

27655, May 19, 1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

In addition, since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950) and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

### VIII. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General

of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

### List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: August 31, 1998.

**James Jones,**

*Director, Registration Division, Office of Pesticide Programs.*

Therefore, 40 CFR chapter I is amended as follows:

### PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 346a and 371.

2. In § 180.533, by alphabetically adding the following commodities to the table in paragraph (a) to read as follows:

### § 180.533 Esfenvalerate; tolerances for residues

(a) \* \* \*

Commodity	Parts per million
Artichoke, globe .....	1.0
* * *	*
Kiwifruit .....	0.5
Kohlrabi .....	2.0
* * *	*
Mustard greens .....	5.0
* * *	*

\* \* \* \* \*

[FR Doc. 98-24770 Filed 9-10-98; 8:45 am]

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 1, 73 and 74

[MM Docket No. 97-234, GC Docket No. 92-52, and GEN Docket No. 90-264; FCC 98-194]

### Implementation of Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This *First Report and Order* (*First R&O*) implements the Federal Communications Commission's amended auction authority. Specifically, the *First R&O* adopts rules and procedures for auctioning pending and future mutually exclusive applications for construction permits in the various commercial broadcast services; determines that competing Instructional Television Fixed Service (ITFS) applications are subject to auction; and adopts procedures for resolving pending broadcast comparative renewal cases, in which the Commission is not authorized to use auctions. To further the goals of the designated entity provisions of the Commission's auction authority, the *First R&O* adopts a tiered "new entrant" bidding credit for entities with controlling interests in either no, or less than four, other media entities. The *First R&O* notes that 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.

**EFFECTIVE DATE:** November 10, 1998.

**FOR FURTHER INFORMATION CONTACT:** Jerianne Timmerman, Video Services Division, Mass Media Bureau at (202) 418-1600; Lisa Scanlan, Audio Services Division, Mass Media Bureau at (202) 418-2720; Lee Martin, Office of General Counsel at (202) 418-1720.

### SUPPLEMENTARY INFORMATION:

#### Summary

This *First R&O* implements: (1) amended Section 309(j) of the Communications Act (Act), which requires that the Commission use auctions to select from among virtually all mutually exclusive applications for initial licenses and construction permits, including broadcast construction permits, and (2) new Section 309(l) of the Act, which

authorizes auctions to resolve pending comparative licensing cases involving applications for full-service commercial radio or television stations filed before July 1, 1997. As proposed in this proceeding, the *First R&O* amends the disparate application procedures for the various broadcast services to establish a uniform window filing approach that should facilitate the determination of mutually exclusive groups of applications for auction purposes, and also establishes rules and procedures for auctioning mutually exclusive applications for broadcast construction permits that follow, as closely as possible, the Commission's general part 1 auction rules.

#### **General Authority to Use Competitive Bidding to Award Secondary and Primary Commercial Broadcast Licenses**

2. Under amended Section 309(j)(1), the Commission found that auctions are mandatory for all secondary commercial broadcast services (e.g., LPTV, FM translator and television translator services). Similarly, the Commission found that, except for certain pending applications that are subject to new Section 309(l), its auction authority is mandatory, rather than permissive, for all full power commercial radio and analog television stations. 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.

3. The Commission stated further 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), and the Commission determined that Congress did not intend to include pending secondary broadcast applications within Section 309(l).

#### **Statutory Authority to Use Competitive Bidding for Modification Applications**

4. The Commission concluded that it is not precluded by the terms of Section

309(j) from auctioning mutually exclusive modification applications. The Commission recognized, 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. The Commission will therefore allow applicants who have, under the window filing procedures adopted in the *First R&O* for new station applications and major modification applications, filed either competing major modification applications, or competing major modification and new station 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. The Commission stated that it would apply competitive bidding procedures 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.

5. The Commission determined that it would 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, the Commission will encourage parties "to use engineering solutions, negotiation \* \* \* and other means" to resolve any mutual exclusivities. 47 U.S.C. 309(j)(6)(E).

#### **Statutory Exemption for Noncommercial Educational and Public Broadcast Stations**

6. The Commission determined that it had not received sufficiently focused comment to finally resolve in this proceeding the issues relating to noncommercial educational and public broadcast stations. While the exemption in Section 309(j)(2)(C) for noncommercial educational broadcasters clearly precludes the Commission from using competitive bidding to award broadcast station licenses on the reserved noncommercial frequencies, there are difficult issues as to how the Commission should apply this provision when noncommercial educational and public broadcasters apply for frequencies in the commercial band. The Commission found that its

decision on these issues would be aided by a further round of comment. Therefore, the Commission stated that it would not proceed to auction at this time any pending cases where both noncommercial and commercial applicants have filed competing applications for nonreserved channels; these cases will be resolved following the release of a report and order in our noncommercial proceeding, MM Docket No. 95-31.

#### **Discretion to Use Auctions in Pending Cases Involving pre-July 1, 1997 Applications**

7. The Commission found that it has discretion under new Section 309(l) to resolve comparative licensing proceedings that involve pre-July 1, 1997 applications for full service commercial radio and television stations by either competitive bidding procedures or through the comparative hearing process. 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 Commission concluded that the language of Section 309(l) unambiguously addresses a situation in which auctions are permissible, but are not required.

#### **Public Interest Considerations Favoring Resolution of Pending Cases by Competitive Bidding**

8. The Commission stated 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. Auctions will generally expedite service and better serve the public interest in these cases, because competitive bidding is a more efficient and cost-effective method of assigning spectrum in cases of mutual exclusivity than any previously employed method. The Commission concluded that there is no inherent unfairness in using auctions, rather than comparative hearings, to resolve mutual exclusivity among these pre-July 1, 1997 applications, as most of these applicants filed after *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), which made it clear that some change in the existing selection criteria was inevitable. The Commission also found that changing the selection process for pending applications filed before July 1, 1997 is not impermissibly retroactive or

otherwise unlawful. 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 the Commission's decision to award such authorizations by a system of competitive bidding. The Commission moreover noted that the impact of this regulatory change is ameliorated somewhat by the statutory requirement that auctions to resolve these pre-July 1 pending cases be closed to other participants.

#### **Treatment of Pending Hearing Cases**

9. The Commission concluded that, even for the small number of pending cases involving pre-July 1, 1997 applications that have progressed at least through an Initial Decision by an Administrative Law Judge, auctions better serve the public interest than comparative hearings. While these pending applicants have spent considerable time and money prosecuting their applications and have experienced significant delays in obtaining a final decision as to the selection of the licensee, these circumstances do not, the Commission determined, outweigh the additional delays, uncertainty and administrative costs that would be incurred by resolving these cases through the comparative hearing process.

#### **Scope of Section 309(l)**

10. The Commission found that, where post-June 30th applications are mutually exclusive with two or more pre-July 1, 1997 applications, it is 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. The Commission also stated 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. Under Section 309(l)(2), the Commission is 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. The *First R&O* notes that the practical effect of this distinction between applications filed before July 1st and after June 30th will be limited, as the Commission believes 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.

#### **Pending Applications Not Subject to Section 309(l)**

11. 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. Specifically, the Commission has the discretion to restrict the class of eligible bidders to those with applications already filed, or to reopen the filing period for additional applicants that would be eligible to participate in the auction. The Commission concluded that, in cases of pending mutually exclusive applications not subject to Section 309(l) where the relevant period or window for filing applications under the existing procedures has expired, the public interest would not be served by reopening the filing period for additional mutually exclusive applications. The Commission found 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.

12. The Commission noted, however, that there are pending 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. Rather than open individual filing windows or issue individual cut-off lists for each of these pending broadcast applications, the Commission decided that it would be more efficient to simply include these applications in the first general auction conducted for new applicants in the relevant service.

#### **Competitive Bidding Design**

13. The Commission announced that it would conduct all auctions of mutually exclusive broadcast applications in conformity with the general competitive bidding rules set forth in part 1 of the Commission's rules. However, 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. The Commission concluded that the appropriate auction design will vary depending on the type of service involved, the number of

construction permits at stake, how many 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. The Commission delegated authority to the Mass Media Bureau and the Wireless Telecommunications Bureau (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. The Commission also delegated to the Bureaus authority to seek comment on and, as appropriate, to establish upfront payments, minimum opening bids and/or reserve prices for each broadcast auction or group of broadcast auctions.

#### **Auction Application Procedures**

14. The Commission will follow for all broadcast service auctions the procedural and payment rules set forth in the general part 1 auction rules, with certain modifications. Specifically, the *First R&O* replaces the Commission's disparate filing procedures for the various broadcast services with a specific time period, or auction window, 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. Applicants 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 to 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. The Commission stated that, prior to auction, it would examine the engineering data submitted by applicants for the non-table services (AM, LPTV, and television and FM translators) only to the extent necessary to determine the mutually exclusive groups of applications for auction purposes. Applicants for FM stations need not submit any engineering data in addition to their FCC Form 175 applications, as such data is not needed to make determinations of mutual exclusivity in the FM service.

15. The Commission determined to follow the general auction rule mandating electronic filing, and will

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 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.

16. Consistent with the part 1 anti-collusion rule, the Commission announced that 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. In addition, applicants 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. 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.

17. The Commission also determined to follow in broadcast auctions the general part 1 auction rules with regard to post-auction procedures, including the payment by winning bidders of their bids and the withdrawal, default and disqualification of winning bidders. The *First R&O* additionally adopted a shortened 10-day period for the filing of petitions to deny against the long-form applications filed by auction winners.

#### **Designated Entities**

18. Due to the insufficiency of the record in this proceeding, the *First R&O* 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, minority- and women-owned businesses, in broadcast service and ITFS auctions. The *First R&O* does

adopt a tiered new entrant bidding credit to further the goals of the designated entity provisions of Section 309(j); specifically, applicants with no controlling interests in any media outlets will receive a 35% bidding credit, and applicants with controlling interests in no more than three media outlets, none of which serve the same area as the proposed station, will receive a 25% bidding credit. Following the completion of certain pending evidentiary studies, the Commission anticipates the release of a further report and order in this proceeding addressing designated entity issues in the broadcast context. If additional or alternative designated entity measures are ultimately adopted in this further order following the completion of the Commission's evidentiary studies, then any such measures will be applicable to the auction of any broadcast and ITFS applications then on file with the Commission. To prevent any unjust enrichment by designated entities utilizing the new entrant bidding credit, we will follow the general part 1 auction rules in requiring, under certain circumstances involving assignments or transfers, the reimbursement of bidding credits utilized in obtaining broadcast licenses via auction.

#### **Auction Authority for Instructional Television Fixed Service**

19. The Commission determined that, because Section 309(j) generally requires the use of competitive bidding to resolve mutually exclusive applications with only certain specified exemptions, it does not have the discretion to create another exemption from competitive bidding for ITFS. When Congress explicitly enumerates certain exceptions to a general requirement, additional exceptions should not be implied, and the list of exemptions from the Commission's 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. Because ITFS is not one of the services exempted from competitive bidding in Section 309(j)(2), the *First R&O* concludes that competing ITFS applications must be subjected to competitive bidding procedures. The Commission declined to interpret the exemption from competitive bidding for noncommercial educational broadcast stations contained in Section 309(j)(2)(C) to include ITFS. As the Commission has stated and the courts have recognized, ITFS is not a broadcast service, and therefore it does not fall within the scope of the Section

309(j)(2)(C) exemption from competitive bidding for noncommercial broadcasters.

20. The Commission stated, however, that it 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. The Commission stated that it will not commence ITFS auctions immediately so as to allow sufficient time to obtain Congressional guidance.

21. The Commission found that pending ITFS applications are outside the scope of new Section 309(l) of the 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 must be resolved by competitive bidding pursuant to Section 309(j)(1). However, the Commission determined that it would not serve the public interest to accept additional competing ITFS applications despite its authority to do so; thus, the eligible bidders in any auction of the pending ITFS applications will be limited to those with applications already on file.

#### **Resolution of Pending Comparative Renewal Proceedings**

22. With regard to the very small number of pending comparative renewal proceedings, the Commission 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 issue, to present the factors and evidence they believe most appropriate. 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.

23. The complete text of this *First R&O*, including any statements, is available for inspection and copying during normal business hours in the Federal Communications Commission Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C., and it may be purchased from the Commission's copy contractor, International Transcription Service,

Inc., 1231 20th Street, N.W., Washington, D.C. 20036, (202)857-3800.

### Final Regulatory Flexibility Analysis (FRFA)

#### Summary

24. As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM) in this proceeding. The Commission sought written public comments on the proposals in the NPRM, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this *First R&O* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996, Public Law 104-121, 110 Stat. 847 (1996).

#### Need For and Objectives of Action

25. This *First R&O* adopts rules to implement the Balanced Budget Act of 1997 (Budget Act), Public Law 105-33, 111 Stat. 251 (1997), which amended Section 309(j) and adopted new Section 309(l) of the Communications Act to expand the Commission's competitive bidding authority to include, *inter alia*, the commercial broadcast and secondary broadcast services.

#### Significant Issues Raised by the Public in Response to the Initial Analysis

26. No comments were received specifically in response to the IRFA contained in the NPRM. 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. To 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. Some commenters argued that upfront payments should be small enough to allow small businesses to compete effectively. Commenters generally opposed the use of competitive bidding for selecting among mutually exclusive Instructional Television Fixed Service (ITFS) applicants, who are primarily educational institutions and governmental educational entities.

27. 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). 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. 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.

#### Description and Number of Small Entities Involved

28. Under the RFA, small entities include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. 601(6). The RFA, 5 U.S.C. 601(3), defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act. See 15 U.S.C. 632. 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**."

29. In the NPRM 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 the Commission's 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.

30. *Radio Broadcasting Stations.* The SBA defines a radio broadcasting station that has no more than \$5 million in annual receipts as a small business. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public. Included in this industry are commercial, religious, educational, and other radio stations. Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included. Official Commission records indicate that 11,334 individual radio stations were operating in 1992. 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. As of May 31, 1998, official Commission records indicate that 4,724 AM radio stations, 7,595 FM radio stations and 3,011 FM translator/booster stations were licensed. We conclude a similarly high percentage (96 percent) of current radio broadcasting licensees are small entities.

31. *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. Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational, and other television stations. Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials. There were 1,509 television stations operating in the nation in 1992. In 1992, there were 1,155 television station establishments that produced less than \$10.0 million in revenue (76.5 percent). 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. We conclude that a similarly high percentage of current television broadcasting licensees are small entities (76.5 percent).

32. *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. 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. 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.

33. *Pending and Future Applicants Affected by Rulemaking.* The auction procedures set forth in the *First R&O* will affect pending and future competing applicants for the various commercial broadcast services and for ITFS. We estimate that, as of the adoption date of the *First R&O*, there are approximately: (1) 700 mutually exclusive pending applications for commercial radio stations; (2) 200 pending competing applications for full power commercial analog television stations; (3) 100 mutually exclusive pending applications for low power television stations and television translator stations; (4) 30 competing applications for FM translator stations; and (5) 200 or more mutually exclusive pending applications for ITFS stations. The Commission has 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. It is not possible, at this time, to estimate the number of markets for which mutually exclusive applications will be received in the future, 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.

*Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements*

34. The *First R&O* 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 R&O*

(referred to in this section more generally as "applicants").

35. 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. Applicants for broadcast auctions will be required to follow the general auction rules, 47 CFR 1.2105, with regard to completion of the short form and exhibits to be submitted with the short form. Also consistent with the Commission's general part 1 auction rules, all applicants for broadcast auctions must file their FCC Form 175 applications electronically beginning January 1, 1999.

36. 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.

37. Following the close of bidding in an auction, winning bidders will be required to submit a down payment, file an appropriate long-form application for each construction permit for which it was the high bidder, and pay the balance of their winning bids in a timely manner. Broadcast auction participants will also be subject to the bid withdrawal, default and disqualification payments set forth in the general part 1 auction rules.

38. 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 generally provided in the Commission's part 1 rules.

*Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered*

39. Due to the insufficiency of the record in this proceeding, the *First R&O* 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. Such measures will be considered in a further report and order to be issued at a later time. For all auctions held prior to ultimate resolution of the designated entity issue, the *First R&O* 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 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.

40. Moreover, even if further special measures are not ultimately adopted, we believe that some of the competitive bidding procedures adopted in this *First R&O* reduce the time and cost of securing commercial broadcast and ITFS licenses to the ultimate benefit of small businesses. For example, 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, although applicants in the non-table services will be required to submit the engineering data necessary to make determinations of mutual exclusivity. 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 application processing to what is necessary to determine mutual exclusivity.

41. After careful consideration and in light of Congress' directive in the Budget Act, we found that a shortened period of 10 days is appropriate for the filing of petitions to deny against the long-form applications filed by broadcast auction winners. We have also eliminated the requirement that applicants affirmatively certify their financial qualifications and the availability of their proposed tower locations in their applications.

42. 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. However, except for certain commercial broadcast applications filed before July 1, 1997, Section 309(j)(1) 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 applications.

43. 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. ITFS auctions will not commence immediately, however, in order to allow sufficient time for the Commission to obtain Congressional guidance.

44. We also determined to use competitive bidding to resolve mutually exclusive major modification applications. Although some commenters opposed the auctioning of

modification applications, 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 station applications, to resolve their mutual exclusivity by means of engineering solutions or settlement before proceeding to auction. 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.

45. 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. 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 would detrimentally affect the quality of broadcast service. We found that Congress itself has made the judgment that auctions are generally preferable to comparative hearings, and concluded that, by providing us with the discretion to determine whether or not to use auctions in pending pre-July 1st cases, Congress intended the Commission 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.

46. 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. 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.

47. 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. 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 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.

48. 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. We found that Congress adopted a bright line distinction and that this 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 1st applications.

49. 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.

50. 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. We are aware of no legal authority to make such additional reimbursement and concluded we have no obligation to do so.

51. 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.

52. A number of commenters opposed our proposal to apply the anti-collusion rule to broadcast service auctions, 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. 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, although a limited exception to the anti-collusion rule will be made, as discussed above, in the context of mutually exclusive major modification applications.

53. 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.

#### Report to Congress

54. The Commission will send a copy of the *First R&O*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. 3See 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the *First R&O*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

55. Authority for issuance of this *First R&O* is contained in 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.

#### List of Subjects in 47 CFR parts 1, 73 and 74

Radio broadcasting, Reporting and recordkeeping requirements, Television broadcasting.

Federal Communications Commission.

**William F. Caton,**

*Deputy Secretary.*

#### Rule Changes

Parts 1, 73 and 74 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

#### PART 1—PRACTICE AND PROCEDURE

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

**Authority:** 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 303(r).

2. Section 1.65 is amended by revising paragraphs (a) and (b) 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 §§ 1.2105(b), 73.5002 and 73.3522 regarding the modification of their applications.

\* \* \* \* \*

3. Section 1.1601 is amended by reserving paragraph (a) to read as follows:

#### § 1.1601 Scope.

\* \* \* \* \*

(a) [Reserved]

\* \* \* \* \*

4. Section 1.604 is amended by revising paragraph (a) to read as follows:

#### § 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.

\* \* \* \* \*

#### PART 73—RADIO BROADCAST SERVICES

5. The authority for part 73 is revised to read as follows:

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

6. Section 73.1010 is amended by adding paragraph (a)(8) to read as follows:

#### § 73.1010 Cross reference to rules in other parts.

\* \* \* \* \*

(a) \* \* \*

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

\* \* \* \* \*

7. Section 73.3500 is amended by adding the following new entry in numerical order to read as follows:



**§ 73.3500 Application and report forms.**

Form number	Title
175 .....	Application to Participate in an FCC Auction
*       *       *	*       *

8. Section 73.3522 is revised 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) and (b)(2)(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 to § 73.3522:** When two or more broadcast applications are tendered for filing which are mutually exclusive with each other but not in conflict with any previously filed applications which have been accepted for filing, the FCC, where appropriate, will announce acceptance of the earliest tendered application and place the later filed application or applications on a subsequent public notice of acceptance for filing in order to establish a deadline for the filing of amendments as a matter of right for all applicants in the group.

9. Section 73.3525 is amended by revising paragraphs (c) and (d) and adding paragraph (l) to read as follows:

**§ 73.3525 Agreements for removing application conflicts.**

\* \* \* \* \*

(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.

\* \* \* \* \*

(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.

10. Section 73.3564 is revised 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).

11. Section 73.3568 is revised 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.

12. Section 73.3571 is revised 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 paragraph (h)(1)(i) of this section.

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

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

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

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

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

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

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

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

stations for which pending applications were filed before December 1, 1987.

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

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

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

(f) Applications for minor modifications for AM broadcast stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and, 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 cutoff as of the date of filing with the FCC and will be protected from subsequently filed long-form applications. Applications will be required to protect all previously filed

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

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

13. Section 73.3572 is revised 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 CFR 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 CFR 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 CFR 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.

14. Section 73.3573 is revised 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.

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

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

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

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

(d) If, upon examination, the FCC finds that the public interest, convenience and necessity will be

served by the granting of an application for FM broadcast facilities, the same will be granted. If the FCC is unable to make such a finding and it appears that a hearing may be required, the procedure given in § 73.3593 will be followed.

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

(2) (i) The FCC will specify by Public Notice, pursuant to § 73.5002(a), a period for filing non-reserved band FM applications for a new station or for major modifications in the facilities of an authorized station. FM applications for new facilities or for major modifications 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 1 to § 73.3573:** 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.

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

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

15. Add Subpart I, which includes §§ 73.5000 through 73.5009, to read as follows:

## **PART 73—RADIO BROADCAST SERVICES**

### **Subpart I—Competitive Bidding Procedures**

- Sec.
- 73.5000 Services subject to competitive bidding.
  - 73.5001 Competitive bidding procedures.
  - 73.5002 Bidding application and certification procedures; prohibition of collusion.
  - 73.5003 Submission of upfront payments, down payments and full payments.
  - 73.5004 Bid withdrawal, default and disqualification.
  - 73.5005 Filing of long-form applications.
  - 73.5006 Filing of petitions to deny against long-form applications.
  - 73.5007 Designated entity provisions.
  - 73.5008 Definitions applicable for designated entity provisions.
  - 73.5009 Assignment or transfer of control.

### **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 CFR Part 1, Subpart Q will apply unless otherwise provided in 47 CFR 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 CFR 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 CFR 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 CFR 1.2105(b) regarding the modification and dismissal of their short-form applications. Notwithstanding the general applicability of Section 1.2105(b) to broadcast and ITFS auctions, 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 CFR 1.2105(c), which becomes effective upon the filing of short-form applications, shall apply to all broadcast service or ITFS auctions. Notwithstanding the general applicability of Section 1.2105(c) to broadcast and ITFS auctions, 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 CFR 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 CFR 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 CFR 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 CFR 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 CFR 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 CFR 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 CFR 1.2107(d)

(concerning any bidding consortia or joint bidding arrangements); § 1.2110(i) (concerning designated entity status, if applicable); and § 1.2112 (a) and (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 CFR 1.2104(g).

(d) An applicant whose short-form application, submitted pursuant to 47 CFR 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 CFR 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 CFR 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.**

*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.

(a) 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:

(1) AM broadcast station—predicted or measured 2mV/m groundwave contour (see 47 CFR 73.183 or 73.186);

(2) FM broadcast or FM translator station—predicted 1.0 mV/m contour (see 47 CFR 73.313);

(3) Television broadcast station—Grade A contour (see 47 CFR 73.684);

(4) Low power television or television translator station—the predicted, protected contour (see 47 CFR 74.707(a));

(5) Cable television system—the franchised community of a cable system;

(6) Daily newspaper—community of publication; and

(7) Multipoint Distribution Service station—protected service area (see 47 CFR 21.902(d) or 21.933).

(b) *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 CFR 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 CFR 1.2111(a) shall apply to an applicant seeking approval for a transfer of control or assignment of a broadcast construction permit or license within three years of receiving such permit or license by means of competitive bidding.

(b) The ownership disclosure requirements contained in 47 CFR 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.

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

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

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

17. Section 74.910 is amended by adding the two new entries in numerical order to read as follows:

**§ 74.910 Part 73 application requirements pertaining to ITFS stations.**

\* \* \* \* \*

**§ 73.3522(a) Amendment of applications.**

\* \* \* \* \*

**§ 73.5000–73.5006 Competitive Bidding Procedures.**

\* \* \* \* \*

18. Section 74.911 is amended by revising paragraph (c) and removing paragraph (d) to read 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 CFR 73.5000 *et seq.*

(2) [Reserved]

**§ 74.912 [Removed]**

19. Section 74.912 is removed.

**§ 74.913 [Removed]**

20. Section 74.913 is removed.

21. Section 74.1233 is revised 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 paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and, generally, will be processed in the order in which they are tendered. The FCC will periodically release a Public Notice listing those applications accepted for filing. 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 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 paragraphs (e)(1), (e)(2) and (e)(3) of this section fail to resolve the mutual exclusivity, the applications will be processed on a first-come-first-served basis.

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