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[FR Doc. 2010–4325 Filed 3–3–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WT Docket No. 10–18; DA 10–288]

Procedural Amendments to Commission Competitive Bidding Rules

AGENCY: Federal Communications Commission.

ACTION: Correcting amendment.

SUMMARY: The Federal Communications Commission published a document in the **Federal Register** at 75 FR 4701, January 29, 2010, revising Commission rules. This summary corrects the final rules by amending the headings of 47 CFR 1.2105 and 1.2105(c) and the statutory authority for part 1. The change and restoration of language conforms the headings to the Commission's intent. These corrections make no change to the substance of the rule, or the Commission's interpretation or application of the rule.

DATES: Effective March 4, 2010.

FOR FURTHER INFORMATION CONTACT: *Wireless Telecommunications Bureau, Auctions and Spectrum Access Division:* Sayuri Rajapakse at (202) 418–0660.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Part 1 Procedural Amendments Order and Errata* adopted February 24, 2010, and released on February 24, 2010. The complete text of the *Part 1 Procedural Amendments Order and Errata* is available for public inspection and copying from 8 a.m. to 4:30 p.m. ET Monday through Thursday or from 8 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The *Part 1 Procedural Amendments Order and Errata* may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, fax 202–488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide the appropriate FCC document number, for example, DA 10–288. The *Part 1 Procedural Amendments Order and Errata* is also available on the Internet at the Commission's Web site: *http://wireless.fcc.gov/auctions*, or by using the search function for WT Docket No. 10–18 on the ECFS Web page at *http://www.fcc.gov/cgb/ecfs/*.

1. The Wireless Telecommunications Bureau (Bureau) makes a conforming amendment to a recent Commission order and corrects errors in the **Federal Register** summary of that order, which made procedural amendments to section 1.2105 of the Commission's competitive bidding rules.

2. On January 7, 2010, the Commission issued an *Order* which amended the rule specifying how to report potential violations of 47 CFR 1.2105(c) and amended the rules specifying how quickly applicants must modify pending auction applications to satisfy the requirements of 47 CFR 1.65(a) and 1.2105(b). The *Order* also modified the heading of paragraph 47 CFR 1.2105(c). A summary of the *Order* was published in the **Federal Register**, 75 FR 4701, January 29, 2010, but the changes made therein were not consistent with the *Order* as released.

3. The Bureau now amends the heading of 47 CFR 1.2105 to read: Bidding application and certification procedures; prohibition of certain communications. The *Order* inadvertently preserved the phrase *prohibition of collusion* in the heading, and the **Federal Register** summary of the *Order* inadvertently deleted a portion of the rule's heading. This change and restoration of language conforms the heading to the Commission's intent underlying the *Order.* In the *Order*, the Commission recognized that collusion is a term used in many contexts, legal and economic, and that its use in connection with 47 CFR 1.2105's prohibition of certain communications by auction applicants may cause confusion. This amendment makes no change to the substance of the rule, or the Commission's interpretation or application of the rule.

4. The Bureau also confirms the Commission's intention to amend the heading of paragraph 1.2105(c) to read *Prohibition of certain communications* rather than *Prohibition of collusion.* While this change is reflected in the *Order*, the **Federal Register** summary inadvertently omitted this language from the paragraph's heading.

5. The Bureau amends the list of statutory authorities for part 1 to correct inaccuracies that exist in the current version of the Code of Federal Regulations.

List of Subjects in 47 CFR Part 1

Administrative practice and procedures, Competitive bidding, Telecommunications.

Federal Communications Commission.

Jane E. Jackson,

Associate Chief, Wireless Telecommunications Bureau.

Correcting Amendment

■ Accordingly, 47 CFR part 1 is corrected by the following amendments:

PART 1—PRACTICE AND PROCEDURE

■ 1. The authority citation for part 1 is revised to read as follows:

Authority: 15 U.S.C. 79 *et seq.;* 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309.

■ 2. Amend § 1.2105 by revising the section heading and the heading to paragraph (c) to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of certain communications.

* * * * *

(c) *Prohibition of certain communications.* * * *

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 09–52; FCC 10–24]

Policies To Promote Rural Radio Service and To Streamline Allotment and Assignment Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopted a number of procedures, procedural changes, and clarifications of existing rules and procedures, designed to promote ownership and programming diversity, especially by Native American tribes, and to streamline processing of AM and FM auction applications.

DATES: Effective April 5, 2010.

FOR FURTHER INFORMATION CONTACT: Peter Doyle, Chief, Media Bureau, Audio Division, (202) 418–2700 or *Peter.Doyle@fcc.gov;* Thomas Nessinger, Attorney-Advisor, Media Bureau, Audio Division, (202) 418–2700 or *Thomas.Nessinger@fcc.gov.* For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams at 202–418–2918, or via the Internet at *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's First Report and Order (First R&O), FCC 10–24, adopted January 28, 2010, and released February 3, 2010. The full text of the First R&O is available for inspection and copying during regular business hours in the FCC Reference Center, 445 Twelfth Street, SW., Room CY–A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 Twelfth Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. via their Web site, *http://www.bcpi.com*, or call 1–800–378–3160. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact Brian Millin at (202) 418–7426 (voice), (202) 418–7365 (TTY), or via e-mail at *Brian.Millin@fcc.gov.*

Paperwork Reduction Act of 1995 Analysis

This First Report and Order (First R&O) adopts new or revised information collection requirements, subject to the Paperwork Reduction Act of 1995 (PRA) (Pub. L. 104–13, 109 Stat. 163 (1995) (codified in 44 U.S.C. 3501–3520)). These information collection requirements will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. The Commission will publish a separate notice in the **Federal Register** inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved them and the Commission has published a notice announcing the effective date of the information collection requirements. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

Synopsis of Order

With this First R&O, the Commission addresses some, but not all, of the proposals set forth in the Rural NPRM. It adopts, with modification, its proposal in the Rural NPRM for a Tribal Priority, as well as a number of other proposals codifying or clarifying auction procedures. The record provides ample support for immediate action on these matters. Accordingly, in this First R&O the Commission adopts the Tribal Priority with modifications. With regard specifically to AM application processing, the Commission adopts, with certain modifications, the proposal to prohibit the downgrading of proposed AM facilities that receive a dispositive preference under Section 307(b) and thus are not awarded through competitive bidding. It also adopts the proposal that technical proposals for AM facilities filed with Form 175 applications meet certain minimum technical standards to be eligible for further auction processing, with some modifications, and adopts the proposal to grant the Media Bureau and the Wireless Telecommunications Bureau (collectively, the "Bureaus") delegated authority to cap the number of AM applications that may be filed in an AM auction filing window. The Commission also adopts proposals to streamline auction application processing; to codify the permissibility of non-universal engineering solutions and settlement proposals; to give the staff delegated authority and flexibility in setting the post-auction long-form application filing deadline; to clarify application of the new entrant bidding credit unjust enrichment rule; and to clarify maximum new entrant bidding credit eligibility.

In the Rural NPRM, Commission tentatively concluded that it would be in the public interest to provide federally recognized Native American Tribes and Alaska Native Villages (Tribes) with a priority under Section 307(b) of the Communications Act of 1934, as amended (47 U.S.C. 307(b)), when proposing FM allotments, and when filing AM and noncommercial educational (NCE) FM filing window applications. As set forth in the Rural NPRM, an applicant would qualify for the Tribal Priority if: (1) The applicant (including a party filing a Petition for Rule Making to amend the FM Table of Allotments, 47 CFR 73.202) is either a federally recognized Tribe or tribal consortium, a member of a Tribe, or an entity more than 70 percent owned or controlled by members of a Tribe or Tribes; (2) at least 50 percent of the daytime principal community contour of the proposed facilities covers tribal lands; (3) the applicant proposed a first (Priority (1)) or second (Priority (2)) aural (reception) service to more than a de minimis population, or proposed a first local transmission service (Priority (3)) at the proposed community of license; and (4) the proposed community of license is located on tribal lands. The Commission further proposed that such a Tribal Priority rank between the current Priority (1) and co-equal Priorities (2) and (3), that is, the Tribal Priority would not take precedence over a proposal to provide first reception service to a greater than de minimis population, but would take precedence over a proposal to provide second local reception service or first local transmission service. The proposed Tribal Priority would apply only at the allotment stage of the commercial FM licensing procedures; as part of the threshold Section 307(b) analysis with respect to commercial or NCE AM applications filed during an AM filing window; and as the first part of the fair distribution analysis of applications filed in an NCE FM filing window, before application of the "first or second reserved channel NCE service" criterion set forth in 47 CFR 73.7002(b). NCE applicants also would be required to meet all NCE eligibility and licensing requirements (47 CFR 73.503 and 73.561). Certain "holding period" restrictions, commencing with the award of a construction permit until the completion of four years of on-air operation, would apply to any station or allotment awarded pursuant to the Tribal Priority. In the case of an AM or NCE FM construction permit awarded pursuant to a Tribal Priority, the permittee/licensee would be prohibited during this period from making any change in ownership that would lower tribal ownership below the required threshold, changing the station's community of license, or implementing a facility modification that would cause the principal community contour to cover less than 50 percent of tribal lands. In the case of a commercial FM allotment, the restriction would apply only to any proposed change of community of license or technical change as described in the preceding sentence. However, even a non-tribal owner that is awarded a permit would still be required to provide broadcast service primarily to tribal lands for four years.

Based on its examination of the record in this proceeding, the Commission adopts a Section 307(b) priority for Tribes or tribal consortia, and entities majority owned or controlled by Tribes, proposing service to tribal lands as proposed in the Rural NPRM. The Tribal Priority as adopted includes some modifications suggested by commenters. In addition, on its own motion the Commission clarifies the application of the Tribal Priority in commercial and NCE contexts, and modifies ownership requirements, eliminating the priority for individual members of Tribes or entities owned by such individuals, and

instead extending the Tribal Priority only to Tribes, consortia of Tribes, and to entities that are majority owned or controlled by a Tribe or Tribes.

The Commission finds that application of its traditional allocation priorities has not realized Section 307(b)'s mandate to "make such distribution of licenses * * * among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service" with regard to tribal lands.[1] Tribal governments have a unique legal relationship with the federal government as domestic dependent nations with inherent sovereign powers over their members and territory. Because of their status as sovereign nations responsible for, among other things, maintaining and sustaining their sacred histories, languages, and traditions, tribal-owned radio stations have a vital role to play in serving the needs and interests of their local communities, yet only 41 radio stations currently are licensed to federally-recognized Indian Tribes or affiliated groups. The Commission concludes that the establishment of an allocation priority for the provision of radio service to tribal lands by Indian tribal government-owned stations will advance its Section 307(b) goals and serve the public interest by enabling Indian tribal governments to provide radio service tailored to the needs and interests of their local communities that they are uniquely capable of providing. The Commission also finds that the Tribal Priority will advance the Commission's longstanding commitment, in accordance with the federal trust relationship, to ensure, through its regulations and policy initiatives, that Indian Tribes have adequate access to communications services. The new Tribal Priority will promote Tribes' sovereign rights by enabling them to provide vital radio services to their communities. Further, the Commission concludes that the establishment of a Tribal Priority will promote the policies and purposes of the Communications Act favoring diversity of media voices, and strengthening the diverse and robust marketplace of ideas that is essential to our democracy.

In response to the Commission's query regarding the constitutionality of the Tribal Priority, Native Public Media and the National Congress of American Indians (NPM/NCAI) concluded that the Tribal Priority would not trigger the strict scrutiny analysis of the case of *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200 (1995), but rather a rational basis standard of review. This is because, as stated in the Supreme Court case of *Morton* v. *Mancari,* 417 U.S. 535 (1974), the proposed benefit would be granted to Tribes and their members not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed in a unique fashion. The Commission agrees that the priority established herein for the benefit of federally recognized Tribes is not constitutionally suspect because it is based on the unique legal status of Indian Tribes under Federal law. Accordingly, the Commission believes that the Tribal Priority is consistent with the Equal Protection Clause of the Fifth Amendment to the United States Constitution.

As proposed, the Tribal Priority also tied the application preference to the needs of tribal communities by requiring that, to qualify for the priority, commercial applicants must propose either a first or second aural service, or a first local transmission service at a community located on tribal lands. The existence of a non-tribal commercial station or stations at a community located on tribal lands should not preclude the establishment of a first local transmission service owned by a Tribe or Tribes. Thus, the Commission modifies the service criterion for the Tribal Priority to require that a qualifying commercial applicant propose first or second aural (reception) service, or a first local tribal-owned transmission service at the proposed community. Thus, a commercial tribal-owned applicant may qualify for a Tribal Priority, notwithstanding the fact that a tribal-owned NCE station is licensed at the same community. As the Commission proposed in the Rural NPRM, however, the Tribal Priority will not take precedence over a bona fide proposal to provide first reception service to a significant population.

The Commission makes certain modifications to the Tribal Priority suggested by commenters. First, the Commission will allow assignments or transfers within the four-year holding period provided that the assignee/transferee also qualifies for the Tribal Priority in all respects. Second, the Commission will permit gradual changes in the governing board of an NCE permittee or licensee during the four-year holding period, as is the case with other NCE holding period restrictions, as long as the majority tribal control threshold (discussed below) is maintained. Third, the Commission finds that the goals underlying the Tribal Priority are not undermined by allowing Tribes to claim the Tribal Priority for both commercial and NCE stations in the same community. A tribal-owned NCE applicant may qualify for a Tribal Priority, notwithstanding the fact that a tribal-owned commercial station is licensed to the same community (in the same way that the existence of a tribal-owned NCE station does not preclude use of the priority by a commercial applicant, as discussed above). The Commission thus modifies the third prong of the test for tribal-owned NCE applicants to state that, to qualify for the Tribal Priority, a tribal applicant seeking NCE facilities will promote Section 307(b) goals by meeting the tribal lands 50 percent signal coverage and community of license requirements, and also by demonstrating that it will provide the first tribal-owned NCE transmission service at the proposed community of license. If a tribal NCE applicant meets these criteria, it will not be compared to other mutually exclusive applicants on a fair distribution basis, but will be the tentative selectee. As is the case with commercial applicants, the Tribal Priority for an NCE applicant will not take precedence over a bona fide proposal to provide first aural reception service to a significant population. If two or more mutually exclusive proposals from tribal NCE applicants qualify for a Tribal Priority, proposing first local tribal-owned NCE service at the same community, the tentative selectee will be the applicant proposing service to the greatest population on tribal lands. The Commission will not

[1] As used here, "tribal lands" means both "reservations" and "near reservation" lands. "Reservations" is defined as any federally recognized Indian tribe's reservation, pueblo or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlements Act (85 Stat. 688), and Indian allotments. 47 CFR 54.400(e). "Near reservation" is defined as "those areas or communities adjacent or contiguous to reservations which are designated by the Department of Interior's Commission of Indian Affairs upon recommendation of the Local Bureau of Indian Affairs Superintendent, which recommendation shall be based upon consultation with the tribal governing body of those reservations, as locales appropriate for the extension of financial assistance and/or social services on the basis of such general criteria as: Number of Indian people native to the reservation residing in the area; a written designation by the tribal governing body that members of their tribe and family members who are Indian residing in the area, are socially, culturally and economically affiliated with their tribe and reservation; geographical proximity of the area to the reservation and administrative feasibility of providing an adequate level of services to the area." *Id.* Thus, "tribal lands" includes American Indian Reservations and Trust Lands, Tribal Jurisdiction Statistical Areas, Tribal Designated Statistical Areas, Hawaiian Homelands, and Alaska Native Village Statistical Areas, as well as the communities situated on such lands.

require the 5,000-person population differential that exists in the current NCE analysis, but adds the "on tribal lands" requirement so as to award the permit to the applicant most successfully meeting the Tribal Priority's goal of providing service to underserved tribal communities that meets their unique cultural needs. Moreover, the Commission will make this comparison even if the mutually exclusive tribal applicants propose first local NCE service at different communities, unlike the usual Priority (3) analysis, under which the most populous community receives a dispositive Section 307(b) preference. The goals of the Tribal Priority are better served by selecting a smaller community that provides greater reception service than by choosing a more remote, but slightly larger, community. Thus, the foregoing comparison will be applied between mutually exclusive NCE applicants claiming the Tribal Priority, whether they propose the same or different communities of license. For the same reason, mutually exclusive applicants claiming the Tribal Priority for commercial facilities, and proposing first local transmission service at the same community or at different communities, will be compared based on service to the greatest population on tribal lands.

The Commission also modifies the Tribal Priority on its own motion. Upon its consideration of the Rural NPRM, and review of pertinent federal law, the Commission is no longer convinced that extending the Tribal Priority to individual members of Tribes, or entities owned by individuals without ownership by the Tribes themselves, advances the Commission's interest in helping promote tribal self-sufficiency and economic development, and endeavoring to ensure that Tribes and tribal communities have adequate access to communications services. It is well established that the Commission's trust relationship is with the Tribes and tribal governments themselves, rather than individual members of Tribes. As an independent federal agency, the Commission looks to the tribal governments, rather than to individual members of Tribes, to determine communications policies that best serve the unique needs of their respective communities, and fulfill the needs of all tribal citizens. Individual members of tribes are not necessarily bound to take such factors into account. By limiting the Tribal Priority to Tribes themselves, the Commission not only furthers the legitimate governmental objective of preserving Native American culture, but also promotes the federal government's interest in furthering tribal self-government. Thus, the Commission concludes that the Tribal Priority should extend only to (1) Tribes; (2) tribal consortia; or (3) entities that are 51 percent or more owned or controlled by a Tribe or Tribes. The Commission's general attribution rules (found in 47 CFR 73.3555 and Notes 1 and 2 to that rule) shall determine the ownership or control of any such qualifying entities. Qualifying Tribes or tribal entities must be those at least a portion of whose tribal lands lie within the proposed station's principal community contour. The principal community contour must still cover at least 50 percent of tribal lands (subject to the provisos proposed in the Rural NPRM, including those on "checkerboarded" tribal lands), but they need not all be the same Tribe's lands. Tribes whose lands are not covered by the proposed facility may invest or sit on controlling boards, but their investments or board membership will not count toward the 51 percent threshold.

The Commission therefore adopts the Tribal Priority as proposed in the Rural NPRM with the following modifications: (1) It will allow assignments or transfers of permits or licenses obtained using the Tribal Priority during the four-year holding period, provided that the assignee/transferee also qualifies for the Tribal priority in all respects; (2) with regard to NCE permittees or licensees who obtained their authorization using the Tribal Priority, it will permit gradual changes in the governing board during the four-year holding period, as long as the 51 percent tribal control threshold is maintained; (3) eligibility to claim the Tribal Priority is limited to Tribes, tribal consortia, or entities 51 percent or more owned or controlled by a Tribe or Tribes; (4) with regard to entities 51 percent or more owned or controlled by Tribes, the 51 or greater percent need not consist of a single Tribe, but the qualifying entity must be 51 percent or more owned or controlled by Tribes at least a portion of whose tribal lands lie within the facility's principal community contour, as defined in the Commission's Rules; (5) the requirement of principal community coverage of 50 percent or more of tribal lands does not require that those lands belong to the same Tribe; (6) to qualify for the priority, a tribal commercial applicant must propose first or second aural (reception) service or first local commercial tribal-owned transmission service at the proposed community of license; and (7) to qualify for the priority, a tribal NCE applicant must propose a first local NCE tribal-owned transmission service at the proposed community of license.

In the Rural NPRM, the Commission stated that when a mutually exclusive AM auction filing window applicant receives a dispositive preference under Section 307(b), it should not be allowed to downgrade that proposal to serve a smaller population, or otherwise negate the factors that led to the award of the dispositive preference, so as not to encourage "gaming" of the Section 307(b) process. The Commission tentatively concluded that AM licensees or permittees receiving Section 307(b) preferences should be required, for a period of four years, to provide service substantially as proposed in their short-form tech box submissions. The Commission adopts a modified version of its proposal to limit the downgrading of proposed AM facilities that receive a dispositive Section 307(b) preference, recognizing that a certain level of flexibility in implementing AM proposals will help expedite the commencement of new service and reduce the possibility of unbuildable construction permits. Thus, to the extent underserved populations or service totals are relevant to a Section 307(b) analysis, the Commission adopts the proposal as follows: an AM licensee or permittee receiving a dispositive Section 307(b) preference may modify its facilities so long as it continues to provide the same priority service to substantially the same number of persons who would have received such service under the initial proposal, even if the population is not the same population that would have received service under the initial proposal. As used here, "substantially" means that any proposed modification must not result in a decrease of more than 20 percent of any population figure that was a material factor in obtaining the dispositive Section 307(b) preference. For example, if an AM licensee or permittee receives a dispositive Priority (4) preference for proposing to provide a third aural service to a population of 500 persons and service to an overall population of 100,000, it may not file an FCC Form 301 application that would provide a third aural service to fewer than 400 persons or service to an overall population of less than 80,000. The same analysis applies to any party that receives a dispositive Priority (1) or Priority (2) preference. In some cases this may result in a reduction of service below that presented by a competing proposal in the Section 307(b) analysis, but there is no guarantee that the

competing proposal could have been effectuated as proposed in such cases. Additionally, a licensee or permittee that has received a dispositive preference under Priority (3) will be prohibited from changing its community of license. These restrictions will be imposed for a period of four years of on-air operations, consistent with Commission rules governing NCE FM stations. Construction permits and licenses issued to these parties will contain conditions delineating these restrictions.

In the Rural NPRM, the Commission observed that its current auction processing rules limit technical review of basic engineering data filed with AM short-form applications only to the extent necessary to determine the mutually exclusive groups of applications. Originally designed to conserve staff resources and expedite auction processing, this practice has contributed to the filing of patently defective applications, potentially undermining the accuracy and reliability of mutual exclusivity and Section 307(b) determinations, and frustrate the staff's ability to manage the window filing process efficiently. Such defective applications may preclude the filing of meritorious modification applications by existing facilities, which must protect the prior-filed defective applications. In the Rural NPRM the Commission tentatively concluded that 47 CFR 73.3571(h)(1)(ii) should be modified to require that applicants in future AM broadcast auctions must, at the time of filing, meet the following basic technical eligibility criteria: community of license coverage (day and night); and protection of existing AM facilities and prior-filed proposed AM facilities (daytime and nighttime). It also tentatively concluded that the rules should be modified to prohibit the amendment of applications that, at time of filing, are technically ineligible to proceed with auction processing, and prohibit applicants that propose such technically ineligible applications from participating in the auction process. This would preclude attempts to amend or correct data submitted in Form 175 or the tech box, including proposals to change community of license before an applicant has been awarded a construction permit. The Commission adopts the proposed rule changes set forth in the Rural NPRM. To alleviate concerns raised by some commenters, the Commission will provide applicants with a one-time opportunity to file a curative amendment to its short-form application. Specifically, if the staff review shows that an application does not meet one or more of the eligibility criteria, it will be deemed "technically ineligible for filing" and will be included on a Public Notice (Technically Ineligible Notice), which will list defective applications identified by the staff during their initial review of the application, identify which of the defects that the applicant must correct, and set the deadline for doing so. Only applicants whose applications are included in the Technically Ineligible Notice may file a curative amendment. Applicants may not modify any part of a proposal not directly related to an identified deficiency in their curative amendments. Applicants may only modify the AM technical parameters of the short-form application, such as power, class (within the limits set forth in 47 CFR 73.21), antenna site or other antenna data.

Amendments seeking to change a proposed community of license or frequency will not be accepted. Notwithstanding this rule change, full technical review of applications will not occur until winning bidders file long-form applications after an auction. This opportunity to cure is not to be considered a settlement opportunity under 47 CFR 73.5002(d). The opportunity to file a curative amendment will occur prior to the disclosure by the Commission of any information on applications submitted during the short-form filing window.

Notwithstanding the broadcast anti-collusion rules, which generally apply upon the filing of a short-form application, 47 CFR 73.5002(d) provides applicants in certain mutually exclusive groups (MX Groups) a limited opportunity to communicate during specified settlement periods in order to resolve conflicts by means of technical amendment or settlement. This exception applies only to those MX Groups that include either (1) At least one AM major modification; (2) at least one NCE application; or (3) applications for new stations in the secondary broadcast services. Currently, the rule neither prohibits the Commission from accepting non-universal technical amendments or settlement proposals—which reduce the number of applicants in a group but do not completely resolve the mutual exclusivities of that group—nor requires it to do so. Given the success of staff auction practice in accepting non-universal technical amendments and settlement proposals, the Commission adopts its proposal to codify the permissibility of non-universal engineering solutions and settlement proposals as proposed in the Rural NPRM, as long as this process results in at least one singleton application that proceeds to long-form processing. Accordingly, the Commission revises its rules to permit non-universal technical amendments and settlement proposals that result in at least one singleton application from an MX Group. An applicant submitting a technical amendment pursuant to this policy is required only to resolve all mutual exclusivities for at least one application in the relevant MX Group, but need not resolve all technical conflicts among all applications in that group.

The Commission observed in the Rural NPRM that the Rules currently do not limit the number of AM Tech Box applications that may be filed with FCC Form 175 during an AM short-form filing window. It noted that an increasing number of applicants had availed themselves of the opportunity to file multiple technical submissions, and questioned whether a significant percentage of AM short-form filing window applications were merely speculative. Accordingly, the Commission sought comment on whether (1) to delegate to the Bureaus authority to limit, in an AM short-form filing window, the number of tech box submissions that an applicant could file with its Form 175 and, if so, the appropriate limitation on this delegation; and (2) to apply Commission attribution standards to determine the number of filings submitted by any party, to guard against the use of affiliates or even sham entities to circumvent such a cap. The Commission finds that delegating authority to the Bureaus to impose application caps in AM short-form filing windows will help to prevent speculative applications, decreasing the likelihood of mutually exclusive applications, and in turn decreasing the likelihood of large, technically complex, and administratively burdensome MX Groups. A cap can also help expedite application processing and prevent abuses of licensing procedures, and will enable the Bureaus to open AM short-form filing windows more frequently, thereby promoting—rather than restricting—new entrant opportunities. Accordingly, the Commission delegates authority to the Bureaus to determine, for each AM short-form window, whether to limit the number of AM applications that may be filed by an applicant and, if so, the appropriate application cap based on the particular circumstances presented by future auctions. The Commission also delegates to the Bureaus authority to adopt attribution standards to effectuate

the goals of an application cap, and to ensure compliance with this restriction. It directs the Bureaus to provide notice and an opportunity for comment on a cap limit and attribution standards prior to imposing these potential filing restrictions. Any such cap limit and attribution standards will be announced in the Public Notice establishing the dates for the Form 175 filing window.

The Commission's Rules currently provide, without exception, that each winning bidder in a broadcast auction must submit an appropriate long-form application within thirty (30) days following the close of bidding. In the Rural NPRM, the Commission observed that this inflexible 30-day time frame has, at times, proved to be problematic, for example, when the close of an auction causes the long-form application filing deadline to fall during the December holiday season, inconveniencing applicants and their consultants. The Commission therefore modifies 47 CFR 73.5005(a) as set forth in the Rural NPRM, to delegate authority to the Bureaus to extend the filing deadline for the post-auction submission of long-form applications.

To promote the objectives of 47 U.S.C. 309(j) and further its long-standing commitment to broadcast facility ownership diversity, the Commission adopted a tiered new entrant bidding credit (NEBC) for broadcast auction applicants with no, or very few, other media interests. To meet the statutory obligation to prevent unjust enrichment, and to ensure that the NEBC would aid eligible individuals and entities to participate in broadcast auctions, the Commission adopted rules requiring, under certain circumstances, reimbursement of bidding credits used to obtain broadcast licenses. In the Rural NPRM, the Commission proposed to clarify certain issues concerning the unjust enrichment provisions of the NEBC that had been raised during previous broadcast auctions. First, under 47 CFR 73.5007(b), a winning bidder is not eligible for the NEBC if it, or any party with an attributable interest in the winning bidder, has an attributable interest in any existing media facility in the "same area" as the proposed new facility, that is, if specified service contours of the two facilities overlap. In the FM service, in the pre-auction Form 175 application, an applicant may submit a set of "preferred site coordinates" as an alternative to the reference coordinates for the vacant FM allotment upon which it intends to bid. The preferred site coordinates specified by prospective auction participants would be entered into the Commission's database and protected from subsequent filings. In the Rural NPRM, the Commission sought to clarify that, for purposes of defining the "same area" restriction for the NEBC, the contour of the proposed FM facility would be identified by the maximum class facilities at the FM allotment site, so that applicants could not attempt to avoid the overlap of contours which defines "same area," and thereby qualify for the bidding credit, by specifying preferred site coordinates in their Form 175 application. The Commission adopts this proposal, which will provide certainty to applicants and help safeguard the diversity and competition goals on which the NEBC is based by eliminating potential applicant manipulation of our "new entrant" standards. The Commission also clarifies, under 47 CFR 73.5007(b)(3), that it will base this proposed FM facility contour standard on an assumption of uniform terrain, which results in a perfectly circular standard 70 dBu contour.

Second, to prevent unjust enrichment by parties that acquire permits through the use of a NEBC, 47 CFR 73.5007(c) requires reimbursement to the Commission of all or part of the credit upon a subsequent assignment or transfer, if the proposed assignee or transferee is not eligible for the same percentage of bidding credit. The rule is routinely applied to "long form" assignment or transfer of control applications filed on FCC Forms 314 and 315, but does not distinguish between pro forma and non-pro forma assignments or transfers of control. In the Rural NPRM the Commission invited comment as to whether the unjust enrichment analysis should also apply to voluntary or involuntary pro forma assignments or transfers filed on Form 316. The Commission tentatively concluded that the unjust enrichment provisions should apply to pro forma assignment and transfer of control applications, thus eliminating any applicant confusion on the issue. The Commission finds it appropriate generally to apply the unjust enrichment provisions contained in 47 CFR 73.5007(c) to pro forma applications to assign or transfer broadcast licenses and permits, pursuant to 47 CFR 73.3540(f), in order to help preserve the integrity of the designated entity measures adopted in prior auction orders. A pro forma assignment or transfer can include new parties, including parties with attributable interest holdings that would nullify or diminish the eligibility of the assignee or transferee for the bidding credit. This is especially the case in transactions eligible for pro forma treatment involving corporate reorganizations where a new attributable interest holder with other media interests is added. Moreover, such an unjust enrichment analysis allows for consistency in the application of the rule. It further ensures that applicants do not use the summary pro forma assignment and transfer procedures to circumvent the unjust enrichment requirements. Thus, the Commission adopts the unjust enrichment analysis recommended in the Rural NPRM, but will only apply the unjust enrichment analysis to voluntary pro forma transactions, and not to involuntary pro forma transactions. Notwithstanding this decision, it will continue to address, on a case-by-case basis, any conduct engaged in by auction participants with the evident intention of manipulating the eligibility standards for, or frustrating the purpose of, the NEBC.

As described in the Rural NPRM, applicants to participate in broadcast auctions are required to establish their qualifications for the NEBC on their short-form applications (FCC Form 175), Application to Participate in an FCC Auction, which is the sole opportunity for the applicant to claim bidding credit eligibility. Applicants meeting the eligibility criteria set forth in 47 CFR 73.5007 qualify for a bidding credit representing the amount by which a winning bidder's gross bid is discounted. The size of a NEBC depends on the number of ownership interests in other media of mass communications that are attributable to the bidder-entity and its attributable interest-holders. In accordance with 47 CFR 73.5008(c), when determining an applicant's eligibility for the NEBC, the interests of the applicant, and of any individuals or entities with an attributable interest in the applicant, in other media of mass communications are considered. An auction applicant's attributable interests, and therefore its maximum NEBC eligibility, are determined as of the Form 175 filing deadline. Consequently, the Commission has consistently held, and has announced in auction Public Notices, that bidders cannot qualify for a bidding credit, nor increase the size of a previously claimed bidding credit, based upon ownership or positional changes occurring after the Form 175 filing deadline. Nonetheless, as noted in the Rural NPRM, certain parties have argued that their NEBC eligibility is maintained or "frozen" as of the Form 175 application filing. Therefore, to prevent applicant confusion, the Commission proposed to

amend 47 CFR 73.5007(a) to codify the current policy, and state explicitly that the NEBC eligibility set forth in an applicant's Form 175 application is the maximum NEBC eligibility for that auction, and that such bidding credit may be reduced or lost upon post-filing changes. The Commission adopts this change, and modifies 47 CFR 73.5007(a) to state unequivocally that: (1) An applicant must specify its eligibility for the NEBC in its Form 175 application; (2) the NEBC specified in an applicant's Form 175 establishes that applicant's maximum NEBC eligibility for that auction; (3) any post-Form 175 filing (post-filing) change in the applicant's circumstances underlying its NEBC eligibility claim, or that of any attributable interest-holder in the applicant, must be reported immediately to the Commission, and no later than five business days after the change occurs; and (4) any such post-filing change may cause a reduction or elimination of the NEBC claimed in the applicant's Form 175 application, if the change would cause the applicant not to qualify for the originally claimed NEBC under the eligibility provisions of 47 CFR 73.5007, and the change occurred prior to grant of the construction permit to the applicant. Under no circumstances will a post-filing change increase an applicant's NEBC eligibility for that auction. The Commission also emphasizes that all of ways in which interests are attributed to individuals and entities (as set forth in 47 CFR 73.3555 and Note 2 to that Section) will be considered to affect NEBC eligibility when they occur after the Form 175 filing deadline.

By auction Public Notices, bidders are also instructed that any change that results in the reduction or loss of the NEBC originally claimed on the Form 175 application, must be reported immediately, and no later than five business days after the change occurs. In the Rural NPRM the Commission proposed to adjust the standard reporting timeframe and codify this immediate reporting requirement. In keeping with the rule amendments it recently adopted in *Procedural Amendments to Commission Part 1 Competitive Bidding Rules,* Order, FCC 10–4 at 5 (rel. Jan. 7, 2010), the Commission codifies the practice that any changes affecting NEBC eligibility must be reported immediately, and in any event no later than five business days after the change occurs, and amends 47 CFR 73.5007(a) accordingly. The Commission will continue to make final determinations regarding an applicant's eligibility to hold a construction permit, including eligibility for and amount of the NEBC, when it is ready to grant the post-auction long form construction permit application.

Final Regulatory Flexibility Analysis. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), 5 U.S.C. 601–612, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Rural NPRM. The Commission sought written public comment on the proposals in the Rural NPRM, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need for, and Objectives of, the Report and Order. This First R&O adopts rule changes and procedures to codify or clarify certain allotment, assignment, auction, and technical procedures. The rules adopted by this First R&O also create a new Tribal Priority to assist Tribes or tribal consortia, or entities controlled by Tribes, in obtaining radio broadcast stations designed to serve their tribal communities.

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

To remedy these problems, the Commission concluded that Tribes seeking new radio stations to serve their citizens should receive a priority in the award of allotments and construction permits. To qualify for the Tribal Priority, an applicant must demonstrate that it meets all of the following eligibility criteria: (1) The applicant is either a federally recognized Tribe or tribal consortium, or an entity 51 percent or more of which is owned or controlled by a Tribe or Tribes, at least part of whose tribal lands (as defined in note 30 of the Rural NPRM) are covered by the principal community contour of the proposed facility. Although the 51 or greater percent need not consist of a single Tribe, the qualifying entity must be 51 percent or more owned or controlled by Tribes at least a portion of whose tribal lands lie within the facility's principal community contour; (2) at least 50 percent of the daytime principal community contour of the proposed facilities covers tribal lands; (3) the proposed community of license must be located on tribal lands; and (4) the applicant proposes first aural, second aural, or first local tribal-owned transmission service at the proposed community of license, in the case of proposed commercial facilities, or at least first local tribal-owned noncommercial educational transmission service, in the case of proposed NCE facilities. In the event that two or more applicants claiming the Tribal Priority are mutually exclusive, the one providing the highest level of service to the greatest population will prevail. The Tribal Priority ranks between the current Priority (1) and co-equal Priorities (2) and (3) in the case of commercial applicants. Thus, the Tribal Priority will not take precedence over a proposal to provide first reception service to a greater than de minimis population, but will take precedence over the provision of second local reception service, or over a proposal for first local non-tribal owned transmission service. Likewise, an NCE applicant qualifying for the Tribal Priority will take precedence over all mutually exclusive applications, except those that propose bona fide first reception service to a greater than de minimis population.

The Tribal Priority will be applied only at the allotment stage of the commercial FM licensing procedures, to commercial AM applications filed during an AM filing window, as part of the threshold Section 307(b) analysis, and to applications filed in an NCE FM filing window as the first part of the fair distribution analysis. NCE applicants must also meet all NCE eligibility and licensing requirements. Holding period restrictions, commencing with the award of a construction permit until the completion of four years of on-air operation, will apply to any authorization or allotment awarded pursuant to the Tribal Priority. In the

case of an AM or NCE FM authorization awarded to a tribal applicant, the permittee/licensee will be prohibited during this period from making any change that would lower tribal ownership below the 51 percent threshold, a change of community of license, or a technical change that would cause less than 50 percent of the principal community contour to cover tribal lands. However, gradual changes in the composition of an NCE board that do not change the nature of the organization or break continuity of control will not violate the four-year holding period restrictions. In the case of a commercial FM allotment, the restrictions will apply only to any proposed change of community of license or technical change as described above. The winner at auction of an FM allotment added to the Table of Allotments under a Tribal Priority, whether Tribal or non-Tribal, must still provide broadcast service primarily to tribal lands for the entire four-year holding period.

Additionally, in the First R&O the Commission requires that applicants receiving dispositive preferences for AM facilities under section 307(b) of the Communications Act of 1934, as amended, be prohibited from substantially downgrading the facilities on which the Section 307(b) award was based. This prohibition was designed to provide basic fairness in the award of a dispositive preference to one proposal in a group of several mutually exclusive proposals. That is, it would be unfair to allow one member of a mutually exclusive group to be awarded a construction permit without auction, based on the superior population coverage in its proposal, only then to allow it to downgrade its proposal to the point where it would no longer be significantly different from the other mutually exclusive proposals.

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

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

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

Summary of Significant Issues Raised by Public Comments in Response to the IRFA. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

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

The subject rules and policies potentially will apply to all AM and FM radio broadcasting licensees and potential licensees. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public. 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. However, radio stations that are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number. The SBA has established a small business size standard for this category, which is: Firms having $7 million or less in annual receipts (13 CFR 121.201, NAICS code 515112 (updated for inflation in 2008)). According to BIA Advisory Services, L.L.C., MEDIA Access Pro Database on March 17, 2009, 10,884 (95%) of 11,404 commercial radio stations have revenue of $6 million or less. Therefore, the majority of such entities are small entities. We note, however, that many radio stations are affiliated with much larger corporations having much higher revenue. Our estimate, therefore, likely overstates the number of small entities that might be affected by any ultimate changes to the rules and forms.

Description of Projected Reporting, Recordkeeping and other Compliance Requirements. As described, certain rules and procedures will change, although the changes will not result in substantial increases in burdens on applicants. Questions will be added to FCC Forms 340, 314, and 315 to establish Section 307(b) eligibility for the Tribal Priority or compliance with holding period restrictions in the event of an assignment or transfer. Questions will also be added to FCC Form 316 based on the Commission's conclusion that the new entrant bidding credit unjust enrichment rules apply to pro forma assignment and transfer

applications. These are largely self-identification questions or questions regarding the duration of on-air operation, requiring minimal calculation. In certain cases (AM auction filing window applications and FM allotment proceedings), Section 307(b) information is already required, thus the information needed to be collected from applicants claiming the Tribal Priority is of the same character as that already collected, resulting in little or no increase in burden on such applicants. The remaining procedural changes in the First R&O are either changes in Commission procedures, requiring no input from applicants, or more stringent regulation of existing requirements. For example, AM auction filing window applicants need not submit more technical information than is already collected; the procedural change merely adds consequences when that information does not meet certain already extant technical standards.

Steps Taken To Minimize Significant Impact of Small Entities, and Significant Alternatives Considered. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities (5 U.S.C. 603(c)(1)–(c)(4)).

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

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

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

The remaining proposals adopted in the First R&O fall into one of two categories: Grant of delegated authority to modify certain rules on an as-needed basis, or codification or clarification of existing policies and rules. In the first category, the new authority granted the Commission to place a "cap" on AM filing window applications may deprive certain applicants of the ability to file all the applications they wish. However, application caps will deter speculation, eliminating superfluous applications and enabling faster processing of applications overall. Caps will cause applicants to focus on those facilities that they value most, and in conjunction with the requirement of technically eligible applications will encourage the filing of better and more quickly grantable applications, streamlining the AM auction and award process. Given that, in the most recent AM auction filing window, less than six percent of the applicants filed ten or more applications (accounting for approximately 40 percent of all technical proposals filed), a reasonable application cap will burden only that small percentage of potential applicants whose multiple applications take up disproportionate amounts of Commission time and resources, slowing down the auction process and impeding the authorization of new AM service to the public. The grant of delegated authority to the Media and Wireless Telecommunications Bureaus to extend post-auction filing deadlines will only benefit applicants: It gives the Bureaus the flexibility to provide additional time for parties that need it, while those who wish their applications to be considered sooner may file when they like. In these cases, because of the significant benefits to regulated parties and minimal to no burdens, it was not deemed necessary to consider other options.

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

Report to Congress. The Commission will send a copy of the First R&O, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 (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. A copy of the First R&O and FRFA (or summaries thereof) will also be published in the **Federal Register** (See 5 U.S.C. 604(b)).

Ordering Clauses

Accordingly, *it is ordered,* pursuant to the authority contained in Sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 303, 307, and 309(j),

that this First Report and Order *is adopted.*

It is further ordered that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 548, the Commission's Rules *are hereby amended* as set forth in Appendix E to the First R&O.

It is further ordered that the rules adopted herein *will become effective* 30 days after the date of publication in the **Federal Register,** except for sections 73.3571(k), 73.7000, 73.7002(b), and 73.7002(c), which contain new or modified information collection requirements that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA), and which *will become effective* after the Commission publishes a notice in the **Federal Register** announcing such approval and the relevant effective date.

List of Subjects in 47 CFR Part 73

Radio broadcast services.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

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

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

■ 2. Section 73.3571 is amended by revising paragraphs (h)(1)(ii) and (h)(4)(iii), and adding new paragraph (k) to read as follows:

§ 73.3571 Processing of AM broadcast station applications.

* * * * *

(h) * * *

(1) * * *

(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. Applications must include the following engineering data: community of license; frequency; class; hours of operations (day, night, critical hours); power (day, night, critical hours); antenna location (day, night, critical hours); and all other antenna data. Applications lacking data (including any form of placeholder, such as inapposite use of "0" or "not applicable" or an abbreviation thereof) in any of these categories will be immediately dismissed as incomplete without an opportunity for amendment. The staff will review the remaining applications to determine whether they meet the following basic eligibility criteria: community of license coverage (day and night) as set forth in § 73.24(i), and protection of co- and adjacent-channel station licenses, construction permits and prior-filed applications (day and night) as set forth in §§ 73.37 and 73.182. If the staff review shows that an application does not meet one or more of the basic eligibility criteria listed above, it will be deemed "technically ineligible for filing" and will be included on a Public Notice listing defective applications and setting a deadline for the submission of curative amendments. An application listed on that Public Notice may be amended only to the extent directly related to an identified deficiency in the application. The amendment may modify the proposed power, class (within the limits set forth in § 73.21), antenna location or antenna data, but not the proposed community of license or frequency. Except as set forth in the preceding two sentences, amendments to short-form (FCC Form 175) applications will not be accepted at any time. Applications that remain technically ineligible after the close of this amendment period will be dismissed, and the staff will determine which remaining applications are mutually exclusive.

* * * * *

(4) * * *

(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. Subject to the restrictions set forth in paragraph (k) of this section, 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.

* * * * *

(k)(1) An AM applicant receiving a dispositive Section 307(b) preference is required to construct and operate technical facilities substantially as proposed in its FCC Form 175. An AM applicant, licensee, or permittee receiving a dispositive Section 307(b) preference based on its proposed service to underserved populations (under Priority (1), Priority (2), and Priority (4)) or service totals (under Priority (4)) may modify its facilities so long as it continues to provide the same priority service to substantially the same number of persons who would have received service under the initial proposal, even if the population is not the same population that would have received such service under the initial proposal. For purposes of this provision, "substantially" means that any proposed modification must not result in a decrease of more than 20 percent of any population figure that was a material factor in obtaining the dispositive Section 307(b) preference.

(2) An AM applicant, licensee, or permittee that has received a dispositive preference under Priority (3) will be prohibited from changing its community of license.

(3) The restrictions set forth in paragraphs (k)(1) and (k)(2) of this section will be applied for a period of four years of on-air operations. This holding period does not apply to construction permits that are awarded on a non-comparative basis, such as those awarded to non-mutually exclusive applicants or through settlement.

■ 3. Section 73.5002 is amended by adding new paragraph (e) to read as follows:

§ 73.5002 Application and certification procedures; return of mutually exclusive applications not subject to competitive bidding procedures; prohibition of collusion.

* * * * *

(e) Applicants seeking to resolve their mutual exclusivities by means of engineering solution or settlement during a limited period as specified by public notice, pursuant to paragraph (d) of this section, may submit a non-universal engineering solution or settlement proposal, so long as such engineering solution or settlement proposal results in the grant of at least one application from the mutually exclusive group. A technical amendment submitted under this subsection must resolve all of the applicant's mutual exclusivities with respect to the other applications in the specified mutually exclusive application group.

■ 4. Section 73.5005 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 73.5005 Filing of long-form applications.

(a) Within thirty (30) days following the close of bidding and notification to the winning bidders, unless a longer period is specified by public notice, each winning bidder must submit an appropriate long-form application (FCC Form 301, FCC Form 346, or FCC Form 349) for each construction permit or license for which it was the high bidder.

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■ 5. Section 73.5007 is amended by revising paragraph (a) and by adding Note 1 to read as follows:

§ 73.5007 Designated entity provisions.

(a) *New entrant bidding credit.* A winning bidder that qualifies as a "new entrant" may use a bidding credit to lower the cost of its winning bid on any broadcast construction permit. Any winning bidder claiming new entrant status must have de facto, as well as de jure, control of the entity utilizing the bidding credit. A thirty-five (35) percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have no attributable interest in any other media of mass communications, as defined in § 73.5008. A twenty-five (25) percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have an attributable interest in no more than three mass media facilities. No bidding credit will be given if any of the commonly owned mass media facilities serve the same area as the proposed broadcast or secondary broadcast station, or if the winning bidder, and/or any individual or entity with an attributable interest in the winning bidder, have attributable interests in more than three mass media facilities. Attributable interests held by a winning bidder in existing low power television, television translator or FM translator facilities will not be counted among the bidder's other mass media interests in determining eligibility for a bidding credit. Eligibility for the new entrant bidding credit must be specified in an applicant's FCC Form 175 application, and the new entrant bidding credit specified in an applicant's FCC Form 175 application establishes that applicant's maximum bidding credit eligibility for that auction. Any post-FCC Form 175 filing change in the applicant's circumstances underlying its new entrant bidding credit eligibility claim, or that of any attributable interest-holder in the applicant, must be reported to the Commission immediately, and no later than five business days after the change occurs. Any such post-FCC Form 175 filing change may cause a reduction or elimination of the new entrant bidding credit claimed in the applicant's FCC Form 175 application, if the change would cause the applicant not to qualify for the originally claimed new entrant bidding credit under the eligibility provisions of § 73.5007, and the change occurred prior to grant of the construction permit to the applicant. Final determinations regarding new entrant status will be made at the time of long form construction permit application grant. Applicants whose eligibility is lost or reduced subsequent to the FCC Form 175 filing must, before a construction permit will be issued, make such payments as are necessary to account for the difference between claimed and actual bidding credit eligibility.

* * * * *

Note 1 to § 73.5007: For purposes of paragraph (b)(3)(ii) of this section, the contour of the proposed new FM broadcast station is based on the maximum class facilities at the FM allotment site, which is defined as the perfectly circular standard 70 dBu contour distance for the class of station.

■ 6. Section 73.7000 is amended by adding six new definitions to read as follows:

§ 73.7000 Definition of terms (as used in subpart K only).

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Near reservation lands. Those areas or communities adjacent or contiguous to reservation or other Trust lands which are designated by the Department of Interior's Commission of Indian Affairs upon recommendation of the Local Bureau of Indian Affairs Superintendent, which recommendation shall be based upon consultation with the tribal governing body of those reservations, as locales appropriate for the extension of financial assistance and/or social services on the basis of such general criteria as: Number of Indian people native to the reservation residing in the area; a written designation by the tribal governing body that members of their tribe and family members who are Indian residing in the area, are socially, culturally and economically affiliated with their tribe and reservation; geographical proximity of the area to the reservation and administrative feasibility of providing an adequate level of services to the area.

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Reservations. Any federally recognized Indian tribe's reservation, pueblo or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlements Act (85 Stat. 688) and Indian allotments, for which a Tribe exercises regulatory jurisdiction.

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Tribe. Any Indian or Alaska Native tribe, band, nation, pueblo, village or community which is acknowledged by the federal government to constitute a government-to-government relationship with the United States and eligible for the programs and services established by the United States for Indians. *See The Federally Recognized Indian Tribe List Act of 1994* (Indian Tribe Act), Public Law 103–454. 108 Stat. 4791 (1994) (the Secretary of the Interior is required to publish in the **Federal Register** an annual list of all Indian Tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians).

Tribal applicant. (1) A Tribe or consortium of Tribes, or

(2) An entity that is 51 percent or more owned or controlled by a Tribe or Tribes that occupy Tribal Lands that receive Tribal Coverage.

Tribal coverage. Coverage of Tribal Lands by at least 50 percent of a facility's 60 dBu (1 mV/m) contour. To the extent that Tribal Lands include fee lands not owned by Tribes or members of Tribes, the outer boundaries of such lands shall delineate the coverage area, with no deduction of area for fee lands not owned by Tribes or members of Tribes.

Tribal Lands. Both Reservations and Near reservation lands. This definition includes American Indian Reservations and Trust Lands, Tribal Jurisdiction Statistical Areas, Tribal Designated Statistical Areas, Hawaiian Homelands, and Alaska Native Village Statistical Areas, as well as the communities situated on such lands.

■ 7. Section 73.7002 is amended by revising paragraphs (b) and (c) to read as follows:

§ 73.7002 Fair distribution of service on reserved band FM channels.

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(b) In an analysis performed pursuant to paragraph (a) of this section, a full-service FM applicant that identifies itself as a Tribal Applicant, that proposes Tribal Coverage, and that proposes the first reserved channel NCE service owned by any Tribal Applicant at a community of license located on Tribal Lands, will be awarded a construction permit. If two or more full-service FM applicants identify

themselves as Tribal Applicants and meet the above criteria, the applicant providing the most people with reserved channel NCE service to Tribal Lands will be awarded a construction permit, regardless of the magnitude of the superior service or the populations of the communities of license proposed, if different. If two or more full-service FM applicants identifying themselves as Tribal Applicants each meet the above criteria and propose identical levels of NCE aural service to Tribal Lands, only those applicants shall proceed to be considered together in a point system analysis. In an analysis performed pursuant to paragraph (a) of this section that does not include a Tribal Applicant, a full service FM applicant that will provide the first or second reserved channel noncommercial educational (NCE) aural signal received by at least 10% of the population within the station's 60dBu (1mV/m) service contours will be considered to substantially further fair distribution of service goals and to be superior to mutually exclusive applicants not proposing that level of service, provided that such service to fewer than 2,000 people will be considered insignificant. First service to 2,000 or more people will be considered superior to second service to a population of any size. If only one applicant will provide such first or second service, that applicant will be selected as a threshold matter. If more than one applicant will provide an equivalent level (first or second) of NCE aural service, the size of the population to receive such service from the mutually exclusive applicants will be compared. The applicant providing the most people with the highest level of service will be awarded a construction permit, if it will provide such service to 5,000 or more people than the next best applicant. If none of the applicants in a mutually exclusive group would substantially further fair distribution goals, all applicants will proceed to examination under a point system. If two or more applicants will provide the same level of service to an equivalent number of people (differing by less than 5,000), only those equivalent applicants will be considered together in a point system.

(c) For a period of four years of on-air operations, an applicant receiving a decisive preference pursuant to this section is required to construct and operate technical facilities substantially as proposed and shall not downgrade service to the area on which the preference was based. Additionally, for a period beginning from the award of a construction permit through four years of on-air operations, a Tribal Applicant receiving a decisive preference pursuant to this section may not:

(1) Assign or transfer the authorization except to another party that qualifies as a Tribal Applicant;

(2) Change the facility's community of license; or

(3) Effect a technical change that would cause the facility to provide less than full Tribal Coverage.

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