensee's performance after the renewal term for purposes of determining whether it deserves a renewal expectancy, as one commenter suggests,[270] or to make other suggested changes in comparative renewal proceedings that would apply to only a few pending cases and have no future applicability.[271] We believe that the fairest and most expeditious approach in these cases is to decide them as nearly as possible according to the standards in effect prior to *Bechtel II*. We accomplish this by deciding them on a case-by-case basis, affording all parties the flexibility to present evidence they deem relevant under the standard comparative issues, and at the same time adhering to the criteria for evaluating the renewal applicant's performance during the license term to determine its eligibility for, and the comparative significance of, any renewal expectancy.

F. Request for Recusal of Commissioners

215. Willsyr Communications, an applicant in a frozen hearing proceeding involving a new FM station in Biltmore Forest, North Carolina, filed a Motion to Recuse FCC Commissioners, as well as comments in this rulemaking proceeding. This Motion is denied in its entirety. A separate statement from Chairman Kennard addresses the request that he recuse himself from this rulemaking.[272] Based on the applicable law of recusal, the other four commissioners decline to recuse themselves from this rulemaking and from the related adjudicatory proceeding involving Biltmore Forest. Recusal from a rulemaking is warranted only upon a clear and convincing showing of an unalterably closed mind, as to issues of fact or policy,[273] whereas the test for disqualification of a Commissioner from an adjudicatory proceeding on grounds of bias or the appearance of bias is whether "a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[274]

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[269] *See* Comments of Parties to Comparative Renewal Proceedings at 5; Reply Comments of National Minority T.V., Inc. at 3.

[270] *See* Reply Comments of National Minority T.V., Inc. at 2.

[271] One filing, for example, urges that the Commission expedite the resolution of motions to dismiss pending against competing applications as a means of possibly eliminating the need for any comparative hearing, and adopt a variety of measures designed to ascertain the *bona fides* of any competing applicants. *See* Comments of Parties to Comparative Renewal Proceedings at 5-6. *See also* Reply Comments of National Minority T.V., Inc. at 1-2.

[272] Chairman Kennard is already recused from participating in the Biltmore Forest licensing proceeding. *See* Letter, dated July 15, 1997, from William E. Kennard, General Counsel, Federal Communications Commission, to Mark Langer, Clerk of the Court, United States Court of Appeals for the District of Columbia (withdrawing his notice of appearance in *Orion Communications Ltd. v. FCC* (Case No. 96-1430), and notifying the court of his recusal from further participation in that proceeding).

[273] *See C & W Fish Company v. Fox*, 931 F.2d 1556, 1564 (D.C. Cir. 1991).

[274] *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995), *citing Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970).

216. At no time during the confirmation process was Commissioner Furchtgott-Roth, Tristani or Powell, or any member of his or her staff, contacted as to the merits of using comparative hearings rather than auctions to decide certain pending adjudicatory proceedings, as to the merits of the ongoing permanent license proceeding involving Biltmore Forest, North Carolina, or of any adjudicatory licensing proceeding potentially affected by the auction rules we adopt today. In addition, subsequent to confirmation, none has received any impermissible *ex parte* communication regarding the merits of any issue in this rulemaking, or any related adjudicatory proceeding. Each confirms that no impermissible factor has influenced, or would influence in the future, his or her decision on any aspect of this rulemaking proceeding, or on the merits of pending applications. There is, therefore, no basis to challenge the participation of Commissioners Furchtgott-Roth, Powell and Tristani in deciding any issue in this rulemaking proceeding or any related adjudicatory licensing proceeding.

217. There is also no basis to challenge the participation of Commissioner Ness in either proceeding. A requester seeking the recusal of a commissioner from an adjudicatory proceeding must point to specific statements clearly showing prejudgment of both the facts and law of a given case, and such statements must be viewed in the context of the entire case.[275] Willsyr, however, relies exclusively on public remarks quoted in *Mediaweek* (Jan. 5, 1998) that Commissioner Ness was "concerned that auctions, while quick and efficient, ignore the equities that exist in some of these outstanding radio license cases, including Lee's."[276] These remarks merely reformulate an issue of policy expressly articulated by the Commission in its *Notice* in this rulemaking proceeding.[277] But they neither suggest that Lee should be singled out for special treatment, intimate how the Biltmore Forest proceeding should be resolved, nor indicate Commissioner Ness's view on whether certain cases should be resolved through the comparative hearing process instead of by auction. Hence, the statements provide no basis for a disinterested reader of the *Mediaweek* article to conclude that the Commissioner had adjudged in advance any party-specific question of fact or law concerning the merits of any of the pending applications for Biltmore Forest, or that recusal from the adjudicatory proceeding is necessary to prevent the appearance of such prejudgment. As to the policy issue of whether to use comparative hearings in certain cases, the remarks identify, but do not discuss the relative merits of, competing public interest considerations (*i.e*, the speed and efficiency of auctions and the equities existing in some cases) pertinent to that issue. Thus, they in no way show by clear and convincing evidence that Commissioner Ness had an unalterably closed mind on that issue, and therefore they fall far short of the threshold showing necessary to disqualify a commissioner from participating in a rulemaking.

218. Willsyr also surmises that the remarks quoted in the *Mediaweek* article indicate that Commissioner Ness must have been presented with, and considered, extra-record evidence regarding the merits of Orion Broadcasting's pending license application for Biltmore Forest in the context of the issue concerning the use of comparative hearings. The Commissioner affirmatively states that she has not received any impermissible *ex parte* communications regarding the merits of pending applications or the issue of whether considerations of fairness warrant the use of comparative hearings rather than auctions to decide certain outstanding license cases (including the mutually exclusive applications at issue in the Biltmore Forest license proceeding).

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[275] *See Fox Television Stations*, 9 FCC Rcd 5246, 5250 (1994) (Separate Statement of Chairman Quello), *aff'd sub nom. Metropolitan Council of NAACP Branches*, 46 F.3d at 1164-65.

[276] The individual mentioned in the quotation, Zebulon Lee, is a principal of Orion Broadcasting, one of the competing applications for a new FM station in Biltmore Forest. The Biltmore Forest license proceeding is one of the fewer than ten frozen hearing cases that did not settle.

[277] *Notice*, 12 FCC Rcd at 22372-73 (¶ 22), requesting comments on "whether the resources these applicants [who have progressed at least through an Initial Decision by an Administrative Law Judge] have expended, as well as the delays they have encountered, raise special equitable concerns that should lead us to have comparative hearings in these cases even if we use auctions for other pending cases."

IV. PROCEDURAL MATTERS AND ORDERING CLAUSES

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

220. Accordingly, IT IS ORDERED, That pursuant to the authority of Sections 4(i) and (j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), 309(l) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), 309(l) and 403, this *First Report and Order* IS ADOPTED, and Part 73 and Part 74 of the Commission's Rules ARE AMENDED as set forth in the attached Appendix C.

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

222. IT IS FURTHER ORDERED, That the Motion to Recuse FCC Commissioners, filed February 25, 1998, by Willsyr Communications, Limited Partnership, IS DENIED.

223. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. §§ 0.61, 0.131(c), 0.283 and 0.331, the Chief of the Mass Media Bureau and the Chief of the Wireless Telecommunications Bureau ARE GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures as set forth herein, including the authority to seek comment on and set forth mechanisms relating to the day-to-day conduct of specific broadcast service and Instructional Television Fixed Service auctions.

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

225. IT IS FURTHER ORDERED, That GC Docket No. 92-52 and GEN Docket No. 90-264 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A -- LIST OF COMMENTING PARTIES

Comments

American Women In Radio & Television, Inc.
Anchor Broadcasting Limited Partnership
Arizona Board of Regents for Benefit of the University of Arizona, et al. (collectively, "ITFS Parties")
Arizona Board of Regents for Benefit of the University of Arizona, et al. (collectively, "Noncommercial Educational Broadcast Licensees")
Association for Community Education
Association of America's Public Television Stations (AFCCE)
Association of Federal Communications Consulting Engineers
Barger, John W.
Batesville Broadcasting Company, Inc.
Beacon Broadcasting, Inc.
Bechtel, Susan M.
BellSouth Corporation and BellSouth Wireless Cable, Inc.
Bernhard, Andrew and Julia, et al. (collectively, "Certain Broadcast Applicants")
Bible Broadcasting Network, Inc.
Big Ben Broadcasting, et al. (collectively, "Various Post-July 1, 1997 FM Applicants")
Bill, Howard G.
Bingham, Steve
Bledsoe Communications, Ltd.
Board of County Commissioners of Monroe County, Florida, et al. (collectively, "Six Video Broadcast Licensees")
Board of Education of the City of Atlanta, et al.
Board of Trustees of Community-Technical Colleges (Connecticut), et al.
Boelter, Elizabeth and Adolph
Brandt, Lawrence
Brantley Broadcast Associates

Breeze Broadcasting Co., Ltd.
Bulmer, John Anthony
Burr, Phillip
Cavallo, James G.
Channel Twenty Television Co., LLC
Cilurzo, Stephen M.
Colby, Lauren A., on Behalf of Various Identified Parties
College of the Albermarle, et al.
Columbia FM Limited Partnership
Communications Technologies, Inc.
Cook Inlet Region, Inc.
Corporation for Public Broadcasting
Cowan, Terry A.
Cox Radio, Inc.
Cromwell Group, Inc.
Czelada, Edward
Dakota Communications, et al.
Danbeth Communications, Inc.
Davis Television Duluth, LLC, et al.
De La Hunt Broadcasting Corporation
Desmond, Thomas
Diotte, Linda
Eckols, Dorisann L.
Eustis, Jeffrey N.
Eells, Thomas M.
Ferrigno, Michael
Flinn, Jr., George S.
Friendship Broadcasting, LLC
Grace Communications L.C.
Grass Roots Radio, Inc.
Grimmelmann, Cynthia
Gross, Joe L.
Gulf Coast Broadcasting, Inc.
Harris, Lisa M.
Hatfield & Dawson Consulting Engineers, Inc.
Hawley, Judy
Heidelberg-Stone Broadcasting Co.
Hispanic Information and Telecommunications Network
Howard, Jr., Kenneth C.
Independent Broadcast Consultants, Inc.
Indiana Higher Education Telecommunications System
J & M Broadcasting Co., Inc.
J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc.
Jacor Communications, Inc.
Jay Man Productions, Inc.
JEM Broadcasting Co., Inc.
JTL Communications Corporation
Kayo Broadcasting
KERM, Inc.

Kidd Communications
KM Communications, Inc.
KM Broadcasting, Inc.
Kulba, Leslee
Kurtz, Wolfgang V.
Lakefront Communications, Inc.
Lamprecht, J. Thomas
Lansman, Jeremy
Lay Catholic Broadcasting Network
Liberty Productions, LP
Lindsay Television, Inc.
Linear Research Associates
Lutz, Betty M.
Mableton Investment Group
Maciejewski, Jack L.
Magrill, Kyle
Mahaffey, Robert B.
Marri Broadcasting, L.P.
Moore, Jr., Robert R.
Morris, Art
Music Ministries, Inc. and Sacred Heart University, Inc.
NAACP Legal Defense and Educational Fund, Inc.
National Association of Black Owned Broadcasters
National Association of Broadcasters
National ITFS Association
National Public Radio, Inc., et al.
National Translator Association
NDEE NITCHI'I BINAGODI'E d/b/a/ Apache Radio Broadcasting Corp.
New Jersey Television Corporation
New Life Evangelistic Center, Inc.
Nobco, Inc.
Noordyk, Donald James
Noordyk, Todd Stuart
Orion Communications Limited
Pacific Radio Engineering
Pappas Telecasting of America
Pennsylvania State University
Pentecostal Revival Association, Inc.
Perkins, Jr., Roy F.
Positive Alternative Radio, Inc., et al.
Power, John
R&S Media, et al.
Reynolds, Lee S.
Reynolds Technical Associates
Rio Grande Broadcasting Co.
Robol, Ken
Rocky Mountain Corporation for Public Broadcasting

Runnels, Dewey Matthew
School District of Palm Beach County, Florida
Schwary, R.L.
Scranton Times, L.P. and Shamrock Communications, Inc.
Sellmeyer Engineering
Seven Ranges Radio Co. Inc.
Shannon, Paula
Simes, Raymond and L.T. Simes II
Sinclair Broadcast Group, Inc.
SL Communications, Inc.
Smith, Thomas C.
Sound Broadcasting, Inc. and Regency Broadcasting, Inc.
Steinkopf, K.
Tanana Valley Television Company
Throckmorton Broadcasting, Inc.
Tri-County Broadcasting, Inc.
Trinity Broadcasting of Florida, Inc., et al. (collectively, "Parties to Comparative Renewal Proceedings")
United Broadcasters Company
University of Northern Iowa
Wilk, Edward J.
Williams Broadcasting Company
Willsyr Communications, LP
Wilson, Duane D.
Wireless Cable Association International, Inc.
Young, Harold W.

Reply Comments

Adams Communications Corporation and Alan Shurberg d/b/a/ Shurberg Broadcasting of Hartford
Arizona Board of Regents for Benefit of University of Arizona, et al. (collectively, "Noncommercial Educational Broadcast Licensees")
Arizona Lotus Corp.
Arnold Broadcasting, Inc.
Ball State University, et al.
Beacon Broadcasting Corporation
Bechtel, Susan M.
BellSouth Corporation and BellSouth Wireless Cable, Inc.
Belmont Abbey College
Big Ben Broadcasting, et al. (collectively, "Various Post-July 1, 1997 FM Applicants")
Bill, Howard G.
Brantley Broadcast Associates
Carteret Community College
CD Broadcasting, Inc.
Channel Twenty Television Company, LLC
College of the Albermarle, et al.
Communications Technologies, Inc.
Community Telecommunications Network

Davis Television Corpus Christi, LLC, et al.
Duhamel Broadcasting Enterprises
Eustis, Jeffrey N.
Galaxy Communications, Inc.
Glendale Broadcasting Company and Maravillas Broadcasting Company
Hispanic Information and Telecommunications Network
Hoke County School System
Jacor Communications, Inc.
KQED, Inc.
Lakefront Communications, Inc.
Linear Research Associates
McComas, Irene Rodriquez Diaz de
Minnesota Public Radio
Mitchell Community College
Montgomery Communications, Inc.
National Minority T.V., Inc.
National Public Radio, Inc., et al.
Network for Instructional TV, Inc., et al. (collectively, "ITFS Coalition")
NOW Foundation
Orion Communications Limited
Out of Market Productions
Paxson Communications Corporation
Peoples Network, Inc., et al.
Positive Alternative Radio, Inc., et al.
Press Communications, LLC
Queens College
Radio Enterprises of Ohio, Inc.
R&S Media, et al.
Rowan-Cabarrus Community College
Simon T
United Church of Christ, Office of Communication, et al.
University of North Carolina, et al.
University of Northern Iowa
Vermont Public Radio and Monroe Board of Education
WB Television Network
WEEU Broadcasting Company
WGUL-FM, Inc.
Willsyr Communications, Limited Partnership
Wireless Cable Association International, Inc.

APPENDIX B

FINAL REGULATORY FLEXIBILITY ANALYSIS (FRFA)

First Report and Order

As required by the Regulatory Flexibility Act (RFA),[278] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking* (*Notice*)[279] in this proceeding. The Commission sought written public comments on the proposals in the *Notice*, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this *First Report and Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.[280]

I. Need For and Objectives of Action:

This *First Report and Order* adopts rules to implement the Balanced Budget Act of 1997 (Budget Act)[281] which amended Section 309(j) and adopted new Section 309(l) of the Communications Act. Specifically, this *First Report and Order*: (1) adopts competitive bidding procedures to award construction permits in the commercial broadcast and secondary broadcast services; (2) amends application filing procedures for the broadcast services to complement the competitive bidding process; (3) determines to utilize competitive bidding to resolve pending mutually exclusive broadcast applications; (4) determines that the Commission is statutorily required to auction competing Instructional Television Fixed Service (ITFS) applications; and (5) establishes procedures for resolving a small number of pending comparative renewal cases, which cannot be resolved by auction under the Commission's revised competitive bidding authority. The *First Report and Order* adopts a tiered "new entrant" bidding credit for entities with controlling interests in either no, or less than four, other media entities so as to further the goals of the designated entity provisions of Section 309(j). As noted in the *First Report and Order*, the Commission intends to continue its review of the barriers to entry or growth that may exist for small, minority- and women-owned businesses in broadcasting, and to make adjustments to its designated entity provisions, as appropriate, in light of these studies.

II. Significant Issues Raised by the Public in Response to the Initial Analysis:

No comments were received specifically in response to the IRFA contained in the *Notice*. However, some comments did address certain small business issues. A number of commenters called for the adoption of bidding credits for small businesses to ensure their participation in broadcast spectrum auctions, noting that bidding credits have been effective in helping small businesses compete in previous Commission auctions.[282] To

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[278] 5 U.S.C. § 603.

[279] *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Notice of Proposed Rulemaking*, 12 FCC Rcd 22363 (1997).

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

[281] Pub. L. No. 105-33, 111 Stat. 251 (1997).

[282] *See* Comments of Cook Inlet Region, Inc.; Danbeth Communications, Inc.; J. McCarthy Miller and Biltmore Forest Broadcasting FM, Inc.; Apache Radio Broadcasting Corp.; Thomas C. Smith; Edward Czedala; American Women in Radio & Television, Inc.; James G. Cavallo; JTL Communications Corp.

promote diversification of ownership of broadcast stations, a number of commenters also supported the adoption of bidding credits for non-group owners, who would likely be small businesses.[283] Some commenters argued that upfront payments should be small enough to allow small businesses to compete effectively.[284] Commenters generally opposed the use of competitive bidding for selecting among mutually exclusive ITFS applicants. ITFS licensees are primarily educational institutions and governmental educational entities, and commenters contended that subjecting ITFS to competitive bidding would, *inter alia,* divert the limited funds of educators away from educational purposes to purchasing licenses and perhaps even discourage educators from applying for licenses.[285]

Small business-related issues were also raised by commenters more indirectly. A small number of commenters opposed requiring prospective bidders in broadcast auctions to file their short-form applications (FCC Form 175) electronically, contending that electronic filing would be a barrier to participation by those not computer literate or by low power television (LPTV) and translator applicants (many of whom are small businesses).[286] Several commenters also asked the Commission to reconfirm its support for certain previously-adopted special measures to protect LPTV and television translator stations that are displaced during the transition to digital television.[287] These commenters sought confirmation that such displacement applications by LPTV and television translator licensees would not be subjected to competing applications and auction procedures.[288] A small number of commenters additionally contended that it was unfair or inequitable to auction secondary broadcast services (LPTV and television and FM translators), the licensees of which tend to be small businesses.[289]

III. Description and Number of Small Entities Involved:

[283] *See* Comments of Grace Communications, L.C.; Kyle Magrill; Throckmorton Broadcasting, Inc.; JTL Communications Corp.; Friendship Broadcasting, LLC; Cook Inlet Region, Inc.; Danbeth Communications, Inc.; Tri-County Broadcasting, Inc.; James G. Cavallo; Thomas Desmond; Kidd Communications.

[284] *See* Comments of JTL Communications Corp.; Independent Broadcast Consultants, Inc.

[285] *See, e.g.*, Comments of Corporation for Public Broadcasting; ITFS Parties; BellSouth Corporation and BellSouth Wireless Cable, Inc.; Indiana Higher Education Telecommunications System; School District of Palm Beach County, Florida.

[286] *See* Comments of Six Video Broadcast Licensees; Kyle Magrill; Thomas C. Smith; Liberty Productions, LP; Rio Grande Broadcasting Co.; Heidelberg-Stone Broadcasting Co.

[287] *See Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 14588, 14653-54 (1997) (LPTV stations and television translators displaced by new digital television stations will be allowed to apply for suitable replacement channels in the same area without being subject to competing applications; such applications by displaced LPTV and television translator stations will be considered on a first-come, first-served basis, and may be submitted at any time without waiting for a filing window to open).

[288] *See* Comments of National Translator Association; Association of America's Public Television Stations.

[289] *See* Comments of Friendship Broadcasting, LLC; Board of Education of the City of Atlanta, *et al*.; Bible Broadcasting Network, Inc.

Under the RFA, small entities include small organizations, small businesses, and small governmental jurisdictions.[290] The RFA[291] defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act.[292] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). Pursuant to the RFA, the statutory definition of a small business applies when considering the impact of an agency's action(s) "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, established one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

In the *Notice* we stated that we tentatively believe that the SBA's definition of "small business" greatly overstates the number of radio and television broadcast stations that are small businesses and is not particularly suitable for our purposes, and we sought comment on how we should define small business for this purpose. While we utilized the SBA's definition to determine the number of small businesses to which any auction procedures would apply, we reserved the right to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations. We received no comment in response to the IRFA on how to define radio and television broadcast "small businesses." Therefore, we will continue to utilize the SBA's definitions for the purposes of this FRFA.

Radio Broadcasting Stations. The SBA defines a radio broadcasting station that has no more than $5 million in annual receipts as a small business.[293] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[294] Included in this industry are commercial, religious, educational, and other radio stations.[295] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[296] Official Commission records indicate that 11,334 individual radio stations were operating in 1992.[297] The 1992 Census indicates that 96 percent of radio station establishments (5,861 of 6,127) produced less than $5 million in revenue in 1992.[298] As of May 31, 1998, official Commission records indicate that 4,724 AM radio stations, 7,595 FM radio stations

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[290] 5 U.S.C. § 601(6).

[291] 5 U.S.C. § 601(3).

[292] 15 U.S.C. § 632.

[293] 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4832 (1996).

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

[295] *Id*.

[296] *Id.*

[297] FCC News Release No. 31327, January 13, 1993.

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

and 3,011 FM translator/booster stations were licensed.[299] We conclude a similarly high percentage (96 percent) of current radio broadcasting licensees are small entities.

Television Broadcasting Stations. The SBA defines a television broadcasting station that is independently owned and operated, is not dominant in its field of operation, and has no more than $10.5 million in annual receipts as a small business.[300] Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.[301] Included in this industry are commercial, religious, educational, and other television stations.[302] Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.[303] There were 1,509 television stations operating in the nation in 1992.[304] In 1992,[305] there were 1,155 television station establishments that produced less than $10.0 million in revenue (76.5 percent).[306] As of May 31, 1998, official Commission records indicate that 1,579 full power television stations, 2089 low power television stations, and 4924 television translator stations were licensed.[307] We conclude that a similarly high percentage of current television broadcasting licensees are small entities (76.5 percent).

ITFS. In addition, there are presently 2032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions may be included in the definition of a small entity.[308] ITFS is a non-pay, non-commercial educational microwave service that, depending on SBA categorization, has, as small entities, entities generating either $10.5 million or less, or $11.0 million or less, in annual receipts.[309] However, we do not collect, nor are we aware of other collections of, annual revenue data for ITFS licensees. Thus, we conclude that up to 1932 of these licensees are small entities.

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[299] FCC News Release, June 19, 1998.

[300] 13 C.F.R. § 121.201, SIC 4833.

[301] Economics and Statistics Administration, Bureau of Census, U.S. Dep't of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

[302] *Id.*

[303] *Id.*

[304] FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Dep't of Commerce, *supra*, Appendix A-9.

[305] Census for communications establishments are performed every five years, during years that end with a "2" or "7". *See* Economics and Statistics Administration, Bureau of Census, U.S. Dep't of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9, III (1995).

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

[307] FCC News Release, June 19, 1998.

[308] *See* 5 U.S.C. §§ 601(3) - (5).

[309] *See* 13 C.F.R. § 121.210, SIC 4833, 4841 and 4899.

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

We estimate that, as of the adoption date of the *First Report and Order*, there are approximately:[310]

- 700 mutually exclusive pending applications for commercial radio stations, and 200 pending competing applications for full power commercial analog television stations;

- 100 mutually exclusive pending applications for low power television stations and television translator stations, and 30 competing applications for FM translator stations; and

- 200 or more mutually exclusive pending applications for ITFS stations.

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

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

Any competitive bidding procedures developed for the broadcast services will not apply to the few pending comparative renewal cases. Resolution of these cases will be done on a case-by-case basis, with the most important factor being the renewal applicant's performance during the license term and its eligibility for a renewal expectancy. This will affect broadcast station licensees that filed their applications for renewal of license on or

[310] These numbers do not include pending mutually exclusive applications for which we have received settlement agreements which are pending. We anticipate that many of these settlement agreements will be approved which will result in the dismissal of all but one of these mutually exclusive applications and the grant of the remaining application.

before May 1, 1995, and any pending initial license applications that are mutually exclusive with such renewal applications. We estimate that there are approximately 9 initial license applications that are mutually exclusive with 8 pending renewal applications. This includes approximately 15 television applicants and 2 radio applicants.

IV. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:

The *First Report and Order* adopts a number of rules that include reporting, recordkeeping, and compliance requirements. These requirements will apply to all applicants subject to the new competitive bidding procedures, as more fully detailed in the *First Report and Order* (referred to in this section more generally as "applicants"). We find that these requirements are the minimum needed to ensure the integrity and efficiency of broadcast licensing and to serve the public interest, as reflected in this record.

Applicants will be required to submit a short-form application (FCC Form 175) prior to any auction. Only winning bidders will need to file complete long-forms (FCC Form 301 for AM, FM and television stations, FCC Form 346 for LPTV and television translators, or FCC Form 349 for FM translators). Specifically, in response to a public notice announcing a window for the filing of broadcast and/or secondary broadcast applications for new stations and for major changes in existing facilities, applicants will be required to file a short-form application, along with any engineering data necessary to determine mutual exclusivity in a particular service.

With regard to the FM service, applicants will have the opportunity to submit a set of preferred site coordinates as a supplement to the FCC Form 175. FM applicants are not required to submit a set of preferred site coordinates, and may simply indicate the vacant allotment in the FM Table of Allotments upon which they intend to bid. No engineering data will be required to be submitted with FM service short-form applications.

Applicants for AM stations, LPTV stations, and television and FM translators will be required to file short-form applications specifying a channel or frequency upon which the applicant may operate in accordance with the Commission's existing interference standards for these services, which we are not altering in any way. To determine which AM, LPTV, and television and FM translator applications are mutually exclusive for auction purposes, we will require applicants for these services to file, in addition to their short-form applications, the engineering data contained in the pertinent FCC form (*i.e.*, FCC Form 301, FCC Form 346 or FCC Form 349). Similarly, in those rare instances in which analog television licensees file major modification applications (such as a change in the community of license), we will require that such applicants file both an FCC Form 175 and the engineering data contained in the FCC Form 301.

Applicants for broadcast auctions will be required to follow the general auction rules, 47 C.F.R. § 1.2105, with regard to completion of the short form and exhibits to be submitted with the short form.

Applicants will be required to identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process.[311] Applicants also will be required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bids,

[311] *See* 47 C.F.R. §§ 1.2105(a)(2)(viii); 1.2105(c)(1).

bidding strategies, or the particular construction permits on which they will or will not bid.[312] After short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders that have applied to bid in the same geographic license area, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.[313]

Consistent with the Commission's general Part 1 auction rules,[314] all applicants for broadcast auctions must file their FCC Form 175 applications electronically beginning January 1, 1999. Applicants for the AM, LPTV, and television and FM translator services, who, as noted above, must submit engineering information with their short forms, will be required to file the engineering section of the electronic versions of the FCC Forms 301, 346 and 349, which are currently being developed.

A winning bidder that meets its down payment obligations in a timely manner will be required to file an appropriate long-form application for each construction permit for which it was the high bidder. Applicants will be required to submit any applicable exhibits required by the general Part 1 auction rules,[315] and should be filed pursuant to the rules governing the relevant broadcast service and according to any procedures set out by public notice.

Applicants may be subject to upfront payments, minimum opening bids and/or reserve prices in order to participate in broadcast service auctions. The Mass Media Bureau in conjunction with the Wireless Telecommunications Bureau shall seek public comment on and, as appropriate, shall establish these mechanisms for each auction, or group of auctions, in the broadcast services.

Following the close of bidding in an auction, the Commission will issue a public notice announcing the close of the auction and identifying the winning bidders. Winning bidders will be required to submit a down payment.[316] Specifically, within 10 business days of the public notice announcing the close of the auction, winning bidders will be required to supplement their upfront payments with a down payment amount sufficient to bring their total deposits with the Commission up to 20% of their winning bids. If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal payments due, amounts to 20% or more of its winning bid(s), no additional deposit will be required. To the extent that any upfront payment not only covers, but exceeds, the required down payment, the Commission will refund any excess amount after determining that no bid withdrawal payments are owed by the bidder. The down payment will be held by the Commission until the winning bidder has been issued its construction permit and has paid the remaining balance of its winning bid, or until the winning bidder is found unqualified to be a permittee or has defaulted, in which case it will be returned, less any applicable default payments.

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[312] *See* 47 C.F.R. § 1.2105(a)(2)(ix).

[313] *See* 47 C.F.R. § 1.2105(c).

[314] *See* 47 C.F.R. §1.2105(a).

[315] *See* 47 C.F.R. §§ 1.2107(d) (concerning bidding consortia or joint bidding arrangements); 1.2110(i) (concerning designated entity status); and 1.2112(a) & (b) (concerning disclosure of ownership and real party in interest information, and disclosure of gross revenue information for applicants claiming any small business special measure).

[316] *See* 47 C.F.R. § 1.2107(a) & (b).

Auctions winners will be required to pay the balance of their winning bids in a lump sum within 10 business days following the release of a public notice announcing that their construction permits are ready to be granted. If a winning bidder fails to pay the balance of its winning bid in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within 10 business days after the payment deadline, provided that it also pays a late fee equal to 5% of the amount due.[317]

Broadcast auction participants will be subject to the bid withdrawal, default and disqualification payments set forth in the general Part 1 auction rules, in instances where high bids are withdrawn during the course of the auction, where winning bids are withdrawn after an auction has closed, and where winning bidders fail to submit their long-form application, pay their winning bids or are disqualified.[318]

A licensee, or holder of a construction permit, who utilized a new entrant bidding credit will be required to reimburse the government for the amount of the bidding credit, plus interest, as a condition for Commission approval of the assignment or transfer of the license or permit to an entity that would not have qualified for the new entrant credit. As provided in the Commission's Part 1 rules, the amount of the repayment will be reduced over a five-year period.[319] A licensee who received a new entrant bidding credit, however, will not be required to repay such bidding credit if it obtains within the five-year reimbursement period additional media interests so that it no longer meets the eligibility requirements for the new entrant credit it previously received.

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

Due to the insufficiency of the record in this proceeding, the *First Report and Order* does not make a final determination regarding the adoption of bidding credits or other special measures to enhance participation by various designated entities, including small businesses, in broadcast service and ITFS auctions. The *First Report and Order* does adopt a tiered new entrant bidding credit for entities with controlling interests in either no, or less than four, other media entities so as to enhance participation by small businesses and other designated entities, including small businesses owned by women and minority group members. Following the completion of certain pending evidentiary studies, the Commission may, in a further report and order in this proceeding, adopt additional or alternative bidding credits or other measures that more directly alleviate any adverse impact on small businesses (including those owned by women or by minority group members) of the requirement to participate in an auction to obtain a construction permit to provide commercial broadcast service. If additional or alternative designated entity measures are ultimately adopted, then any such measures will be applicable to the auction of any broadcast and ITFS applications then on file with the Commission.

Moreover, even if further special measures are not ultimately adopted, we believe that some of the competitive bidding procedures adopted in this *First Report and Order* reduce the time and cost of securing commercial broadcast and ITFS licenses to the ultimate benefit of small businesses.

Entities interested in bidding for broadcast station permits will not be required to submit a long form application prior to auction. We will require only that a short form application be submitted prior to auction,

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[317] *See* 47 C.F.R. § 1.2109(a).

[318] *See* 47 C.F.R. §§ 1.2104(g) & 1.2109.

[319] *See* 47 C.F.R. § 1.2111(d)(2).

although AM, LPTV, and television and FM translator applicants will be required to submit the engineering data necessary to make determinations of mutual exclusivity. Requiring only minimal information in a short form application rather than a more detailed long form application will reduce the burden on small entities interested in participating in an auction. These entities (particularly FM applicants who are not required to submit any engineering data with their short-forms) will not be required to expend additional sums to prepare a complete long form application prior to auction. Limiting pre-auction costs will encourage and facilitate the participation of small entities in the auction and eliminate a potential barrier to entry for these parties.

The procedures adopted here further expedite service to the public, thereby reducing the cost to small entities of participating in these auctions, by limiting our pre-auction processing to what is necessary to determine mutual exclusivity. Similarly, in the case of pending applications, we will defer until after the auction all issues as to a bidder's basic qualifications or the acceptability of its application, whether raised in a petition to deny or a motion to enlarge issues, and we will decide such issues only with respect to the auction winner.

Also, as permitted by Section 3008, we have reduced the time for filing petitions to deny to 10 days after the long form applications submitted by winning bidders are accepted for filing. Some commenters objected to the establishment of a petition to deny period as brief as that allowed under Section 3008 (*i.e.*, five days), contending, *inter alia*, that such a short period is insufficient to evaluate the technical proposals and legal information contained in broadcast long-form applications.[320] While recognizing that the Commission relies on petitioners as private attorneys general to assist in overseeing the conduct of applicants and licensees and in the fulfillment of its statutory functions, we also consider expedition of service to the public to be of paramount significance. Accordingly, after careful consideration and in light of Congress' directive in the Budget Act, we found that a shortened petition to deny period of 10 days is appropriate for applications for broadcast and secondary broadcast construction permits obtained through the competitive bidding process.

We have eliminated the requirement that applicants affirmatively certify their financial qualifications and the availability of their proposed tower locations in their applications. This will provide small entities with additional flexibility to focus their limited financial resources on participation in the auction rather than preparing financial and other documentation and securing a tower location. We believe that the competitive bidding process itself serves to lessen the incentive for insincere application filings and provides a strong stimulus for timely station construction, so as to recapture bidding investments. In addition, we think it unlikely that bidders, who must construct their facilities to recoup the expenditures made in obtaining their construction permits via auction, will have the incentive to participate in and prevail at auction if they lack the financial wherewithal to construct their facilities.

We recognize that, despite the efficiency of auctions and the resulting reduction in the costs associated with filing an application, having to participate in an auction may limit the opportunities available to small businesses, particularly regarding future applications filed in anticipation of the winner being selected through a system of competitive bidding. However, except for certain commercial broadcast applications filed before July 1, 1997, Section 309(j)(1), as amended by the Budget Act of 1997, requires that the Commission use competitive bidding procedures to award virtually all construction permits for commercial broadcast stations where mutually exclusive applications are filed. After carefully considering the comments, we determined that auctions are statutorily required to resolve mutually exclusive secondary broadcast service applications, as nothing in the statute or in the legislative history reflects an intention to limit Section 309(j)(1) to full power radio and television

[320] *See* Comments of KERM, Inc. at 5; Tri-County Broadcasting, Inc. at 5; Communications Technologies, Inc. at 2; Michael Ferrigno at 10; Hatfield & Dawson Consulting Engineers at 3.

applications. We advised applicants to be aware that the requirement that competing applications be auctioned did not change the secondary nature of the LPTV and television and FM translator services.

Relying on the fact that the exemption from competitive bidding set forth in Section 309(j)(2) is expressly limited to noncommercial educational and public *broadcast* stations, we also determined that the exemption does not apply to ITFS, which is a non-broadcast service. Thus, although we agreed with commenters that ITFS is similar to noncommercial educational broadcast service and that Section 309(j) may not reflect on its face Congress's intent regarding the treatment of competing ITFS applications, we found that auctions are statutorily required to resolve all pending and future mutually exclusive ITFS applications. However, we will request that Congress amend Section 309(j) so that the statute clearly reflects its intent with regard to ITFS. Absent a clear statement from Congress that it means to exempt ITFS from competitive bidding, we will proceed to auction mutually exclusive ITFS applications. We will not commence ITFS auctions immediately, however, in order to allow sufficient time for us to obtain Congressional guidance.

Auctions are not statutorily required to resolve modification applications, since Section 309(j)(1) expressly refers to "mutually exclusive applications for . . . any initial license or construction permit." Nevertheless, we determined to use competitive bidding to resolve mutually exclusive major modification applications but not mutually exclusive minor modification applications. Although some commenters opposed the auctioning of modification applications,[321] commenters did not suggest another method of resolving mutually exclusive major modification applications that is as efficient as competitive bidding. We will, however, allow applicants who have filed competing major modification applications, or competing major modification and new applications, to resolve their mutual exclusivity by means of engineering solutions or settlement before proceeding to auction. Given the infrequency with which minor modification applications are mutually exclusive and the less significant changes proposed in minor modification applications, we saw less utility to be gained from subjecting minor change applications to competitive bidding procedures. Thus, in accord with the comments, the parties will be expected to work together to resolve any mutual exclusivities between minor modification applications.

Section 309(l) governs the resolution of approximately 130 pending comparative licensing proceedings involving pre-July 1, 1997, applications for new commercial radio or television stations that did not settle within the 180-day waiver period prescribed by Congress. For settlements executed within that period, we waived our settlement rules, including the prohibition against "white knight" settlement agreements where a full-market settlement was involved. Such a waiver would allow a non-party to receive the license after paying the pending applicants to settle. We concluded that this "white knight" waiver could not be extended to partial settlements, as some commenters urged,[322] because doing so would contravene Section 309(l)(2), which explicitly restricts our discretion regarding persons qualified to participate in a competitive bidding proceeding that involves pre-July 1, 1997 applications.

We also concluded that, contrary to certain comments,[323] it would not serve the public interest to waive our settlement rules on our own motion to facilitate settlements among applicants ineligible to take advantage

[321] *See, e.g.*, Comments of Cox Radio, Inc. at 2-3; Kayo Broadcasting at 1-4; KM Broadcasting, Inc.; Six Video Broadcast Licensees at 6; Reply Comments of WB Television Network at 12.

[322] *See* Reply Comments of Paxson Communications Corp. at 10; Comments of Marri Broadcasting, L.P. at 2-4; Dewey Matthew Runnels at 2-4.

[323] *See, e.g.*, Reply Comments of WB Television Network at 10; Comments of Grace Communications LC at 7.

of the statutory 180-day settlement period where applicants could settle for more than their legitimate and prudent expenses, or expand the 180-day period for applicants who were eligible to take advantage of the statutorily-mandated waiver period but did not do so. We noted that Congress had made no change to Section 311(c) that would require a substantial relaxation of our settlement rules, and pending competing applicants may settle at any time under our existing policies that limit payments. Moreover, there was no reason to believe that an additional waiver period would produce settlements in a significant number of the remaining cases.

Based upon the express language of Section 309(l), we concluded that in cases that did not settle, we have discretion to resolve applications subject to that provision by either auction or comparative hearings. Some commenters favored the use of comparative hearings for these pending pre-July 1, 1997 cases and expressed concern that the switch to auctions will detrimentally affect the quality of broadcast service. They focused particularly on the impact that auctions will allegedly have in terms of securing service that is narrowly tailored to the needs of the small, local community.[324] We found that Congress itself has made the judgment that auctions are generally preferable to comparative hearings by requiring them for competing commercial broadcast applications filed on or after July 1, 1997. We concluded that, by providing us with the discretion to determine whether or not to use auctions in pending pre-July 1st cases, Congress intended us to focus on any special circumstances in these cases that would tip the policy balance in favor of comparative hearings, not to re-visit the general congressional determination that broadcast auctions serve the public interest.

In exercising this discretion, we concluded that, even for the few pre-July 1, 1997 cases that had already progressed through an Initial Decision by an Administrative Law Judge, auctions will generally be fairer and more expeditious than deciding these pending cases through the comparative hearing process, particularly since the court's invalidation of the key comparative criterion prevents us from deciding any of these cases according to the applicants' reasonable expectation when they filed their applications. Under these circumstances, we disagreed that it would be arbitrary and capricious to ignore the results of the prior hearing. We found that for the Commission's Administrative Law Judges to adjudicate and decide the approximately 130 pending proceedings would take many years while auctions can be carried out much more quickly.

We rejected arguments raised by commenters that changing the selection process for pending applications filed before July 1, 1997 is impermissibly retroactive or otherwise unlawful.[325] We found that none of the pre-July 1, 1997 applicants subject to the new Section 309(l) have a vested right to a comparative hearing that is abridged by our decision to resolve such applications by a system of competitive bidding. And, in any event, the economic impact of this regulatory change is ameliorated somewhat by the statutory requirement that auctions to decide these pending cases be closed to other participants.

Based upon the express language of Section 309(l)(2), we found that, where post-June 30, 1997, applications are mutually exclusive with two or more pre-July 1, 1997 applications, we must dismiss them and conduct a competitive bidding procedure that is restricted to the pre-July 1, 1997 applications. We rejected arguments by some commenters that the distinction between pre-July 1st and post June 30th applications is arbitrary.[326] We found that Congress adopted a bright line distinction and that this distinction operates to exclude

[324] *See, e.g.,* Comments of Wolfgang V. Kurtz at 1-2; Cromwell Group, Inc. at 1-2.

[325] *See, e.g.,* Comments of Susan M. Bechtel at 6-8; Lindsay Television, Inc. at 8-10; Throckmorton Broadcasting, Inc. at 3-4.

[326] *See, e.g.,* Comments of George S. Flinn at 3-4; Robert B. Mahaffey at 4-7. *But see* Comments of Pappas Telecasting of America at 2-3.

some applicants but to include others does not make it unlawful. Moreover, the practical effect of this bright line distinction will be limited, as we believe that settlement agreements have been filed in connection with the small number of cases involving post-June 30th applications mutually exclusive with two or more pre-July 1st applications.

Except for applications subject to Section 309(l), there is no statutory bar to reopening new filing periods for applications that would be mutually exclusive with pending applications. We agreed with commenters that reopening already closed filing periods would not serve the public interest since it would delay, rather than expedite, the resolution of the pending applications, and would defeat the reasonable expectations of applicants who timely filed long-form applications. As in the case of pending applications subject to Section 309(l)(2), restricting the qualified bidders to the pending applicants ameliorates the economic impact on small businesses of having to participate in an auction.

As a matter of fairness to pending applicants, we determined to refund all hearing and certain filing fees paid by all pending applicants. But we declined the suggestion of various commenters that we also reimburse the legitimate and prudent expenses of pending pre-July 1st applicants subject to the comparative freeze, who either do not participate in the auction or are outbid in the auction.[327] We are aware of no legal authority to make such additional reimbursement and concluded we have no obligation to do so.

We concluded that, consistent with our approach in most of the Commission's previous auctions, broadcast and ITFS applicants should be required to submit upfront payments with their short-form applications prior to auction. We also reserved the right to adopt minimum opening bid and/or reserve prices for each license. Establishing upfront payments, minimum opening bid and/or reserve prices may have a significant economic impact on small businesses interested in applying for commercial broadcast and ITFS licenses. However, upfront payments have been required in our general Part 1 auction rules since they were first promulgated, and Congress has directed us to prescribe minimum opening bids or reserve prices unless we specifically determine that this will not serve the public interest. While we were unpersuaded by generalized assertions that reserve prices or minimum opening bids would contravene the public interest, we directed the staff to seek comment on, and as appropriate, establish upfront payments, opening bids and/or reserve prices for each auction or group auctions, and to consider the issues raised by commenters in this proceeding in formulating proposals regarding upfront payments and minimum opening bids or reserve prices.

We adopted our proposal to apply the anti-collusion rule to broadcast service auctions. A number of commenters opposed this, believing instead that auction applicants should be permitted to conclude settlement agreements following the short-form filing deadline with those applicants with whom they are mutually exclusive.[328] We noted that we adopted the anti-collusion rule to both prevent and to facilitate the detection of collusive conduct, thereby enhancing the competitiveness of the auction process and the post-auction market structure. We found that the rule has proven effective in the numerous spectrum auctions conducted to date, and concluded to apply the rule to broadcast auctions. A limited exception to the anti-collusion rule will, however, allow applicants who have filed either competing major modification applications, or competing major

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[327] *See, e.g.*, Comments of United Broadcasters Company at 10; Rio Grande Broadcasting Company at 8-9; Marri Broadcasting, LP at 4-5; Dewey Matthew Runnels at 4-5; Howard G. Bill at 4-5; Heidelberg-Stone Broadcasting Co. at 8-9; Grass Roots Radio, Inc. at 2-3; Willsyr Communications, LP at 32-33; Roy F. Perkins at 1-2; Liberty Productions, LP at 3-4; Columbia FM Limited Partnership at 7.

[328] *See, e.g.*, Comments of KM Communications, Inc. at 8; Positive Alternative Radio, Inc., *et al.* at 10; Throckmorton Broadcasting, Inc. at 11; Independent Broadcast Consultants, Inc. at 9; National Translator Association at 8.

modification and new applications, to resolve their mutual exclusivity by means of engineering solutions or settlements during a limited period after the filing of short-form applications.

For the pending comparative renewal proceedings (which may not be resolved by auction), we determined that the most equitable and expeditious approach would be simply to permit the renewal applicants and their challengers, within the confines of the generally phrased standard comparative issues, to present whatever factors and evidence they believe most appropriate. We found that none of the commenters provided any persuasive arguments against such an approach to comparative hearings if we rejected our alternative two-step procedure.[329] We acknowledged that comparative renewal hearings tend to be time-consuming and expensive for both the Commission and the private parties, and to disserve the public interest by prolonging the period during which a renewal applicant operates under a cloud. However, we stated that we remain willing, where the circumstances afford assurance that the competing applications were not filed for speculative or other improper purpose, to waive the limitations on payments to dismissing applicants in comparative renewal proceedings.

VI. Report to Congress:

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

[329] One commenter did urge that in cases in which the renewal applicant is not awarded a renewal expectancy the Commission should rely on diversification. *See* Comments of Lawrence Brandt at 2-3. Another commenter recommended that the Commission resolve these cases on a case-by-case basis, considering all comparative criteria except for integration, and according comparative credit for the incumbent's past record based on the strength of the station's performance during the license period. *See* Reply Comments of Simon T. at 16-19.

APPENDIX C

I. **Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:**

Subpart A - General Rules of Practice and Procedure

Section 1.65 is amended to read as follows:

§ 1.65 Substantial and significant changes in the information furnished by applicants to the Commission.
(a) Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47. Where the matter is before any court for review, statements and requests to amend shall in addition be served upon the Commission's General Counsel. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.
(b) Applications in ITFS and broadcast services subject to competitive bidding will be subject to the provisions of §§ 73.5002, 73.3522 and 1.2105(b) regarding the modification of their applications.

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Subpart L - Random Selection Procedures for Mass Media Services

Section 1.1601 is amended to read as follows:

§ 1.1601 Scope.

The provisions of this subpart, and the provisions referenced herein, shall apply to applications for initial licenses or construction permits or for major changes in the facilities of authorized stations in the following services:

(a) [Reserved]
(b) [Reserved]

§ 1.1604 Post-selection hearings.

(a) Following the random selection, the Commission shall announce the "tentative selectee" and, where permitted by § 73.3584 invite Petitions to Deny its application.
(1) [Removed]

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II. **Part 73 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:**

Section 73.1010 is amended to read as follows:

§ 73.1010 Cross reference to rules in other parts.
Certain rules applicable to broadcast services, some of which are also applicable to other services, are set forth in the following Parts of the FCC Rules and Regulations.
(a) Part 1, "Practice and Procedure."

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(8) Subpart Q, "Competitive Bidding Proceedings" (§§ 1.2101-1.2112).

Section 73.3500 is amended to read as follows:

§ 73.3500 Application and report forms.

Following are the FCC broadcast application and report forms, listed by number.

Form number	Title
175	Application to Participate in an FCC Auction

Section 73.3522 is amended to read as follows:

§ 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 band FM and reserved noncommercial educational television stations.

(1) Predesignation amendments. Subject to the provisions of §§ 73.3525, 73.3572, 73.3573 and 73.3580, mutually exclusive broadcast applications for reserved band FM stations and television stations on a reserved channel may be amended as a matter of right by the date specified (not less than 30 days after issuance) in the FCC's Public Notice announcing the acceptance for filing of the last-filed mutually exclusive application. Subsequent amendments prior to designation of the proceeding for hearing will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration.

(2) Postdesignation amendments. (i) Except as provided in paragraph (ii) of this section, requests to amend an application after it has been designated for hearing will be considered only upon written petition properly served upon the parties of record in accordance with § 1.47 and, where applicable, compliance with the provisions of § 73.3525, and will be considered only upon a showing of good cause for late filing. In the case of requests to amend the engineering proposal (other than to make changes with respect to the type of equipment specified), good cause will be considered to have been shown only if, in addition to the usual good cause consideration, it is demonstrated:

(A) That the amendment is necessitated by events which the applicant could not reasonably have foreseen (e.g., notification of a new foreign station or loss of transmitter site by condemnation); and

(B) That the amendment does not require an enlargement of issues or the addition of new parties to the proceeding.

(ii) In comparative broadcast cases (including comparative renewal proceedings), amendments relating to issues first raised in the designation order may be filed as a matter of right within 30 days after that Order or a summary thereof is published in the Federal Register, or by a date certain to be specified in the Order. (iii) Notwithstanding the provisions of paragraphs (b)(2)(i) -(ii) of this section, and subject to compliance with the provisions of § 73.3525, a petition for leave to amend may be granted, provided it is requested that the application as amended be removed from the hearing docket and returned to the processing line.

(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: 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.

Section 73.3525 is amended to read as follows:

§ 73.3525 Agreements for removing application conflicts.

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(c) Except where a joint request is filed pursuant to paragraph (a) of this section, any applicant filing an amendment pursuant to §§ 73.3522(b)(1) and (c), or a request for dismissal pursuant to §§ 73.3568(b)(1) and (c), which would remove a conflict with another pending application; or a petition for leave to amend pursuant to § 73.3522(b)(2) which would permit a grant of the amended application or an application previously in conflict with the amended application; or a request for dismissal pursuant to § 73.3568(b)(2), shall file with it an affidavit as to whether or not consideration (including an agreement for merger of interests) has been promised to or received by such applicant, directly or indirectly, in connection with the amendment, petition or request.

(d) Upon the filing of a petition for leave to amend or to dismiss an application for broadcast facilities which has been designated for hearing or upon the dismissal of such application on the FCC's own motion pursuant to § 73.3568, each applicant or party remaining in hearing, as to whom a conflict would be removed by the amendment or dismissal shall submit for inclusion in the record of that proceeding an affidavit stating whether or not he has directly or indirectly paid or promised consideration (including an agreement for merger of interests) in connection with the removal of such conflict.

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(l) The prohibition of collusion as set forth in §§ 1.2105(c) and 73.5002 of this section, which becomes effective upon the filing of short-form applications, shall apply to all broadcast services subject to competitive bidding.

Section 73.3564 is amended to read as follows:

§ 73.3564 Acceptance of applications.

(a) (1) Applications tendered for filing are dated upon receipt and then forwarded to the Mass Media Bureau, where an administrative examination is made to ascertain whether the applications are complete. Except for applications for minor modifications of facilities in the non-reserved FM band, as defined in § 73.3573 (a)(2), long form applications subject to the provisions of § 73.5005 found to be complete or substantially complete are accepted for filing and are given file numbers. In the case of minor defects as to completeness, a deficiency letter will be issued and the applicant will be required to supply the missing or corrective information. Applications that are not substantially complete will not be considered and will be returned to the applicant.

(2) In the case of minor modifications of facilities in the non-reserved FM band, applications will be placed on public notice if they meet the following two-tiered minimum filing requirement as initially filed in first come/first served proceedings:

(i) The application must include:
(A) Applicant's name and address,
(B) Applicant's original signature,
(C) Principal community,
(D) Channel or frequency,
(E) Class of station, and
(F) Transmitter site coordinates; and

(ii) The application must not omit more than 3 of the second tier items specified in appendix C, Report and Order, MM Docket No. 91-347, FCC 92-328, 7 FCC Rcd 5074 (1992). Applications found not to meet minimum filing requirements will be returned to the applicant. Applications found to meet minimum filing requirements, but that contain deficiencies in tender and/or acceptance information, shall be given an opportunity for corrective amendment pursuant to § 73.3522. Applications found to be substantially complete and in accordance with the Commission's core legal and technical requirements will be accepted for filing. Applications with uncorrected tender and/or acceptance defects remaining after the opportunity for corrective amendment will be dismissed with no further opportunity for corrective amendment.

(b) Acceptance of an application for filing merely means that it has been the subject of a preliminary review by the FCC's administrative staff as to completeness. Such acceptance will not preclude the subsequent dismissal of the application if it is found to be patently not in accordance with the FCC's rules.

(c) At regular intervals, the FCC will issue a Public Notice listing all long form applications which have been accepted for filing. Pursuant to §§ 73.3571(h), 73.3572, and 73.3573(f), such notice shall establish a cut-off date for the filing of petitions to deny. With respect to reserved band FM applications, the Public Notice shall also establish a cut-off date for the filing of mutually exclusive applications pursuant to § 73.3573(e). However, no application will be accepted for filing unless certification of compliance with the local notice requirements of § 73.3580(h) has been made in the tendered application.

(d) The FCC will specify by Public Notice, pursuant to § 73.5002, a period for filing applications for new stations or for major modifications in the facilities of an existing station. Except for reserved band FM stations and TV stations on reserved noncommercial educational channels, applications for new and major modifications in facilities will be accepted only during these window filing periods specified by the Commission.

(e) Applications for minor modification of facilities may be tendered at any time, unless restricted by the FCC. These applications will be processed on a "first come/first served" basis and will be treated as simultaneously tendered if filed on the same day. Any applications received after the filing of a lead application will be grouped according to filing date, and placed in a queue behind the lead applicant. The FCC will periodically release a Public Notice listing those minor modification of facilities applications accepted for filing.

(f) If a non-reserved band FM channel allotment becomes vacant, after the grant of a construction permit becomes final, because of a lapsed construction permit or for any other reason, the FCC will, by Public Notice, announce a subsequent filing window for the acceptance of new applications for such channels.

(g) Applications for operation in the 1605-1705 kHz band will be accepted only if filed pursuant to the terms of § 73.30(b).

Section 73.3568 is amended to read as follows:

§ 73.3568 Dismissal of applications.

(a) (1) Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal.

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

(3) Applicants in all broadcast services subject to competitive bidding will be subject to the provisions of §§ 73.5004, 73.5005 and 1.2104(g) regarding the dismissal of their long-form applications and the imposition of applicable withdrawal, default and disqualification payments.

(b) (1) Subject to the provisions of § 73.3525, dismissal of applications for channels reserved for noncommercial educational use will be without prejudice where an application has not yet been designated for hearing, but may be made with prejudice after designation for hearing.

(2) Subject to the provisions of § 73.3525, requests to dismiss an application for a channel reserved for noncommercial educational use, without prejudice, after it has been designated for hearing, will be considered only upon written petition properly served upon all parties of record. Such requests shall be granted only upon a showing that the request is based on circumstances wholly beyond the applicant's control which preclude further prosecution of his application.

(c) Subject to the provisions of §§ 73.3523 and 73.3525, any application for minor modification of facilities may, upon request of the applicant, be dismissed without prejudice as a matter of right.

(d) An applicant's request for the return of an application that has been accepted for filing will be regarded as a request for dismissal.

Section 73.3571 is amended to read as follows:

§ 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 increase in power, except where accompanied by a complimentary reduction of antenna efficiency which leads to the same amount, or less, radiation in all directions (in the horizontal and vertical planes when skywave propagation is involved, and in the horizontal plane only for daytime considerations), relative to the presently authorized radiation levels, or any change in frequency, hours of operation, or community of license. 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.

(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 (h)(1)(i).

(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 (a)(2) of this paragraph, 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. Any such applications found to be mutually exclusive must be resolved through settlement or technical amendment.

(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 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; (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) If, during the window filing period, the FCC receives non-mutually exclusive AM applications, a Public Notice will be released identifying the non-mutually exclusive applicants, who will be required to submit the appropriate long form application within 30 days of the Public Notice and pursuant to the provisions of § 73.5005(d). These non-mutually exclusive applications 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. 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 and 73.5003 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 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) These 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. 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 winning bidder's long form application, a Public Notice will be issued announcing that the construction permit is ready to be granted. Each winning bidder shall pay the balance of its winning bid in a lump sum within 10 business days after release of the Public Notice, as set forth in §§ 1.2109(a) and 73.5003. Construction permits will be granted by the Commission following the receipt of the full payment. (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. 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.

Section 73.3572 is amended to read as follows:

§ 73.3572 Processing of TV broadcast, low power TV, TV translator and TV booster station applications.

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

(1) In the first group are applications for new stations or major changes in the facilities of authorized stations. A major change for TV broadcast stations authorized under this part is any change in frequency or community of license which is in accord with a present allotment contained in the Table of Allotments (§ 73.606).

Other requests for change in frequency or community of license for TV broadcast stations must first be submitted in the form of a petition for rulemaking to amend the Table of Allotments. In the case of low power TV, TV translator, and TV booster stations authorized under Part 74 of this chapter, a major change is any change in:

(i) Frequency (output channel) assignment (does not apply to TV boosters);

(ii) Transmitting antenna system including the direction of the radiation,
directive antenna pattern or transmission line;

(iii) Antenna height;

(iv) Antenna location exceeding 200 meters; or

(v) Authorized operating power.

(2) However, if the proposed modification of facilities, other than a change in frequency, will not increase the signal range of the low power TV, TV translator or TV booster station in any horizontal direction, the modification will not be considered a major change.

(i) Provided that in the case of an authorized low power TV, TV translator or TV booster which is predicted to cause or receive interference to or from an authorized TV broadcast station pursuant to § 74.705 or interference with broadcast or other services under § 74.703 or § 74.709, that an application for a change in output channel, together with technical modifications which are necessary to avoid interference (including a change in antenna location of less than 16.1 km), will not be considered as an application for a major change in those facilities.

(ii) Provided further, that a low power TV, TV translator or TV booster station: authorized on a channel from channel 60 to 69, or which is causing or receiving interference or is predicted to cause or receive interference to or from an authorized DTV station pursuant to § 74.706, or which is located within the distances specified below in paragraph (iii) of this section to the coordinates of co-channel DTV authorizations (or allotment table coordinates if there are no authorized facilities at different coordinates), may at any time file a displacement relief application for a change in output channel, together with any technical modifications which are necessary to avoid interference or continue serving the station's protected service area. Such an application will not be considered as an application for a major change in those facilities. Where such an application is mutually exclusive with applications for new low power TV, TV translator or TV booster stations, or with other nondisplacement relief applications for facilities modifications, priority will be afforded to the displacement application(s) to the exclusion of the other applications.

(iii)(A) The geographic separations to co-channel DTV facilities or allotment reference coordinates, as applicable, within which to qualify for displacement relief are the following:

(1) Stations on UHF channels: 265 km (162 miles)

(2) Stations on VHF channels 2-6: 280 km (171 miles)

(3) Stations on VHF channels 7-13: 260 km (159 miles)

(B) Engineering showings of predicted interference may also be submitted to justify the need for displacement relief.

(iv) Provided further, that the FCC may, within 15 days after acceptance of any other 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 filed for low power TV, TV translator, TV booster stations, and for a non-reserved television allotment, are subject to competitive bidding procedures and will be dismissed if filed outside a specified filing period. See 47 C.F.R. § 73.5002(a).

(b) A new file number will be assigned to an 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, or result in 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 and § 73.3580 will apply to such amended application.

An application for change 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.

(c) Amendments to low power TV, TV translator, TV booster stations, or non-reserved television applications, which would require a new file number pursuant to paragraph (b) of this section, are subject to competitive bidding procedures and will be dismissed if filed outside a specified filing period. See 47 C.F.R. § 73.5002(a). When an amendment to an application for a reserved television allotment would require a new file number pursuant to paragraph (b) of this section, the applicant will have the opportunity to withdraw the amendment at any time prior to designation for a 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 a hearing.

(d) Applications for TV stations on reserved noncommercial educational channels will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically release a Public Notice listing applications which have been accepted for filing and announcing a date (not less than 30 days after issuance) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and petitions to deny the listed applications must be filed.

(e) (1) The FCC will specify by Public Notice, pursuant to § 73.5002, a period for filing applications for a new non-reserved television, low power TV and TV translator stations or for major modifications in the facilities of such authorized station. (2) Such applicants shall be subject to the provisions of §§ 1.2105 and competitive bidding procedures. See 47 C.F.R. §§ 73.5000 et seq.

(f) Applications for minor modifications for television broadcast, low power television and TV translator 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.

(g) TV booster station applications may be filed at any time. Subsequent to filing, the FCC will release a Public Notice accepting for filing and proposing for grant those applications which are not mutually exclusive with any other TV translator, low power TV, or TV booster application, and providing for the filing of Petitions To Deny pursuant to § 73.3584.

Section 73.3573 is amended to read as follows:

§ 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 in the facilities of authorized stations. A major change for an FM station authorized under this part is any change in frequency or community of license which is in accord with a present allotment contained in the Table of Allotments (§ 73.202 (b)). A licensee or permittee may seek the higher or lower class adjacent channel, intermediate frequency or co-channel or the same class adjacent channel of its existing FM broadcast station authorization by filing a minor change application.

Other requests for change in frequency or community of license for FM stations must first be submitted in the form of a petition for rulemaking to amend the Table of Allotments. Long-form applications submitted pursuant to § 73.5005 for a new FM broadcast service may propose a higher or lower class adjacent channel, intermediate frequency or co-channel. For noncommercial educational FM stations, a major change is any change in frequency or community of license or any change in power or antenna location or height above average terrain (or combination thereof) which would result in a change of 50% or more in the area within the station's predicted 1 mV/m field strength contour. (A change in area is defined as the sum of the area gained and the area lost as a percentage of the original area). 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.

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

Note. 1: Applications to modify the channel and/or class of an FM broadcast station to an adjacent channel, intermediate frequency (IF) channel, or co-channel shall not require any other amendments to the Table of Allotments. Such applications may resort to 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.

(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 (f)(2)(i).
(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.

(e) Applications for reserved band and Class D FM broadcast stations will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are

entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically release a Public Notice listing applications which have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and/or petitions to deny the listed applications must be filed.

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

(1) Applications for minor modifications for non-reserved FM broadcast stations, as defined in (a)(2) of this paragraph, 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 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; (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. If, during the window filing period, the FCC receives only one application for any non-reserved FM allotment, a Public Notice will be released identifying the non-mutually exclusive applicant, who will be required to submit the appropriate long-form application within 30 days of the Public Notice and pursuant to the provisions of § 73.5005. These non-mutually exclusive applications 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 of this chapter. 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) 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 and 73.5003 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 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) These 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 of this chapter. 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 winning bidder's long-form application, a Public Notice will be issued announcing that the construction permit is ready to be granted. Each winning bidder shall pay the balance of its winning bid in a lump sum within 10 business days after release of the Public Notice, as set forth in §§ 1.2109(a) and 73.5003(c). Construction permits will be granted by the Commission following the receipt of the full payment. (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.

Note 2: 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: For rules on processing FM translator and booster stations, see § 74.1233 of this chapter.

III. **The following sections are added as amendments to Part 73 of Chapter 1 of Title 47 of the Code of Federal Regulations.**

Subpart I - Competitive Bidding Procedures

§ 73.5000 Services subject to competitive bidding.

(a) Mutually exclusive applications for new facilities and for major changes to existing facilities in the following broadcast services are subject to competitive bidding: AM; FM; FM translator; analog television; low power television; and television translator. Mutually exclusive applications for new facilities and for major changes to existing facilities in the Instructional Television Fixed Service (ITFS) are also subject to competitive bidding. The general competitive bidding procedures found in 47 C.F.R. Part 1, Subpart Q will apply unless otherwise provided in 47 C.F.R. Part 73 and Part 74.

(b) Mutually exclusive applications for broadcast channels in the reserved portion of the FM band (Channels 200-220) and for television broadcast channels reserved for noncommercial educational use are not subject to competitive bidding procedures.

§ 73.5001 Competitive bidding procedures.

(a) Specific competitive bidding procedures for broadcast service and ITFS auctions will be set forth by public notice prior to any auction. The Commission may also design and test alternative procedures, including combinatorial bidding and real time bidding. *See* 47 C.F.R. §§ 1.2103 and 1.2104.

(b) The Commission may utilize the following competitive bidding mechanisms in broadcast service and ITFS auctions:

(1) *Sequencing*. The Commission will establish and may vary the sequence in which broadcast service construction permits and ITFS licenses will be auctioned.

(2) *Grouping*. In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding in broadcast service or ITFS auctions, the Commission will determine which construction permits or licenses will be auctioned simultaneously or in combination.

(3) *Reservation price*. The Commission may establish a reservation price, either disclosed or undisclosed, below which a broadcast construction permit or ITFS license subject to auction will be not awarded.

(4) *Minimum and maximum bid increments.* The Commission may, by announcement before or during broadcast service or ITFS auctions, require minimum bid increments in dollar or percentage terms. The Commission may, by announcement before or during broadcast service or ITFS auctions, establish maximum bid increments in dollar or percentage terms.

(5) *Minimum opening bids*. The Commission may establish a minimum opening bid for each broadcast construction permit or ITFS license subject to auction.

(6) *Stopping rules*. The Commission will establish stopping rules before or during multiple round broadcast service or ITFS auctions in order to terminate the auction within a reasonable time.

(7) *Activity rules*. The Commission will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted a certain number of waivers of such rule during the auction.

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

(a) Prior to any broadcast service or ITFS auction, the Commission will issue a public notice announcing the upcoming auction and specifying the period during which all applicants seeking to participate in an auction must file their applications for new broadcast or ITFS facilities or for major changes to existing facilities. Broadcast service or ITFS applications for new facilities or for major modifications will be accepted only during these specified periods. This initial and other public notices will contain information about the completion and submission of applications to participate in the broadcast or ITFS auction, any materials that must accompany the applications, and any filing fee that must accompany the applications or any upfront payments that will need to be submitted. Such public notices will also, in the event mutually exclusive applications are filed for broadcast construction permits or ITFS licenses, contain information about the method of competitive bidding to be used and more detailed instructions on submitting bids and otherwise participating in the auction. In the event applications are submitted that are not mutually exclusive with any other application in the same service, such applications will be identified by public notice and will not be subjected to auction.

(b) To participate in broadcast service or ITFS auctions, all applicants must timely submit short-form applications (FCC Form 175), along with all required certifications, information and exhibits, pursuant to the provisions of 47 C.F.R. § 1.2105(a) and any Commission public notices. So determinations of mutual exclusivity for auction purposes can be made, applicants for non-table broadcast services or for ITFS must also submit the engineering data contained in the appropriate FCC form (FCC Form 301, FCC Form 346, FCC Form 349 or FCC Form 330). Beginning January 1, 1999, all short-form applications must be filed electronically.

(c) Applicants in all broadcast service or ITFS auctions will be subject to the provisions of 47 C.F.R. § 1.2105(b) regarding the modification and dismissal of their short-form applications. Notwithstanding the general applicability of Section 1.2105(b) to broadcast and ITFS auctions, applicants who file mutually exclusive major modification applications, or mutually exclusive major modification and new station applications, will be permitted to make amendments to their engineering submissions following the filing of their short-form applications so as to resolve their mutual exclusivity.

(d) The prohibition of collusion set forth in 47 C.F.R. § 1.2105(c), which becomes effective upon the filing of short-form applications, shall apply to all broadcast service or ITFS auctions. Notwithstanding the general applicability of Section 1.2105(c) to broadcast and ITFS auctions, applicants who file mutually exclusive major modification applications, or mutually exclusive major modifications and new station applications, will be permitted to resolve their mutual exclusivities by means of engineering solutions or settlements during a limited

period after the filing of short-form applications. Such period will be further specified by Commission public notices.

§ 73.5003 Submission of upfront payments, down payments and full payments.

(a) To be eligible to bid, each bidder in every broadcast service or ITFS auction shall submit an upfront payment prior to the commencement of bidding, as set forth in any public notices and in accordance with 47 C.F.R. § 1.2106.

(b) Within ten (10) business days following the close of bidding and notification to the winning bidders, each winning bidder in every broadcast service or ITFS auction shall make a down payment in an amount sufficient to bring its total deposits up to twenty (20) percent of its high bid(s), as set forth in 47 C.F.R. § 1.2107(b).

(c) Each winning bidder in every broadcast service or ITFS auction shall pay the balance of its winning bid(s) in a lump sum within ten (10) business days after release of a public notice announcing that the Commission is prepared to award the construction permit(s) or license(s), as set forth in 47 C.F.R. § 1.2109(a). If a winning bidder fails to pay the balance of its winning bid 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 (5) percent of the amount due. Broadcast construction permits and ITFS licenses will be granted by the Commission following the receipt of full payment.

§ 73.5004 Bid withdrawal, default and disqualification.

(a) The Commission shall impose the bid withdrawal, default and disqualification payments set forth in 47 C.F.R. § 1.2104(g) upon bidders who withdraw high bids during the course, or after the close, of any broadcast service or ITFS auction, who default on payments due after an auction closes, or who are disqualified. 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 also be subject to the remedies set forth in 47 C.F.R. § 1.2109(d).

(b) In the event of a default by or the disqualification of a winning bidder in any broadcast service or ITFS auction, the Commission will follow the procedures set forth in 47 C.F.R. § 1.2109(b)-(c) regarding the reauction of the construction permit(s) or license(s) at issue.

§ 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, FCC Form 349 or FCC Form 330) 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 47 C.F.R. § 1.2107(d) (concerning any bidding consortia or joint bidding arrangements); § 1.2110(i) (concerning designated entity status, if applicable); and § 1.2112(a) & (b) (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 C.F.R. § 1.2104(g).

(d) An applicant whose short-form application, submitted pursuant to 47 C.F.R. §73.5002(b), was not mutually exclusive with any other short-form application in the same service and was therefore not subject to auction, 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 § 73.5005(a), 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.

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

(a) As set forth in 47 C.F.R. § 1.2108, petitions to deny may be filed against the long-form applications filed by winning bidders in broadcast service or ITFS auctions and against the long-form applications filed by applicants whose short-form applications to participate in a broadcast or ITFS auction were not mutually exclusive with any other applicant.

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

(d) If the Commission denies or dismisses all petitions to deny, if any are filed, and is otherwise satisfied that an applicant is qualified, a public notice will be issued announcing that the broadcast construction permit(s) or ITFS license(s) is ready to be granted, upon full payment of the balance of the winning bid(s). *See* 47 C.F.R. § 73.5003(c). Construction of broadcast stations or ITFS facilities shall not commence until the grant of such permit or license to the winning bidder.

§ 73.5007 Designated entity provisions.

(a) *New entrant bidding credit*. A winning bidder that qualifies as a "new entrant" may use a bidding credit to lower the cost of its winning bid on any broadcast construction permit. A thirty-five (35) percent bidding credit

will be given to a winning bidder if it and/or its owners have no recognizable interest (more than fifty (50) percent or *de facto* control) in the aggregate, in any other media of mass communications. A twenty-five (25) percent bidding credit will be given to a winning bidder if it and/or its owners, in the aggregate, have a recognizable interest in no more than three mass media facilities. No bidding credit will be given if any of the commonly owned mass media facilities serves the same area as the proposed broadcast station, or if the winning bidder and/or its owners have recognizable interests in more than three mass media facilities.

(1) The new entrant bidding credit is not available to applicants that control, or whose owners control, in the aggregate, more than fifty (50) percent of any other media of mass communications in the same area as the proposed broadcast facility. The facilities will be considered in the "same area" if the following defined areas wholly encompass, or are encompassed by, the proposed broadcast or secondary broadcast facility's relevant contour:

(i) AM broadcast station--predicted or measured 2mV/m groundwave contour (*see* 47 C.F.R. §§ 73.183 or 73.186);
(ii) FM broadcast or FM translator station--predicted 1.0 mV/m contour (*see* 47 C.F.R. § 73.313);
(iii) Television broadcast station--Grade A contour (*see* 47 C.F.R. § 73.684);
(iv) Low power television or television translator station--the predicted, protected contour (*see* 47 C.F.R. § 74.707(a));
(v) Cable television system--the franchised community of a cable system;
(vi) Daily newspaper--community of publication; and
(vii) Multipoint Distribution Service station--protected service area (*see* 47 C.F.R. §§ 21.902(d) or 21.933).

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

§ 73.5008 Definitions applicable for designated entity provisions.

(a) *Scope*. The definitions in this section apply to 47 C.F.R. § 73.5007, unless otherwise specified in that section.

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

(c) The *owners* of a winning bidder shall include the winning bidder, in the case of a sole proprietor; partner, including limited or "silent" partners, in the case of a partnership; the beneficiaries, in the case of a trust; any member, in the case of a nonstock corporation or unincorporated association with members; any member of the governing board (including executive boards, boards of regents, commissions, or similar governmental bodies where each member has one vote), in the case of nonstock corporation or unincorporated association without members; and owners of voting shares, in the case of stock corporations.

§ 73.5009 Assignment or transfer of control.

(a) The reporting requirement contained in 47 C.F.R. § 1.2111(a) shall apply to an applicant seeking approval for a transfer of control or assignment of a broadcast construction permit or license within three years of receiving such permit or license by means of competitive bidding.

(b) The ownership disclosure requirements contained in 47 C.F.R. § 1.2112(a) shall apply to an applicant seeking consent to assign or transfer control of a broadcast construction permit or license awarded by competitive bidding.

IV. **Part 74 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:**

Subpart I - Instructional Television Fixed Service

Section 74. 910 is amended as follows:

§ 74.910 Part 73 application requirements pertaining to ITFS stations.

* * * * *

73.3522(a) Amendment of Applications
Subpart I, "Competitive Bidding Procedures" (Secs. 73.5000 - 73.5006).

Section 74.911 is amended as follows:

§ 74.911 Processing of ITFS station applications.

* * * * *

(c)(1) (i) The FCC will specify by Public Notice, pursuant to § 73.5002, a period for filing ITFS applications for a new station or for major modifications in the facilities of an authorized station. (ii) Such ITFS applicants shall be subject to the provisions of §§ 1.2105 and the ITFS competitive bidding procedures. See 47 C.F.R. §§ 73.5000 et seq.

* * * * *

(d) [Removed]

§ 74.912 [Removed]

§ 74.913 [Removed]

Section 74.1233 is amended to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

(a) Applications for FM translator and booster stations are divided into two groups:

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. In the case of FM translator stations, a major change is any change in frequency (output channel), or change (only the gain should be included in determining amount of change) or increase (but not decrease) in area to be served greater than ten percent of the previously authorized 1 mV/m contour. All other changes will be considered minor. All major changes are subject to the provisions of §§ 73.3580 and 1.1104 of this chapter pertaining to major changes.

(2) In the second group are applications for licenses and all other changes in the facilities of the authorized station.

(b) Applications for booster stations and reserved-band FM translator stations will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically release a Public Notice listing reserved-band applications that have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and/or petitions to deny the listed applications must be filed.

(c) In the case of an application for an instrument of authorization, other than a license pursuant to a construction permit, grant will be based on the application, the pleadings filed, and such other matters that may be officially noticed. Before a grant can be made it must be determined that:

(1) There is not pending a mutually exclusive application filed in accordance with paragraph (b) of this section.

(2) The applicant is legally, technically, financially and otherwise qualified;

(3) The applicant is not in violation of any provisions of law, the FCC rules, or established policies of the FCC; and

(4) A grant of the application would otherwise serve the public interest, convenience and necessity.

(d) Processing non-reserved band FM translator applications.

(1) Applications for minor modifications for non-reserved FM translator stations, as defined in (a)(2) of this paragraph, 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. All minor modification applications found to be mutually exclusive, must be resolved through settlement or technical amendment.

(2)(i) The FCC will specify by Public Notice, pursuant to § 73.5002(a), a period for filing non-reserved band FM translator applications for a new station or for major modifications in the facilities of an authorized station. FM translator applications for new facilities or for major modifications will be accepted only during these specified periods. 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 translator applicants will be subject to the provisions of §§ 1.2105 and 73.5002(a) regarding the submission of the short-form application, FCC Form 175, and all appropriate certifications, information and exhibits contained therein. To determine which FM translator applications are mutually exclusive, FM translator applicants must submit the engineering data contained in FCC Form 349 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) FM translator applicants will be subject to the provisions of § 1.2105 regarding the modification and dismissal of their short-form applications. (iv) Consistent with § 1.2105(a), beginning January 1, 1999, all short-form applications must be filed electronically.

(3) Subsequently, the FCC will release Public Notices: (i) identifying the short-form applications received during the appropriate filing period or "window" which are found to be mutually exclusive; (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, during the window filing period, the FCC receives non-mutually exclusive applications for a non-reserved FM translator station, a Public Notice will be released identifying the non-mutually exclusive applicants, who will be required to submit the appropriate long form application within 30 days of the Public Notice and pursuant to the provisions of § 73.5005. These non-mutually exclusive applications 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 of this chapter. If the applicants are 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.

(5)(i) The auction will be held pursuant to the procedures set forth in § 1.2101. 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 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, 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.
(ii) These 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 § 73.3584 of this chapter. If the applicants are duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the winning bidder's long form application, a Public Notice will be issued announcing that the construction permit is ready to be granted. Each winning bidder shall pay the balance of its winning bid in a lump sum within 10 business days after release of the Public Notice, as set forth in § 1.2109(a). Construction permits will be granted by the Commission following the receipt of the full payment. (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 translator applications. Applications will be required to protect all previously filed 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 (d)(2)(i) of this section.

(e) Selection of mutually exclusive reserved band FM translator applications.

(1) Applications for FM translator stations proposing to provide fill-in service (within the primary station's protected contour) of the commonly owned primary station will be given priority over all other applications.

(2) Where applications for FM translator stations are mutually exclusive and do not involve a proposal to provide fill-in service of a commonly owned primary stations, the FCC may stipulate different frequencies as necessary for the applicants.

(3) Where there are no available frequencies to substitute for a mutually exclusive application, the FCC will base its decision on the following priorities: (i) First-full-time aural services; (ii) second full-time aural services; and (iii) other public interest matters including, but not limited to the number of aural services received in the proposed service area, the need for or lack of public radio service, and other matters such as the relative size of the proposed communities and the growth rate.

(4) Where the procedures in paragraph (1), (2) and (3) of section (f) fail to resolve the mutual exclusivity, the applications will be processed on a first-come-first-served basis.

STATEMENT OF CHAIRMAN WILLIAM E. KENNARD REGARDING REQUEST FOR RECUSAL

I write separately to respond to the request of Willsyr Communications that, due to congressional influence, I should recuse myself from participating in this rulemaking proceeding with respect to the adoption of any rules that would govern the resolution of the application of Orion Communications for a license for a new FM station in Biltmore Forest, North Carolina. In support of its recusal request, Willsyr attaches excerpts from the Congressional Record and newspaper clippings purportedly showing that Senator Helms placed a hold on my nomination as chairman in order to secure assurances regarding the disposition of Orion Broadcasting's application for a new FM radio station in Biltmore Forest, North Carolina. Based upon a careful review of the facts and the law governing recusals by administrative officials, I decline to recuse myself from this rulemaking proceeding.

The courts have made clear that in an administrative adjudication "the appearance of bias or pressure may be no less objectionable than reality." *ATX, Inc. v. United States Department of Transportation*, 41 F.3d 1522, 1527 (D.C. Cir. 1994), *citing District of Columbia Fed. of Civic Assns. v. Volpe*, 459 F.2d 1231, 1246-47 (D.C. Cir. 1972)[1] Guided by these principles and out of an abundance of caution, I recused myself from participating in the adjudicatory proceeding involving the radio license for Biltmore Forest as soon as it became clear that the proceeding might become an issue in the confirmation process.[2] I did so because I was acutely aware of the need to avoid even the appearance of any bias, which is critical to safeguarding the integrity of the FCC processes.

Willsyr argues that, having recused myself from the adjudicatory licensing proceeding, I must also recuse myself from participating in the rulemaking with respect to the adoption of any rules that would govern the resolution of the licensing proceeding. However, a request for recusal by an administrative official from a rulemaking proceeding is subject to a far higher evidentiary showing than a similar request in an adjudicatory proceeding. Recusal from a non-judicial proceeding -- such as the rulemaking to implement the Commission's newly expanded auction authority -- is appropriate only where there is clear and convincing evidence of an unalterably closed mind on an issue that is critical to the disposition of the proceeding.[3] Further, congressional influence in a rulemaking is improper only to the extent that it causes the agency to deviate from the substantive law.[4] Finally, the appearance of bias in the non-adjudicatory context may be cured by the development of "a full-scale administrative record which might dispel any doubts about the true nature of [the agency's] action." *ATX*, 41 F.3d at 1528, *citing Volpe*, 459 F.2d at 1249.

Willsyr points to no specific statements that even suggest, let alone provide clear and convincing evidence, that I have an unalterably closed mind on any issue in this rulemaking proceeding. During the

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[1] *See also Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1990) (speech by FTC Chairman addressing the merits of a pending adjudicatory case warrants his recusal from proceeding); *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir.1966) (in the context of a pending formal adjudication to be decided on the basis of an on-the-record hearing, congressional pressure focusing on the mental, decision-making processes of an administrative agency taints the proceeding).

[2] *See* Letter, dated July 15, 1997, from William E. Kennard, General Counsel, Federal Communications Commission, to Mark Langer, Clerk of the Court, United States Court of Appeals for the District of Columbia (withdrawing my notice of appearance in *Orion Communications Ltd. v. FCC* (Case No. 96-1430) and notifying the court of my recusal from further participation in that proceeding).

[3] *See C & W Fish Company v. Fox*, 931 F.2d 1556, 1564 (D.C. Cir. 1991) (pre-appointment statements of administrator endorsing particular standard were insufficient to show bias).

[4] *See, e.g., Chemung County v. Dole*, 804 F.2d 216, 222 (2d Cir. 1986) (holding that the test is whether political pressure was intended to and did influence the agency to act for irrelevant reasons); *District of Columbia Fed. of Civic Assns. v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1972) (administrative decision must be strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes).

confirmation process, in written responses to questions, I acknowledged that "the *Bechtel* decision has caused unfairness to many applicants who have had further processing of their applications delayed and, as a result of that court decision, will necessarily have their applications processed under new procedures."[5] Consistent with that response and my responsibility regarding the implementation of the Commission's newly authorized auction authority under the Balanced Budget Act in a fair and impartial manner, I also indicated that "[t]he Commission certainly may consider as part of th[e] rulemaking proceeding any arguments that particular classes of pending applicants should be treated differently."[6] However, inclusion of that issue was largely dictated by statutory language unambiguously according the agency discretion to resolve such cases by auctions or comparative hearings. Therefore, my willingness to support inclusion in the Notice of Proposed Rulemaking in this proceeding of a request for comment on whether there were equitable circumstances warranting the use of comparative hearings in certain types of cases is certainly not evidence that I have a closed mind on any issue in the rulemaking.

Nor did I agree to support the adoption of rules, or take any other action, that would be favorable to a particular applicant in exchange for Senator Helms's agreement to support my nomination to be Chairman of the Commission. Senator Helms's remarks in support of my confirmation, published in the *Congressional Record* and quoted in a variety of press reports, do not reflect otherwise. Senator Helms stated:

> I have been given assurances satisfactory to me by Mr. Kennard that he will, within statute and regulation, work in good faith with me and others to resolve the problems the Bechtel decision caused.
>
> I was very impressed when Mr. Kennard came to my office and met with me about 3 weeks ago. I appreciate his voluntary assurance that he will work with us on the Zeb Lee case.[7]

Senator Helms further explained this matter in a letter to the Senate Select Committee on Ethics. Specifically, the November 20, 1997 letter states:

> After his recusal from the WZLS matter, and before his confirmation, I met with Mr. Kennard to discuss, among other things, the difficulties of implementing the Bechtel decision. I appreciated Mr. Kennard's candor; and on the Senate floor I announced that I would vote for his confirmation, stating "I have been given assurances satisfactory to me by Mr. Kennard that he will, w*ithin statute and regulation*, work in good faith with me and others to resolve the problems associated with the Bechtel decision." . . . At no time, either publicly or in my private conversations with Mr. Kennard, did I state that my support for his nomination depended on the outcome of any specific adjudication. Instead, I sought clarification and acknowledgment of the public policy issues raised by implementation of the Bechtel decision, a matter of great importance to not only one of my constituents, but to all those similarly situated.[8]

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[5]Congressional Record, S11309 (Oct. 29, 1997) (Exhibit 1).

[6] *Id.*

[7]*Congressional Record* at S11309 (October 29, 1997).

[8]Letter, dated November 20, 1997, from Jesse Helms to Bob Smith, Chairman, and Harry Reid, Vice Chairman, Senate Select Committee on Ethics (emphasis in the original).

As Senator Helms's remarks and my written answers to the committee reflect, my concerns regarding the unfairness resulting from the *Bechtel* decision pertained not to a particular applicant in a pending case, but to the general policies surrounding applicants that were caught in the comparative freeze. As the Commission's General Counsel, I headed the office that was chiefly responsible for making recommendations to the Commission regarding these hearing cases, and I was well acquainted with the issues that arose from the *Bechtel* decision. It was these policy concerns, in light of the explicit discretion in the statute regarding the use of auctions or hearings in certain pending cases, that led me to support the inclusion of a request for comments on whether equitable considerations militated against the use of auctions in all of these cases. Of course, even without a specific request focusing on this issue, commenters would have had an opportunity to argue that equitable considerations warranted different treatment for certain classes of pending applicants.

Finally, scattered, purely speculative newspaper articles reporting the circumstances surrounding my confirmatiion and the initial opposition but ultimate support of my nomination by Senator Helms, are not a basis for requiring my recusal from this rulemaking proceeding. None of the press reports quote me directly and only quote material from Senator Helms published in the Congressional Record. Nevertheless, various articles and editorials surmise that, because Senator Helms expressed some concern regarding the plight of Orion in connection with my nomination, his ultimate support of that nomination must have been the result of my agreement to assist Orion not only in the adjudicatory proceeding but through the adoption of rules that would somehow favor Orion. However, none of these articles corroborate the existence of such an agreement, reflect my prejudgment of any issue in MM Docket No. 97-234, et al. (or in the related Biltmore Forest case from which I am recused), or otherwise provide any evidence supporting the request that I recuse myself from participating in any aspect of this rulemaking proceeding.

Suffice it to say that Senator Helms received no assurance from me regarding the outcome of the adjudicatory proceeding involving Biltmore Forest or the adoption of any rules to govern the resolution of that proceeding. To safeguard the integrity of the adjudicatory proceeding and to avoid the appearance of any impropriety regarding any decision ultimately reached in that proceeding, I recused myself from that proceeding. Having done so, I see no reason also to recuse myself from any aspect of this rulemaking proceeding. On the discrete issues raised in the rulemaking proceeding, I have participated in every aspect of this First Report and Order. As is my practice, I approached every issue decided herein with an open mind and I have relied solely on the record compiled in this proceeding.

STATEMENT OF COMMISSIONERS HAROLD FURCHTGOTT-ROTH AND GLORIA TRISTANI, DISSENTING IN PART

In the Matter of Implementation of Section 309(j) of the Communications Act -- MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264

We would not have sought additional comment on the question whether section 309(j)(2)(C) precludes us from using competitive bidding to award a broadcast license to a noncommercial educational broadcast or public broadcast station to operate on a commercial channel. We believe that Congress' mandate is clear: the Commission lacks authority to employ auctions to issue licenses to such stations, regardless of whether they operate on a reserved or on a commercial frequency. Since the statute is clear on its face, we are bound to give it effect. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

The express exemption to our competitive bidding authority in section 309(j)(2)(C) provides that such authority "shall not apply to licenses or construction permits issued by the Commission . . . for stations described in section 397(6) of this title." Section 397(6), in turn, defines the terms "noncommercial educational broadcast station" and "public broadcast station" as "a television or radio broadcast station which . . . under the rules and regulations of the Commission . . . is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association" or "is owned and operated by a municipality and which transmits only noncommercial programs for education purposes."

Nothing in section 309(j)(2)(C) limits the inapplicability of our auction authority to licenses issued for noncommercial and public broadcast stations *on reserved channels*. The statute makes no distinction between licensees granted to section 397(6) stations to operate on reserved spectrum and licensees granted to such entities to operate on unreserved spectrum; the prohibition on the licensing of these stations pursuant to auctions is, in this regard, unqualified. The statute makes plain that the Commission simply has no competitive bidding authority when it comes to licenses issued for stations described in section 397(6).

Similarly, nothing in section 397(6) limits the definition of noncommercial educational and public broadcast stations to those operating on reserved channels. Rather, section 397(6) defines the stations exempt from auctions under section 309(j)(2)(C) in terms of the station's *eligibility* under Commission rules to be licensed as a noncommercial educational or public broadcast station. And Commission rules do not require broadcast stations to operate only on reserved bands in order to be eligible for status as a noncommercial educational or public broadcast station. *See* 47 C.F.R. § 73.503. To the contrary, our rules specifically address the situation in which noncommercial educational stations operate on unreserved channels. *See* 47 C.F.R. § 73.513.

Had Congress intended to limit the exemption for noncommercial educational and public broadcasters from competitive bidding to cases in which such broadcasters were applying for reserved frequencies, presumably Congress would have done so explicitly. Indeed, prior versions of both the House and Senate bills expressly provided for an auction exemption limited to "channels reserved for noncommercial use," but those limitations were eliminated prior to passage. *See* H.R. 2015, 105th Cong., 1st Sess., § 3301(a)(1); S. 947, 105th Cong., 1st Sess., § 3001(a)(1). Where Congress deletes limiting language from a bill prior to enactment, it may be presumed that the limitation was not intended. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983). We would not read this limitation back into the statute.

We fully agree with the majority, however, that it is not clear how the exemption from our auction authority contained in section 309(j)(2)(C) should be implemented. The practical question of how to establish a process for awarding licenses to noncommercial educational and public broadcast stations without running afoul of section 309(j)(2)(C) is, admittedly, a difficult one. We also agree that there is a range of

options for how the Commission could award broadcast licenses to stations described in section 397(6). But to the extent that the majority fails to exclude the possibility that noncommercial educational and public broadcast stations seeking commercial frequencies will be forced to obtain their licenses through auctions, we respectfully dissent.