## DEPARTMENT OF TRANSPORTATION

### Coast Guard

### 46 CFR Part 72

### Construction and Arrangement

*CFR Correction*

In Title 46 of the Code of Federal Regulations, parts 70 to 89, revised as of October 1, 1997, page 52, § 72.25–15 is corrected in Table 72.25–15(A) under ''Washbasins'' by correcting the entry ''61'' to read ''1''.

BILLING CODE 1505–01–D

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 0

**[GC Docket No. 96–55; FCC 98–184]**

### Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission amends its rules to set out more clearly what should be contained in a request that information not be routinely available for public disclosure, provide that audit information and programming contracts will be presumed to be exempt from routine public disclosure, codify its practice of sometimes deferring action on a request for confidentiality until a request for inspection is made, and otherwise clarify its rules, delete obsolete references, and renumber the rules. The Commission also adopts a Model Protective Order (MPO) for general use.

**DATES:** These rules are effective November 20, 1998. Public comments on the information collection requirements are due on or before October 20, 1998.

**ADDRESSES:** Send comments on information collections contained herein to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554 or via the Internet to jboley@fcc.gov.

**FOR FURTHER INFORMATION CONTACT:** Laurence H. Schecker, Office of General Counsel, (202) 418–1720. For additional information concerning information collections contained herein, contact Judy Boley at (202) 418–0214.

**SUPPLEMENTARY INFORMATION:**

1. The handling of confidential information requires the Commission to balance the concerns of the parties submitting information and the interest of the public in accessing that information. The manner in which the Commission performs this task affects both the competitive nature of the telecommunications industry and the performance of the Commission's public responsibilities. As the telecommunications industry becomes increasingly competitive, participants increasingly assert that the information they provide to the Commission is competitively sensitive. Likewise, there are an increasing number of disputes among competitors concerning requests for confidential treatment.

### A. Substantiating Confidentiality Claims

2. When a person submitting information to the Commission requests that it not be made available routinely to the public, 47 CFR 0.459(b) requires that each such request contain a statement of the reasons for withholding the materials from inspection and the factual basis for the request. We believe that specifically identifying types of information we need to evaluate requests for confidentiality will reduce the number of unsubstantiated requests that we receive and conserve the resources of the submitters by providing them with guidance as to what kind of information we require to decide a confidentiality request.

3. Accordingly, we will amend 47 CFR 0.459(b) to list the types of information that should be included in a request. Where relevant, the following should be submitted:

(i) identification of the specific information for which confidential treatment is sought;

(ii) identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission;

(iii) explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;

(iv) explanation of the degree to which the information concerns a service that is subject to competition;

(v) explanation of how disclosure of the information could result in substantial competitive harm;

(vi) identification of any measures taken by the submitting party to prevent unauthorized disclosure;

(vii) identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties;

(viii) justification of the period during which the submitting party asserts that material should not be available for public disclosure; and

(ix) any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

4. We do not agree that substantiation of a confidentiality request at the time the request is made is arbitrary and unduly burdensome. To the extent there are changes in, for example, the measures taken by the submitter to prevent disclosure, the extent to which the information has already been disclosed, and the degree of competition facing the service in question, between the time the request for confidential treatment is made and the time a request for disclosure is received, we note that submitters are permitted to update their confidentiality request before any records are released.

### B. ''Persuasive Showing'' That Confidential Materials Should Be Released

5. To obtain access to records listed in 47 CFR 0.457(d) or records withheld from inspection under 47 CFR 0.459(a), our current rules provide that the requesting party must make ''[a] persuasive showing as to the reasons for inspection'' in a filing which must ''contain a statement of the reasons for inspection and the facts in support thereof.'' We believe that the determinations of whether the showing standard has been met should continue to be made on a case-by-case basis. A case-by-case determination is appropriate because it requires a balancing of, *inter alia*, the type of proceeding, the relevance of the information, and the nature of the information. The Commission's current rules contemplate that the Commission will engage in a balancing of the public and private interests when determining whether the ''persuasive showing'' standard has been met. That balancing may well take into account the type of proceeding involved, whether the requestor is a party to the proceeding, and may also be affected by other factors, such as whether it is feasible to use a protective order. Because we believe that a case-by-case determination is most appropriate, we decline to adopt a blanket rule requiring the requester to demonstrate that access is ''vital'' to the conduct of a proceeding, necessary to the ''fundamental integrity'' of the Commission process at issue, or that the

information have a direct impact on the requestor. We also decline to impose a requirement that the requester prove that the information or a substitute cannot be obtained by other means.

6. Commenters also point out that, where materials are voluntarily submitted, our rules allow a party to request that the information be returned if confidentiality is not granted. These commenters express a concern that the distinction between voluntarily submitted and required information may put more heavily regulated entities at a competitive disadvantage vis-a-vis new entrants. We recognize that a more heavily regulated entity may in some instances be subject to mandatory submissions that do not apply to a new entrant. As part of the biennial review process pursuant to section 11 of the Communications Act and otherwise, the Commission is striving to minimize any such burdens. We also note that whether or not materials are submitted voluntarily, the Commission may not return them to the submitter once it has received a FOIA request for the documents. Therefore, as a practical matter, once a request for documents is received, no submitter, whether regulated or not, may have its documents returned.

**C. Burden of Proof**

7. Our rules provide that the party initially claiming confidentiality pursuant to 47 CFR 0.459(a) bears the burden of proving by a preponderance of the evidence that such treatment is appropriate. We reject the suggestion that where a party initially claims confidentiality, the Commission staff should bear the burden of showing that the information should not be accorded confidential treatment. Consistent with FOIA's presumption in favor of disclosure, the Commission's rules appropriately place the burden of showing that a record should not be routinely available for public inspection on the proponent of that claim. If a party's request has been granted, it has, by definition, met that burden of proof, sufficient to demonstrate that the information falls within FOIA Exemption 4. The types of materials listed in 47 CFR 0.457(d) are accepted by the Commission as confidential because, on a generic basis, they have been found to contain confidential information and are exempt from disclosure under FOIA Exemption 4. Similarly, the Commission may find, on its own motion, that specific materials should not be routinely made available because they contain trade secrets or confidential information. Thereafter, when a request is made for disclosure of materials deemed confidential under any of these circumstances, we agree with the parties commenting that the requester of such information should continue to bear the burden of making a persuasive showing as to the reasons for inspection when access to confidential information is sought.

8. This burden of making a persuasive showing as to the reasons for inspection is consistent with FOIA's presumption in favor of disclosure because the burden only applies to information already determined to fall within Exemption 4. As discussed below, the Commission sometimes defers action on requests for confidentiality if a request for inspection has not been made. In those circumstances, if a request for inspection is made, we first consider whether the party submitting the information has met its burden of proving by a preponderance of the evidence that confidential treatment is appropriate, and then apply the persuasive showing test.

**D. Model Protective Order**

9. In recent years, the Commission has tried to balance the interests in disclosure and the interests in preserving the confidentiality of competitively sensitive materials by making more use of special remedies such as protective orders. Protective orders can provide the benefit of protecting competitively valuable information while permitting limited disclosure for a specific public purpose. Nonetheless, the Commission is mindful that extensive reliance on protective orders may also impose burdens on the public and the Commission.

10. On the whole, however, we conclude that the benefits of adopting an MPO for general use in Commission proceedings will be substantial. It will reduce the need for lengthy negotiations or litigation over the terms of such orders and help prevent delays in proceedings. It is not our intention, however, to suggest that protective agreements can be used for information falling outside of the nine categories of material exempt from disclosure under the FOIA.

11. While we believe the MPO will prove appropriate in most instances where protective orders are appropriate, the Bureaus will retain the authority to use a different or modified protective order where they determine it is warranted. The MPO may also be used to provide limited access to information on a timely basis where the submitter has made a good faith request for confidential treatment of information pursuant to 47 CFR 0.459(a) and the Commission has not yet ruled on that request. The latter use is consistent with existing Commission practice. We note, however, that where a request for confidential treatment is pending, release of information, even under a protective order, will be delayed pursuant to 47 CFR 0.459(g) to permit the submitting party to file an application for review with the Commission and then a judicial stay.

12. *Off-Site Inspection.* In some circumstances, where the quantity of material subject to inspection is very large, a submitting party may also file a request with the Commission that the entirety of the material not be filed with the Commission. If the Commission grants this request, Commission staff or any party examining the material under the terms of a protective order at an off-site location may designate portions of the material for inclusion in the record. The submitting party shall promptly file such designated material under seal in the record. This procedure will minimize the need for the Commission to store in a secure fashion large quantities of potentially irrelevant material while ensuring that relevant material is placed in the record.

13. *Restrictions on persons with authorized access to materials under the MPO.* We decline to adopt the suggestion that parties examining information under a protective order should be limited to allowing review by a set number of persons with various sublimits. We believe such limitations may unreasonably preclude a party from utilizing individuals, consistent with its needs and resources, who can provide the requisite expertise to examine the documents. The serious consequences of violating a Commission protective order make this limitation unnecessary. We will, however, in rare instances such as when specific future business plans are involved, consider limiting access to documents to outside counsel and experts so as to minimize the potential for inadvertent misuse of such information. A party seeking this additional degree of protection must justify its request when filing a request for confidential treatment. In making such a request, a party should specify the modifications to the model protective order that it believes to be necessary. The Commission, as necessary, may seek comment from the other parties to a proceeding on whether such modified protective procedures are appropriate in the particular case at hand.

14. *Copying of confidential information under the MPO.* We agree that a ban on copying materials subject to a protective order imposes an unnecessary burden on the review of

such information. Moreover, we believe a prohibition on copying might lead to a less thorough review of the confidential documents and accordingly to less useful public comment. We will modify the MPO to require a reviewing party to keep a written record of all copies made and to provide this record to the Submitting Party on reasonable request.

15. *Copying charges.* We reject the proposal to delete the 25 cents maximum per page copying charge in the MPO and replace it with a reasonable cost-based maximum because we believe it is prudent to avoid disputes over what copying charges are reasonable by setting a maximum charge for copying. At the time individual protective orders are issued, however, the issuing Bureau may modify the maximum charge per page for copies as circumstances warrant.

16. *Sanctions for violations of the MPO.* Current laws and regulations already provide the Commission and the courts with a broad range of sanctions for violations of Commission orders. Nonetheless, we modify the MPO to include more examples of the available sanctions for addressing violations of our protective orders to (i) specify that possible sanctions for violation of a protective order include disbarment from Commission proceedings, forfeitures, cease and desist orders, and a denial of access to confidential information in that and other Commission proceedings; (ii) clarify that the MPO is also an agreement between the reviewing parties and the submitting party; (iii) clarify that the submitting party retains all rights and remedies available at law or equity against any party using confidential information in a manner not authorized by the protective order; and (iv) require violating parties to notify immediately the Commission and the submitting party of the identity of anyone who improperly obtains or uses the confidential information.

17. *Duration of confidentiality protection.* While we recognize that many types of confidential information become less sensitive as time passes, we do not believe that there is a sufficient basis in the record to limit treatment under a protective order to any set period. Accordingly, we will address claims of staleness on a case-by-case basis. The prohibition on the unauthorized disclosure or use of the confidential information remains binding indefinitely unless the submitting party otherwise agrees or the Commission or a court determines that particular information should be released from restrictions contained in the protective order. We also modify the MPO to allow a reviewing party to retain attorney work product containing confidential information, so long as that information remains subject to the MPO.

18. *Use of confidential materials subject to the MPO in other proceedings.* We believe that routinely allowing confidential information from one proceeding to be used in other proceedings will increase the burdens, risks, and disputes associated with protective orders. Therefore, as a general matter, we will allow information subject to a protective order to be used only in the proceeding in which it was obtained. However, we reserve the right to permit the use of protected material in more than one Commission proceeding in the exceptional case where the Commission finds that such use would be in the public interest. A party seeking to use protected information obtained in one proceeding in another proceeding may file a petition with the Commission explaining why such use of the protected information is appropriate. Any such petition shall ensure that any protected information contained in or accompanying the petition is protected from public disclosure.

19. *Other MPO issues.* The MPO, as originally proposed, already contains the requirement that all authorized representatives be required to execute non-disclosure agreements agreeing to be bound by the terms of the protective order. We will not adopt for general usage the suggestion that confidential information be made available only to an independent auditor. While appropriate in very unusual cases, this procedure would be impractical for conventional Commission proceedings. Finally, we reject the suggestion that we adopt a protective order that divides confidential information into two classes to be treated differently. A standard protective order that further subdivides the categories of confidential information, treats them differently, and denies parties the ability to copy any information from certain categories, would impose undue burdens on parties reviewing information and the Commission.

**E. Issues That Arise With Respect to Specific Types of FCC Proceedings.**

20. *Title III Licensing Proceedings.* Although our rules specify that broadcast and other Title III license applications are routinely available for public inspection, applicants sometimes request confidential treatment pursuant to 47 CFR 0.459. We agree that a party should not be required to forego trade secrets as a condition of obtaining a Commission license, but note that, with the exception of experimental licenses, most information submitted in Title III licensing proceedings should be made publicly available. We will continue the practice of making broadcast and other Title III license applications routinely available for public inspection. We expect that requests for confidentiality or protective orders in licensing proceedings will and should remain relatively rare. Nevertheless, the Commission will consider requests pursuant to 47 CFR 0.459 of our rules to limit disclosure of confidential information to individuals and entities who file a petition to deny and who execute a protective order. Where appropriate, the Commission will issue protective orders consistent with the MPO discussed previously. We agree that if the Commission decides to permit disclosure of certain information only pursuant to a protective order, the petitioner should be given an opportunity to file or supplement its petition to deny the license after it has had an opportunity to review the protected material. If the Commission decides to issue a protective order, interested parties generally will be given at least 30 days from the date the protected material becomes available to file or supplement a petition to deny.

21. *Tariff Proceedings.* Recently we have adopted new procedures to handle confidentiality requests in tariff review cases. First, in *In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996,* Report and Order, 62 FR 5757 (February 7, 1997) (*Tariff Streamlining*), *petitions for reconsideration pending,* we concluded that pre-effectiveness tariff review was required to implement Section 204(a)(3) of the Communications Act. *Tariff Streamlining* concluded that requests for confidentiality could not be resolved in the 7 or 15-day pre-effective review period. We therefore adopted a procedure for handling confidentiality requests in this context. A protective order will be issued where the submitting party includes with the tariff filing a showing by a preponderance of the evidence that the data should be accorded confidential treatment consistent with the provisions of the FOIA or makes a sufficient showing that the information should be subject to a protective order. To do this, a submitting party must comply with 47 CFR 0.459(b) and (c) of our rules to demonstrate that its supporting data should be afforded confidential treatment. If it does so, a standard

protective order will be issued. No written determination by the Bureau will be made because of the short time frames involved. If an investigation occurs, the Bureau can make a further determination concerning the carrier's entitlement to confidentiality. Subsequent to *Tariff Streamlining,* the Common Carrier Bureau decided to apply the protective order adopted for streamlined tariffs in non-streamlined tariff filings where the submitting party demonstrates that cost support data should be afforded confidential treatment. *Southwestern Bell Telephone Co.,* 12 FCC Rcd 10271 (Common Carrier Bureau 1997), *application for review denied,* 13 FCC Rcd 3602 (1997).

22. The procedures adopted in *Tariff Streamlining,* with the following modifications, will continue to govern confidentiality requests in both streamlined and non-streamlined tariff review proceedings. First, if a carrier seeks confidential treatment for tariff support information, it must either state that it will make its cost support information available to those signing a nondisclosure agreement, or file a request that the cost support information be kept entirely confidential. The request that information be released only pursuant to a protective order or that it be kept entirely confidential must include the supporting information required by 47 CFR 0.459(b) of our rules. We note that in the latter case, streamlined filings are likely to be suspended if the Commission is unable to determine the lawfulness of the tariff within the appropriate time frame without public participation. This would allow us to rule on the request for complete confidentiality, which we believe would be granted only in the rarest of instances. In addition, the protective order to be used in tariff review proceedings will be the one adopted in this proceeding, in place of the one adopted in *Tariff Streamlining.* We note that the MPO we adopt here does not differ substantially from that previously adopted, and that we specifically noted in *Tariff Streamlining* that this proceeding might modify the protective order adopted there.

23. We have decided not to establish different procedures for the tariff review and the tariff investigation stage because, although the decisions to allow tariffs to go into effect are non-final, non-judicially reviewable orders, we believe public comment is important in determining the lawfulness of rates at this stage, especially given the short time frames in streamlined proceedings. We have also decided not to require filing of confidential information in advance of a tariff filing because that would cause delays in the tariff filing process Congress may not have intended.

24. *Rulemaking Proceedings.* The Commission generally has not afforded confidential treatment to material submitted in rulemakings, although on rare occasions protective agreements have been used in the context of rulemakings. Material submitted in rulemakings will continue to be routinely available for public inspection because, as the commenters who addressed rulemakings acknowledge, rulemakings have a broad impact on the public, and wide public participation, with a full opportunity to comment, is contemplated by the Administrative Procedure Act.

25. To the extent that submissions made in rulemakings involve sensitive commercial information, one option is to utilize protective orders, as has been our policy in other procedural settings. Protective orders generally are not practical solutions in rulemakings, however, because rulemakings frequently involve numerous parties. Use of protective orders could also inhibit full public participation in proceedings that are of broad public interest. Nonetheless, a blanket refusal to apply protective orders in the context of rulemakings, or refusal to consider information accompanied by a request for confidentiality, could ultimately result in the Commission not having access to information that is highly relevant to our ultimate decisions. Accordingly, although we expect to act favorably upon them only in extremely rare instances, we will consider requests for confidential treatment that propose to limit the availability of confidential information in rulemaking proceedings to those who have executed a protective order. Parties seeking confidential treatment should request the Commission to return the materials without considering them, pursuant to 47 CFR 0.459(e) of our rules, if the request for confidentiality is denied, as we expect it would be in most cases. We note, however, that the Commission cannot return information if a FOIA request has been filed. Parties should also consider the option of presenting information in a manner that reduces or eliminates its commercial sensitivity, since, if such options are available, or if public disclosure of the information does not present a serious potential for competitive harm, we would not be inclined to authorize protective orders.

26. *Requests for Special Relief and Waivers.* The comments reveal no need to modify our existing confidentiality rules for use in Commission proceedings dealing with requests for relief or special waivers. Thus, we will continue to consider requests for confidentiality on a case-by-case basis. Where appropriate, we may make information available only subject to a protective order.

27. *Formal Complaints.* The parties generally suggested little change to our current treatment of confidential information submitted to the Commission during formal complaints, and we agree that our current procedures are generally workable. We note, however, that the MPO adopted herein may be used by the parties to formal complaints and may be imposed by the Commission where parties cannot resolve discovery disputes between themselves. The suggestion that we eliminate discovery in formal complaint proceedings is beyond the scope of this proceeding.

28. *Audits.* The Commission has a longstanding policy of treating information obtained from carriers during audits as confidential. Since we are able to make a finding that audit materials received from carriers generally fall within FOIA Exemption 4, and as an indication of the importance we place on upholding the confidentiality of these materials, we will amend 47 CFR 0.457 of our rules to indicate that information submitted in connection with audits, investigations and examination of records will not routinely be made available for public inspection. In the context of an FOIA request, the Commission would still need to make a particularized determination that the information is exempt from disclosure.

29. As previously discussed, we have only rarely departed from the general policy of withholding audit information from public disclosure. Parties should note, however, that, we may publicly disclose audit information in rare cases where the underlying concerns that normally lead us to withhold audit information from public disclosure are diminished by the minimal risk posed by the release of aggregate data or, where the data is otherwise not highly commercially sensitive and disclosure is justified by significant public interest factors. We do not believe that carriers need be given an opportunity to object to the proposed disclosure of audit data in aggregate form, where the data does not reveal the confidences of any individual company.

30. Some parties expressed concern about the indication in footnote 109 of the *Notice* that the Bureaus and Offices have the authority to disclose audit records where the information is required to be disclosed under the

provision of the FOIA. We note that the Commission has previously delegated authority to the Common Carrier Bureau to (1) approve the release to state public utility commissions of information that the Bureau may obtain during the course of audit activities and that falls within the common interest and jurisdiction of the Commission and the states, and (2) act on requests for audit information that are filed pursuant to the FOIA, including the authority to furnish copies of documents and other records. We continue to believe this delegation is fully consistent with section 220(f) of the Communications Act.

31. *Surveys and Studies.* We believe the best way to protect the confidentiality of these items is to allow survey and study respondents to request confidential treatment pursuant to 47 CFR 0.459 to the extent they can show by a preponderance of the evidence a case for non-disclosure consistent with the FOIA. Assessments of the confidentiality of this information will be made on a case-by-case basis, as the nature of the information obtained in surveys and studies vary greatly.

32. *Other Proceedings.* While we have discussed in some detail how confidential information will be treated in seven specific types of proceedings, we expect that the principles set forth in this Report and Order will also apply in other types of proceedings not specifically discussed above. Thus, for example, United States international carriers classified as dominant due to a foreign affiliation could seek confidential treatment of some quarterly reports regarding provisioning and maintenance and circuit status. We would expect to use the model protective order or a modified version thereof to protect confidential information if a sufficient case were made for confidential treatment of such reports. We also would expect to use the standard protective order where contributors to universal service support mechanisms justify non-disclosure of company-specific data pursuant to 47 CFR 54.711(b) of the rules as well as in proceedings under section 271 of the Communications Act regarding Bell Operating Company entry into interLATA services. We expect that the off-site inspection procedures described above may prove useful in certain merger proceedings involving voluminous materials that are subject to claims of confidentiality.

**F. Scope of Materials Not Routinely Available for Public Inspection**

33. We believe that the suggestion that 47 CFR 0.457(d) be replaced with provisions that automatically accord confidential treatment to any non-public information that can offer a competitor an advantage over the submitting party is overly broad. We also reject the suggestion that we categorically include ''information provided voluntarily to the Commission subject to a certification by the provider that such information is not customarily disclosed.'' Since judicial standards on the issue of ''voluntary'' submission are highly fact-specific and continue to evolve, we believe it is better to look at such requests on a case-by-case basis under our current rules. Nevertheless, we do not agree that we should reject all proposals classifying specific categories of information as confidential. It is certainly possible to identify categories of information that are likely to fall within FOIA Exemption 4. Identifying such categories reduces administrative burdens on submitters and the Commission. We conclude that certain programming contracts fall squarely within Exemption 4. The Commission has consistently recognized that disclosure of programming contracts between multichannel video program distributors and programmers can result in substantial competitive harm to the information provider and has afforded confidential treatment to such contracts in a variety of contexts. We believe that protecting such confidential information is compatible with the public interest, and the requirements of FOIA Exemption 4.

34. Therefore, we amend 47 CFR 0.457 of our rules to state that programming contracts between programmers and multichannel video programming distributors will not be routinely available for public inspection. We note, however, that, consistent with our current rules, such contracts may be made available subject to the MPO in situations where they are relevant to the dispute at hand, *e.g.*, program access complaints.

35. Parties urge expanding the list of information not routinely available for public disclosure to include ''[i]nformation submitted in connection with audits, investigations and examination of records.'' We addressed the recommendation in the previous discussion on audit material, where we expanded the list of information not routinely available for public inspection to include that type of data.

36. The submission of confidential materials to the Commission can pose problems in the drafting of agency decisions. In most instances, we expect it will be possible to write an order without publicly revealing the confidential information. In some instances, this may involve stating a conclusion that does not reveal confidential information, backed up by a citation to confidential information in the record that generally will have been available to parties signing a protective order. In other instances, orders may refer to industry-wide data that is aggregated in a manner that does not reveal confidential information. Some commenters suggest that submitters should be notified and given the opportunity to object, even when the data is aggregated, prior to the release of the data. As discussed above, we disagree. Aggregation of data ensures that confidential materials are released in a form that removes confidentiality issues. Similarly, releasing an order that cites to but does not reveal confidential information remedies confidentiality concerns. We therefore decline to adopt the commenters' suggestion as a matter of routine policy.

37. One court has suggested that an order relying on confidential materials might be released all or in part under seal. We have only rarely engaged in this practice, and are not aware of its widespread use by other administrative agencies, although we note that the courts do utilize this approach. We consider this option to be a last resort when reference to confidential materials is necessary to support our decisions. In such cases, we note, the sealed decision and the confidential part of the record can be transmitted to the court under seal if judicial review is sought.

**G. Clarifications to Commission Rules**

38. *Deferral of rulings on confidentiality requests.* We will amend 47 CFR 0.459 to indicate that, based on considerations of administrative efficiencies, rulings on requests for confidentiality may in some instances be deferred until a request for inspection has been made. As long as the request for confidential treatment remains pending before the Commission, the information will be treated confidentially. In other instances, including, for example, where the information is gathered specifically so that it may be published in Commission reports, rulings on requests for confidentiality would likely be made even in the absence of requests for inspection. We will provide in our rules that the submitter will be notified of a request for inspection. At the time a request for inspection is made, the submitter may supplement its request for confidentiality, or revise it.

39. *Changing the title of Section 0.457(d) and deleting the introductory paragraph.* The Commission also proposed to amend the title of 47 CFR

0.457(d) of its rules to describe better the Section's contents as follows: ''Certain trade secrets and commercial or financial information obtained from any person and privileged or confidential—categories of materials not routinely available for public inspection.'' One party suggests leaving out the word ''certain,'' as it may lead to confusion. We will adopt this proposal along with the suggested amendment. We will also delete as unnecessary the introductory paragraph of 47 CFR 0.457(d), which is derived from the June 1967 Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, and does not necessarily reflect the current state of the law concerning Exemption 4.

40. *Defining ''Required''* versus *''Voluntary''*. Some parties seek clarification of the required submission vs. voluntary submission distinction as applied to our confidentiality rules. As a more general matter, we decline to make these clarifications, preferring that the distinction between ''required'' and ''voluntary'' for Exemption 4 purposes be examined on a case-by-case basis, in light of the evolving case law. The provision in 47 CFR 0.459(e) of the rules governing the return of materials that are submitted voluntarily was adopted prior to *Critical Mass Energy Project* versus *Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993). For purposes of this rule, our use of the term ''voluntary'' was not intended to be co-extensive with the legal distinctions articulated in the *Critical Mass* decision. We shall also modify 47 CFR 0.459(e) to clarify that, if the information is subject to a request for inspection, it will not be returned. When requesting that information be afforded confidential treatment, a submitter will be required to indicate whether information provided is customarily disclosed to the public and the extent of any prior disclosure. We will assess this submission in making our confidentiality determination.

41. *Opportunity to comment.* We agree that if the information belongs to third parties, they should be afforded the opportunity to participate in the Commission proceeding resolving the confidentiality issue. 47 CFR 0.459 will be amended accordingly.

42. *Clarification of review procedures.* We find no need to clarify the procedures for review of denials of confidentiality requests as these matters are already addressed by the Commission's current rules. Specifically 47 CFR 0.459(g) provides that, if a request for confidentiality is denied, the requester may, within five working days, file an application for review by the Commission. If the application for review is denied, the requesting party will be afforded 5 working days in which to seek a judicial stay of the ruling. In such circumstances, the material is not released until the court denies a stay request. Similar provisions govern situations in which the records are the subject of a FOIA request. We believe that these procedures provide parties with sufficient opportunity to obtain timely and independent review of Bureau and Commission decisions denying confidentiality.

43. *Deletion of obsolete references and renumbering of rules.* We will take this opportunity to update 47 CFR 0.457(d)(1) of our Rules. Under 47 CFR 0.457(d)(1)(i), financial reports filed under former 47 CFR 1.611 are not routinely made available for public inspection. 47 CFR 1.611 of our Rules was deleted when we eliminated the regular filing of financial reports by broadcast stations. We also no longer require radio or television networks to file financial reports. However, these reports are permanent records and therefore still exist. We will therefore amend 47 CFR 0.457(d)(1)(i) to indicate that financial reports submitted pursuant to former 47 CFR 1.611 remain not routinely available for public inspection. The parenthetical to 47 CFR 0.457(d)(1)(i) states that ''fees paid on consummation of the assignment or transfer of a broadcast station licenses, pursuant to § 1.1111 of this chapter, are computed from information contained in financial reports submitted pursuant to § 1.611. Information and correspondence concerning such computations are not routinely available for public inspection.'' Fees for the assignment or transfer of broadcast stations are now set by statute as reflected in 47 CFR 1.1104 of our rules. Therefore, we will eliminate the parenthetical portion of 47 CFR 0.457(d)(1).

44. Section 0.457(d)(1)(iii) of our rules provides that ''Schedules 2, 3, and 4 of financial reports submitted for cable television systems pursuant to § 76.403 of this chapter'' are not routinely available for public inspection. Section 76.403 was deleted in 1983 and cable television financial reports were eliminated at that time. While the Commission indicated that reports previously filed under 47 CFR 76.403 would continue to be afforded confidentiality under 47 CFR 0.457(d), these reports have been destroyed pursuant to our records retention schedules. In addition, 47 CFR 0.457(d)(1)(iv) of our rules indicate that the ''annual fee computation forms submitted for cable television systems pursuant to 76.406 of this chapter'' are not routinely available for public inspection. These forms are no longer used. Section 76.406 was deleted from our rules in 1982. Under our record retention schedules, any such forms previously filed should have been long since been destroyed. We will therefore eliminate 47 CFR 0.467(d)(1)(iii) and 0.467(d)(1)(iv) from our rules as unnecessary. If the reports have inadvertently not been destroyed, however, we intend that they remain not routinely available.

45. Section 0.457(d)(2) lists various materials submitted confidentially to the Commission prior to March 25, 1974. We will renumber this subsection as part of 47 CFR 0.457(d)(1). We will also renumber current 47 CFR 0.457(d)(2)(i) as a new 47 CFR 0.457(d)(2).

## H. Final Regulatory Flexibility Act Certification

46. Our document incorporated an initial regulatory flexibility analysis of the proposed rules. No comments were received. Section 604 of the Regulatory Flexibility Act, as amended, requires a final regulatory flexibility analysis in a notice and comment rulemaking proceeding unless we certify that ''the rule will not, if promulgated, have a significant economic impact on a significant number of small entities.'' The rule modifications adopted herein largely codify the Commission's existing practices regarding confidential information, and therefore will not have a substantial economic effect on small entities. We therefore certify, pursuant to Section 605(b) of the Regulatory Flexibility Act, that the rules will not have a significant economic impact on a substantial number of small entities. The Office of Public Affairs, Reference Operations Division, shall send a copy of this Report and Order, including this certification and statement, to the Chief Counsel for Advocacy of the Small Business Administration.

## I. Paperwork Reduction Act

47. This Report and Order contains new and modified information collections. As part of the Commission's continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this Order, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due October 20, 1998. Comments may address the following: (a) whether the

proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Written comments on the proposed information collections must be submitted on or before October 20, 1998. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to <jboley@fcc.gov>. For additional information concerning the information collections contained in the Report and Order contact Judy Boley at 202–418–0214.

**J. Ordering Clauses**

48. It is ordered that, pursuant to Sections 4(i), 4(j), 303(r) and 403 of the Communications Act of 1934, 47 U.S.C. 154(i), 154(j), 303(r) and 403, this Report and Order is hereby adopted and Part 0 of the Commission's rules are amended.

**List of Subjects in 47 CFR Part 0**

Freedom of information.

Federal Communications Commission.

**Magalie Roman Salas,**

*Secretary.*

**Rule Changes**

Part 0 of Title 47 of the Code of Federal Regulations is amended as follows:

## PART 0—COMMISSION ORGANIZATION

1. The authority citation for part 0 continues to read as follows:

**Authority:** Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.457 is amended by revising paragraph (d) to read as follows:

**§ 0.457 Records not routinely available for public inspection.**

* * * * *

(d) *Trade secrets and commercial or financial information obtained from any person and privileged or confidential—categories of materials not routinely available for public inspection, 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905.*

(1) The materials listed in this subparagraph have been accepted, or are being accepted, by the Commission on a confidential basis pursuant to 5 U.S.C. 552(b)(4). To the extent indicated in each case, the materials are not routinely available for public inspection. If the protection afforded is sufficient, it is unnecessary for persons submitting such materials to submit therewith a request for non-disclosure pursuant to § 0.459. A persuasive showing as to the reasons for inspection will be required in requests for inspection of such materials submitted under § 0.461.

(i) Financial reports submitted by licensees of broadcast stations pursuant to former § 1.611 or by radio or television networks are not routinely available for inspection.

(ii) Applications for equipment authorizations (type acceptance, type approval, certification, or advance approval of subscription television systems), and materials relating to such applications, are not routinely available for public inspection prior to the effective date of the authorization. The effective date of the authorization will, upon request, be deferred to a date no earlier than that specified by the applicant. Following the effective date of the authorization, the application and related materials (including technical specifications and test measurements) will be made available for inspection upon request (see § 0.460).

(iii) Information submitted in connection with audits, investigations and examination of records pursuant to 47 U.S.C. 220.

(iv) Programming contracts between programmers and multichannel video programming distributors.

(v) Prior to July 4, 1967, the rules and regulations provided that certain materials submitted to the Commission would not be made available for public inspection or provided assurance, in varying degrees, that requests for nondisclosure of certain materials would be honored. See, e.g., 47 CFR chapter I revised as of October 1, 1966, §§ 0.417, 2.557, 5.204, 5.255, 15.70, 21.406, 80.33, 87.153, 89.215, 91.208, 91.605 and 93.208. Materials submitted under these provisions are not routinely available for public inspection. To the extent that such materials were accepted on a confidential basis under the then existing rules, they are not routinely available for public inspection. The rules cited in this paragraph (d)(1)(v) were superseded by the provisions of this paragraph (d), effective July 4, 1967. Equipment authorization information accepted on a confidential basis between July 4, 1967 and March 25, 1974, will not be routinely available for inspection and a persuasive showing as to the reasons for inspection of such information will be required in requests for inspection of such materials submitted under § 0.461.

(2) Unless the materials to be submitted are listed in paragraph (d)(1) of this section and the protection thereby afforded is adequate, it is important for any person who submits materials which he wishes withheld from public inspection under 5 U.S.C. 552(b)(4) to submit therewith a request for non-disclosure pursuant to § 0.459. If it is shown in the request that the materials contain trade secrets or commercial, financial or technical data which would customarily be guarded from competitors, the materials will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection submitted under § 0.461. In the absence of a request for non-disclosure, the Commission may, in the unusual instance, determine on its own motion that the materials should not be routinely available for public inspection. Ordinarily, however, in the absence of such a request, materials which are submitted will be made available for inspection upon request pursuant to § 0.461, even though some question may be present as to whether they contain trade secrets or like matter.

* * * * *

3. Section 0.459 is amended by revising paragraphs (b), (d), and (e) to read as follows:

**§ 0.459 Requests that materials or information submitted to the Commission be withheld from public inspection.**

* * * * *

(b) Each such request shall contain a statement of the reasons for withholding the materials from inspection (see § 0.457) and of the facts upon which those records are based, including:

(1) Identification of the specific information for which confidential treatment is sought;

(2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission;

(3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;

(4) Explanation of the degree to which the information concerns a service that is subject to competition;

(5) Explanation of how disclosure of the information could result in substantial competitive harm;

(6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure;

(7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties;

(8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure; and

(9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

* * * * *

(d)(1) The Commission may defer acting on requests that materials or information submitted to the Commission be withheld from public inspection until a request for inspection has been made pursuant to § 0.460 or § 0.461. The information will be accorded confidential treatment, as provided for in § 0.459(g) and § 0.461, until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted.

(2) Requests which comply with the requirements of paragraphs (a) and (b) of this section will be acted upon by the appropriate Bureau or Office Chief, who is directed to grant the request if it presents by a preponderance of the evidence a case for non-disclosure consistent with the provisions of the Freedom of Information Act, 5 U.S.C. 552. If the request is granted, the ruling will be placed in the public file in lieu of the materials withheld from public inspection. A copy of the ruling shall be forwarded to the General Counsel.

(e) If the materials are submitted voluntarily (i.e., absent any direction by the Commission), the person submitting them may request the Commission to return the materials without consideration if the request for confidentiality should be denied. In that event, the materials will ordinarily be returned (e.g., an application will be returned if it cannot be considered on a confidential basis). Only in the unusual instance where the public interest so requires will the materials be made available for public inspection. However, no materials submitted with a request for confidentiality will be returned if a request for inspection is filed under § 0.461. If submission of the materials is required by the Commission and the request for confidentiality is denied, the materials will be made available for public inspection.

* * * * *

4. Section 0.461 is amended by revising paragraph (d)(3) to read as follows:

**§ 0.461 Requests for inspection of materials not routinely available for public inspection.**

* * * * *

(d) * * *

(3) An original and two copies of the request shall be submitted. If the request is for materials not open to routine public inspection under § 0.457(d) or § 0.459, or if a request for confidentiality is pending pursuant to § 0.459, one copy of the request will be mailed by the custodian of the records to the person who originally submitted the materials to the Commission.

* * * * *

**Appendix—Standard Protective Order and Declaration**

**Note:** This appendix will not appear in the Code of Federal Regulations.

**Before the Federal Communications Commission**

*Washington, D.C. 20554*

In the Matter of [Name of Proceeding]
Docket No. _____.

**Protective Order**

This Protective Order is intended to facilitate and expedite the review of documents containing trade secrets and commercial or financial information obtained from a person and which is privileged or confidential. It reflects the manner in which ''Confidential Information,'' as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 CFR 0.442.

1. Definitions.

a. *Authorized Representative.* ''Authorized Representative'' shall have the meaning set forth in Paragraph seven.

b. *Commission.* ''Commission'' means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. *Confidential Information.* ''Confidential Information'' means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets or commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4); (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information; and (iii) information that the Commission has allowed to be examined off-site and that otherwise complies with the requirements of this paragraph. Confidential Information includes additional copies of and information derived from Confidential Information.

d. *Declaration.* ''Declaration'' means Attachment A to this Protective Order.

e. *Reviewing Party.* ''Reviewing Party'' means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding.

f. *Submitting Party.* ''Submitting Party'' means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Protective Order.

2. *Claim of Confidentiality.* The Submitting Party, may designate information as ''Confidential Information'' consistent with the definition of that term in Paragraph 1 of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 CFR 0.459 and 0.461, determine that all or part of the information claimed as ''Confidential Information'' is not entitled to such treatment.

3. *Procedures for Claiming Information is Confidential.* Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, ''CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION—DO NOT RELEASE.'' Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

4. *Storage of Confidential Information at the Commission.* The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

5. *Access to Confidential Information.* Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Before counsel to a Reviewing Party or such other designated person designated by the Reviewing Party may obtain access to Confidential Information, counsel or such other designated person must execute the attached

Declaration. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement or if they execute the attached Declaration.

6. Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 7 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

7. Authorized Representatives shall be limited to:

a. Counsel for the Reviewing Parties to this proceeding, including in-house counsel actively engaged in the conduct of this proceeding, and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;

b. Specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; or

c. Any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper.

8. *Inspection of Confidential Information.* Confidential Information shall be maintained by a Submitting Party for inspection at two or more locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives upon reasonable notice (generally not to exceed one business day) during normal business hours.

9. *Copies of Confidential Information.* The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding, Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly secured at all times.

10. *Filing of Declaration.* Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission with a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

11. *Use of Confidential Information.* Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review) unless otherwise ordered by the Commission or a court of competent jurisdiction, shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

12. *Pleadings Using Confidential Information.* Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;

b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;

c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: ''Confidential Information included pursuant to Protective Order, [cite proceeding];'' and

d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal. They shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notation required by subsection c. of this paragraph is not removed.

13. *Violations of Protective Order.* Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

14. *Termination of Proceeding.* Unless otherwise ordered by the Commission or a court of competent jurisdiction, within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made. Authorized representatives shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party and other attorney work product. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 9 and 11 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

15. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of any privilege.

16. *Additional Rights Preserved.* The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

17. *Effect of Protective Order.* This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

18. *Authority.* This Protective Order is issued pursuant to sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. 154(i), (j) and 47 CFR 0.457(d).

**Attachment A to Standard Protective Order**

**Declaration**

In the Matter of [Name of Proceeding]
Docket No. _____

I, _____, hereby declare under penalty of perjury that I have read the Protective Order in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party.

(signed) _____
(printed name) _____
(representing) _____
(title) _____
(employer) _____
(address) _____
_____
(phone) _____
(date) _____

[FR Doc. 98–22001 Filed 8–17–98; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

## 47 CFR Part 73

**[MM Docket No. 91–58; RM–7419, RM–7797, RM–7798]**

## Radio Broadcasting Services; Caldwell, College Station and Gause, TX

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; Application for review.

**SUMMARY:** This document denies an Application for Review filed by Roy E. Henderson directed to a *Memorandum Opinion and Order* denying a Petition for Reconsideration. 61 FR 24244 (May 14, 1996). In the *Memorandum Opinion and Order,* the Commission determined that the Henderson proposal for a Channel 236C2 upgrade at Caldwell, Texas, did not comply with the principal city coverage requirement contained in Section 73.315(a) of the Rules, and, as such, the competing proposal for a Channel 236C2 upgrade at College Station, Texas, should be preferred in this comparative proceeding. With this action, the proceeding is terminated.

**EFFECTIVE DATE:** August 18, 1998.

**FOR FURTHER INFORMATION CONTACT:** Robert Hayne, Mass Media Bureau (202) 418–2177.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Memorandum Opinion and Order,* MM Docket No.91–58, adopted July 15, 1998, and released July 22, 1998. The full text of this decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3805, 1231 M Street, NW, Washington, DC 20036.

### List of Subjects in 47 CFR Part 73

Radio Broadcasting.

The authority citation for part 73 continues to read as follows:

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

Federal Communications Commission.

**Magalie Roman Salas,**

*Secretary.*

[FR Doc. 98–22161 Filed 8–17–98; 8:45 am]

BILLING CODE 6712–01–P

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

## 48 CFR Parts 1836 and 1852

## Partnering for Construction Contracts

**AGENCY:** Office of Procurement, Contract Management Division, National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** This final rule amends NASA's Federal Acquisition Regulation Supplement (NFS) to set forth a clause to be used to promote partnering under construction contracts when it is determined that the benefits to be derived exceed the costs.

**EFFECTIVE DATE:** August 18, 1998.

**FOR FURTHER INFORMATION CONTACT:** Mr. Joseph Le Cren, Telephone: (202) 358–0444.

**SUPPLEMENTARY INFORMATION:**

### Background

On April 29, 1998, a proposed rule to amend the NFS to establish a clause to promote the use of partnering under construction contracts was published in the **Federal Register** (63 FR 23414–23415) for comment. The clause is to be included in construction contracts when a determination is made that the benefits to be derived exceed the costs. Comments were submitted by only one commenter. The commenter believes the proposed rule is not strong enough since it neither makes partnering mandatory for construction contracts, nor does it make mandatory participation by all subcontractors and the architect and design contractor under a construction contract. The comments were reviewed and considered; however, no changes were made to the proposed rule.

### Impact

NASA certifies that this regulation will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et. seq.) because it establishes a voluntary communication program applicable only to construction contracts. This rule does not impose any reporting or record keeping requirements subject to the Paperwork Reduction Act.

### List of Subjects in 48 CFR Parts 1836 and 1852

Government procurement.

**Tom Luedtke,**

*Deputy Associate Administrator for Procurement.*

Accordingly, 48 CFR 1836 and 1852 are amended as follows:

1. The authority citation for 48 CFR Parts 1836 and 1852 continues to read as follows:

**Authority:** 42 U.S.C. 2473(c)(1).

## PART 1836—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

**1836.70 [Added]**

2. Subpart 1836.70 is added to read as follows:

**Subpart 1836.70 Partnering**

1836.7001 Definition.
1836.7002 General.
1836.7003 Policy.
1836.7004 NASA solicitation provision and contract clause.

**1836.70 Partnering.**

**1836.7001 Definition.**

*Partnering* means a relationship of open communication and close cooperation that involves both Government and Contractor personnel working together for the purpose of establishing a mutually beneficial, proactive, cooperative environment within which to achieve contract objectives and resolve issues and implementing actions as required.

**1836.7002 General.**

(a) The establishment of a partnering environment usually leads to higher quality products completed more