

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Procedures Governing Amendments	)	MB Docket No. 05-210
To FM Table of Allotments and Changes	)	RM-10960
Of Community of License in the Radio Broadcast	)	
Services	)	

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: June 9, 2005**

**Released: June 14, 2005**

Comment Date: 60 days from date of publication in the Federal Register  
 Reply Comment Date: 90 days from date of publication in the Federal Register

By the Commission:

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- Appendix A: Initial Regulatory Flexibility Act Analysis
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## I. INTRODUCTION

1. With this *Notice of Proposed Rulemaking* (“*Notice*”), we commence a proceeding to consider changes in the procedures for making certain amendments to the FM Table of Allotments,<sup>1</sup> as well as other changes to our procedures for making certain modifications to broadcast facilities. These proposals are intended to reduce backlog in, and streamline, our FM allotment procedures and, to a lesser extent, streamline certain procedures pertaining to AM broadcast applications. Although the Commission has made important changes to streamline the processing of radio broadcast applications, our basic procedures for amending the Table have not changed since 1982. Given the backlog of pending rulemaking proceedings to amend the Table, the large disparity in processing time-frames between applications and allocations proposals, and the increased demands now being placed on the staff for new and modified facility authorizations in all radio broadcast services, we believe it is critically important to implement streamlined procedures in this area as well.

2. In this *Notice*, we seek comment on a number of specific rule and procedural changes in the handling of FM and AM applications and rulemaking petitions to amend the Table. In the area of allocations procedures, we seek comment on a proposal to require that parties filing petitions for rulemaking to “drop in” new FM allotments simultaneously file Form 301 applications for the proposed facilities and pay the required application fee, as a way to discourage non-*bona fide* allocations proposals. We also seek comment on a proposal to limit the number of FM channel additions or substitutions that may be included in a rulemaking proposal or counterproposal to five. This latter proposal is intended to simplify and expedite the processing of what have become increasingly complex and protracted rulemaking proceedings.

3. The other proposals on which we seek comment affect AM and FM application processing generally. We seek comment on a proposal to make both AM and FM community of license changes minor changes, which may be accomplished by filing a Form 301 application on a first come-first served basis. We also seek comment on whether and under what conditions we should allow a licensee to move a community’s sole local transmission service in order to provide another community with its first local transmission service.

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<sup>1</sup> 47 C.F.R. § 73.202 (“Table”).

4. Finally, we announce a freeze on new petitions for rulemaking to amend the Table. Because of the size of the backlog of such rulemaking proceedings, as well as the rule changes we propose in this Notice, it is in the public interest not to accept further petitions for rulemaking until we have issued a *Report and Order* in this proceeding. We also announce the opening of a one-time settlement window designed to help eliminate the current backlog in FM rulemaking petitions.

## II. BACKGROUND

5. **Table of Allotments.** New and modified allotments for FM broadcast channels are currently made through notice-and-comment rulemaking, in which proponents of new or amended FM allotments file petitions for rulemaking to amend the Table, and other parties may comment or file counterproposals. The current Table was adopted by the Commission in 1963.<sup>2</sup> The Commission stated that re-introduction of the Table “provides the best means to insure an efficient present distribution of channels.”<sup>3</sup>

6. The next, and last, major development in the area of FM allotments was in 1982, when the Commission revised the priorities for allotting FM channels when amending the Table.<sup>4</sup> *FM Assignment Policies* gave first priority to provision of first full-time aural reception service, next priority to provision of second full-time aural reception service or first local transmission service, and last priority to “other public interest matters.”<sup>5</sup> Those revised priorities have been used, and continue to be used, in all rulemaking proceedings to amend the Table since the early 1980s, and for resolving conflicts among mutually exclusive proposals to amend the Table. Likewise, our procedures for evaluating and processing rulemaking proceedings to amend the Table have changed little in that time.

7. In the *Allocations Third Report*, the Commission responded to concerns about the cumbersome nature of rulemaking proceedings to amend a fixed Table of Allotments. It stated that while “[i]t is true that new rule making is necessary to change assignments in the table . . . such proceedings are usually uncomplicated in nature and far less time consuming than a general allocation proceeding such as this one.”<sup>6</sup> While this statement generally is still true on a case-by-case basis, at the time the Commission made this pronouncement there were approximately 1,300 FM broadcast stations in the United States. At the present time there are over 6,200 FM broadcast stations operating in the non-reserved band, with a concomitant rise in the number of rulemaking proceedings initiated to amend the Table. From 1997 to 2004, 2,054 petitions for rulemaking to add new FM allotments were filed, an average of 257 such filings a year. Second, proceedings to amend the Table have in some cases become quite complicated, involving up to 36 different allotments once counterproposals are factored in. These facts suggest the need to revisit the procedures used in amending the Table.

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<sup>2</sup> *Revision of FM Broadcast Rules, Particularly as to Allocation and Technical Standards, Third Report, Memorandum Opinion and Order*, 40 F.C.C. 747, 23 R.R. 1859 (1963) (“*Allocations Third Report*”).

<sup>3</sup> *Id.* at 758. A prior Table of FM Assignments was in effect from 1945 to 1958. *Revision of FM Broadcast Rules, Particularly as to Allocation and Technical Standards, First Report and Order*, 23 R.R. 1801, 1817 (1963).

<sup>4</sup> *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88 (1982) (“*FM Assignment Policies*”).

<sup>5</sup> *Id.* at 91-93. The 1982 proceeding refined the original FM priorities and attempted to streamline the rulemaking process by reducing the number of factors considered in choosing among mutually exclusive FM allotment proposals.

<sup>6</sup> *Allocations Third Report*, 40 F.C.C. at 758.

8. **First Broadcasting Petition for Rulemaking.** On March 5, 2004, First Broadcasting Investment Partners, LLC (“First Broadcasting”) filed a Petition for Rulemaking (“First Broadcasting Petition”), proposing several changes in our allotment procedures. First Broadcasting contends that our procedures in this area are ripe for review, owing to the lapse of time since our last comprehensive allocations review in 1982, along with other factors, such as the dramatic increase in allotments created by Docket 80-90, which among other things created three new classes of FM stations.<sup>7</sup> First Broadcasting argues that the rule and procedural changes it proposes will allow licensees to increase spectrum efficiency by enabling faster community of license and other changes that will speed new and improved radio service to greater populations, and will generally reduce the time necessary to process certain FM facility modifications.

9. First Broadcasting proposes that we make the following changes to our procedures:
- a. Permit change of an FM broadcast station’s community of license through a minor modification application, rather than by rulemaking;
  - b. Presume that, under certain defined circumstances, relocating an FM broadcast station that constitutes a community’s sole local transmission service to a new community of license to become that community’s first local transmission service is in the public interest;
  - c. Establish a simplified procedure to remove “non-viable” FM allotments from the Table;
  - d. Open a one-time settlement window to allow rulemaking proponents and counter-proponents to resolve their competing proposals without limitation as to the amount of reimbursement, thus reducing the backlog of pending rulemaking proceedings to amend the Table;
  - e. Permit change of an AM broadcast station’s community of license through a minor modification application, rather than by a major modification application that may only be filed in an auction filing window; and
  - f. Streamline the process for downgrading a Class C station to Class C0 status.

10. The First Broadcasting Petition was placed on Public Notice by the Consumer and Governmental Affairs Bureau on April 22, 2004.<sup>8</sup> In response to the Public Notice, we received 28 comments from various interested parties, listed in Appendix B hereto.

11. We do not believe it is in the public interest at this time to seek comment on all of First Broadcasting’s proposals. Specifically, we do not at this time propose to establish a procedure for removing “non-viable” FM allotments from the Table. In FM Broadcast Auction No. 37, only two of 288 FM allotments failed to receive a bid. It is possible that with certain adjustments, such as reductions in the minimum opening bid amount, these allotments might attract interest in a re-auction. Very few FM licensees surrender their licenses and, should that occur, it may be more appropriate to offer such surrendered allotments at auction rather than delete them from the Table. While we do not rule out the possibility that some allotments may, ultimately, have to be deleted from the Table due to lack of viability or interest, our experience thus far suggests that this is not a problem that must be addressed at this time.

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<sup>7</sup> *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 94 F.C.C.2d 152 (1983), *recon. granted in part*, 97 F.C.C.2d 279 (1984).

<sup>8</sup> *Public Notice*, “Consumer and Governmental Affairs Bureau – Reference Information Center Petition for Rulemaking Filed,” Report No. 2657 (CGB Apr. 22, 2004).

12. We also decline at this time to revisit our procedures for downgrading Class C FM stations to Class C0 stations. While, again, we may wish to examine this issue more closely in the future, we believe it is not sufficiently congruent with our goal of streamlining allocation proceedings to warrant such examination at this time.

13. We do not, at this time, consider most of the additional proposals forwarded by commenters in response to First Broadcasting's petition, as we find that most are either subsumed under the proposals considered herein, are not sufficiently related to the subjects of the proposals considered herein, or lack substantial merit. We do, however, wish to consider a proposal suggested by Clear Channel Communications, Inc. ("Clear Channel"). In its comments, Clear Channel suggests that we consider charging a fee for filing petitions to amend the Table. Clear Channel contends that a fee would deter "speculative" petitions to add allotments for which the proponents have no intention of applying. We examine the scope of this concern beginning at paragraph 30 herein, as well as related legal issues. Additionally, based on the Commission's extensive experience, we propose limiting to five the number of channel additions, modifications, and substitutions that may be proposed in a single rulemaking proposal or counterproposal, as a way of further simplifying and streamlining processing of rulemaking proceedings. Finally, we propose to eliminate the exception in our rules that prohibits electronic filing of petitions to amend the Table.

### III. SPECIFIC PROPOSALS

14. **Permit AM and FM Station Community of License Changes by Minor Modification Applications.** *Background.* Currently, changes to community of license are considered to be major modifications in both the AM and FM services.<sup>9</sup> The Commission has, as recently as 1999, declined to make community of license changes for the AM and NCE FM services minor modifications, concluding that they raise "important statutory and policy issues under Section 307(b) . . . issues that require substantive legal analysis."<sup>10</sup> As a result, applications to change an AM station's community of license must be filed during an auction filing window and subjected to competing mutually exclusive applications, while applications to change an FM station's community of license must be made in a rulemaking proceeding, and subjected to counterproposals. The only exception in this regard is a rulemaking proceeding to change an FM licensee's community of license in which the amended allotment would be mutually exclusive with the licensee's or permittee's present assignment.<sup>11</sup> In such a case, the proposal is not subject to competing expressions of interest in the initially proposed reallocation (although counterproposals may be filed). However, the licensee or permittee must still file a petition for rulemaking to accomplish the community of license change.<sup>12</sup>

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<sup>9</sup> 47 C.F.R. §§ 73.3571(a)(1), 73.3573(a)(1).

<sup>10</sup> *1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, 14 FCC Rcd 5272, 5278 (1999) ("Tech P"). Unlike minor changes, major change applications are subject to a number of statutory requirements. These include providing both a thirty-day public notice period following the acceptance of a major change application and the opportunity to file petitions to deny and mutually exclusive applications within this 30-day period. See 47 U.S.C. § 309(b); 47 C.F.R. §§ 73.3573(3), 73.3580.

<sup>11</sup> 47 C.F.R. § 1.420(i).

<sup>12</sup> *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990) ("New Community MO&O").

15. A petition to amend the Table to specify a new community of license is initially analyzed to determine whether it will meet Commission legal (e.g., community status) and technical requirements (e.g., minimum distance separation and principal community coverage.)<sup>13</sup> If this analysis indicates that the proposed channel could be allotted at the new community, the Commission issues a *Notice of Proposed Rulemaking* (“NPRM”), seeking comment on the allotment and setting forth dates by which comments and reply comments must be filed.<sup>14</sup> During the comment period, parties may file counterproposals suggesting alternate, mutually exclusive uses of the spectrum in other communities. The change of community proponent must demonstrate that its proposal will result in a preferential arrangement of allotments by comparing the existing and proposed arrangement of allotments using the FM allotment priorities. If the Commission determines that grant of the proposal is in the public interest, it issues a *Report and Order* (“R&O”) amending the Table and modifying the license or permit to specify the new community, as well as directing the petitioner to file, within ninety days of the effective date of the R&O, a minor change construction permit application specifying the new community of license. The application is then studied for acceptability and, if acceptable, is placed on a Public Notice of acceptability. The application then undergoes technical analysis to verify compliance with the Commission’s rules regarding minimum distance separation, community coverage, and station class requirements with respect to tower height and operating power. If the application complies with all relevant requirements, a construction permit is issued. While the petitioner seeking the community of license change often specifies the same site in its application as in its petition, for various reasons the petitioner sometimes changes the technical specifications in the application. Also, at both the NPRM and application stages, other parties may oppose the proposed community of license change, by comment or counterproposal at the NPRM stage, or by informal objection at the application stage. Even an uncontested proceeding of this type may take over two years from filing the petition to grant of the implementing modification application.

16. An AM licensee or permittee seeking a change of community of license need not file a rulemaking petition, since there is no table of allotments for the AM service. However, it may not file its short form (Form 175) modification application until the opening of an AM auction filing window, of which there have been two to date (2000 and 2004).<sup>15</sup> Once filed, if the application is not mutually exclusive with any other window-filed application(s), the applicant may then file a long form (Form 301) application, which is studied by the Commission’s staff for compliance with Commission legal and technical rules.<sup>16</sup> If the short form application is mutually exclusive with other window-filed applications, the mutually exclusive applicants are given an opportunity to use settlements or engineering solutions to eliminate their mutual exclusivity.<sup>17</sup> If they are unable to eliminate mutual exclusivity, the applicants file amendments to their short form applications addressing whether their applications should be favored under Section 307(b) of the Communications Act of 1934, as amended (the “Act”).<sup>18</sup> If one modification

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<sup>13</sup> 47 C.F.R. §§ 73.207, 73.315(a).

<sup>14</sup> At this stage of the proceeding, the Commission also requests concurrence by the Canadian or Mexican governments if required to do so.

<sup>15</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, 13 FCC Rcd 15920, 15928 (1998) (“*Broadcast First Report and Order*”). See also 47 C.F.R. § 73.3571(h)(1)(i).

<sup>16</sup> See, e.g., 47 C.F.R. §§ 74.24(i) (principal community coverage requirement), 73.37 (signal overlap), 73.182 (interference and other engineering standards).

<sup>17</sup> *Id.* § 73.5002(d).

<sup>18</sup> 47 U.S.C. § 307(b). See *Broadcast First Report and Order*, 13 FCC Rcd at 15964-65.

application prevails under Section 307(b), that applicant files a long form application which is then studied. If no party prevails, all of the mutually exclusive applications proceed to auction. Only the winning auction bidder proceeds to long form filing and study.

17. Typically, an AM community of license change application is only subject to challenge by petition to deny or informal objection, and then only when the applicant files a long form application. However, because AM major modification applications are only filed during auction filing windows, there is no guarantee that the permittee or licensee will even be able to change its community or, if it is able to do so, it may be required to submit a substantial winning auction bid. Even if the applicant is not mutually exclusive with other window-filed applicants, at a minimum, the applicant will wait eight to nine months before it may file a long form application as a result of auction procedures and the complex engineering review the staff must complete. If the application is mutually exclusive, the wait before an auction is scheduled can be over a year.

18. *Discussion.* First Broadcasting contends that the current Commission procedures for changing an FM station's community of license consume "extraordinary" amounts of Commission resources, involve substantial financial expenditures by proponents, and take years to complete.<sup>19</sup> First Broadcasting further states that the delays inherent in the rulemaking procedures introduce "a great deal of regulatory uncertainty into the FM broadcast industry," leading to a disincentive on the part of broadcasters to invest in their facilities.<sup>20</sup> With regard to AM community of license changes, First Broadcasting similarly complains of delays, primarily due to the amount of time between the opening of AM auction filing windows, and the amount of time between filing and the completion of auctions or Section 307(b) determinations.<sup>21</sup> First Broadcasting also contends that, by concentrating all such filings in a filing window, the simultaneous receipt of hundreds of such applications over-burdens Commission staff.<sup>22</sup>

19. By contrast, First Broadcasting argues that allowing community of license changes by minor modification application would dramatically decrease the processing time associated with FM rulemaking proceedings or AM auction filing window applications. Citing the Commission's *Report and Order* allowing so-called "one-step" FM station modifications,<sup>23</sup> First Broadcasting claims that, by allowing community of license changes under the same procedures as current "one-step" modification applications, the public interest will be served by speeding implementation of service modifications. Additionally, First Broadcasting contends that processing community of license change applications on a first come-first served basis, evaluating Section 307(b) showings as submitted by applicants rather than having to analyze a series of proposals, comments, and counterproposals, will reduce staff burdens, processing time, and uncertainty on applicants' part. On the AM side, First Broadcasting argues that spreading out such applications over time, rather than concentrating them in week-long filing windows, will enable the staff more thoroughly to review each application in order to determine whether grant would implement Commission policies.<sup>24</sup>

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<sup>19</sup> First Broadcasting Petition at 8.

<sup>20</sup> *Id.* at 8-9.

<sup>21</sup> *Id.* at 27-28.

<sup>22</sup> *Id.* at 28.

<sup>23</sup> *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993) ("*One-Step Order*").

<sup>24</sup> First Broadcasting Petition at 29.

20. First Broadcasting notes that there appears to be no obstacle to a proposal under which we would amend the Table through the use of applications rather than rulemaking proceedings, pointing out that “one-step” modifications to station channel or class, which are accomplished by application, result in changes to the Table.<sup>25</sup> Likewise, First Broadcasting contends that its proposal complies with the *Ashbacker* doctrine,<sup>26</sup> noting that in the *One-Step Order* the Commission observed that potential rulemaking counter-proponents are not “applicants” that acquire *Ashbacker* rights.<sup>27</sup> Further, in the *One-Step Order* the Commission concluded that the Supreme Court gave it the authority to promulgate rules limiting eligibility to apply for a channel if those rules would expedite enhanced service to the public.<sup>28</sup>

21. To address the flaws in allotment procedures, First Broadcasting proposes that we permit AM and FM licensees and permittees to file minor modification applications that specify community of license changes. Where the proposed facilities would be mutually exclusive with the applicant’s existing facilities, these applications would be processed on a first come-first served basis. The applicant would file an exhibit demonstrating that the proposed community of license change furthers the aims of Section 307(b) of the Act, and would demonstrate that any changes fully comply with all spacing rules, without requiring changes to any other facility. First Broadcasting notes, however, that should modifications to other facilities be required, we could require that any such related modification applications be filed simultaneously as contingent, interdependent applications.<sup>29</sup>

22. Commenters on this issue were divided. Many commenters support the First Broadcasting proposal for the reasons put forth by First Broadcasting, namely, the elimination of delays and the benefits of expediting the provision of enhanced broadcast services.<sup>30</sup> Some commenters have proposed slight modifications to First Broadcasting’s proposal. For example, Cox suggests we concurrently increase the number of contingent applications that may be filed from its current maximum of four, “to ensure that no public interest benefits of the rulemaking system are lost.”<sup>31</sup> Similarly, BBA/Scott believes the community change application process must be tied to the contingent application

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<sup>25</sup> *Id.* at 10 n.30.

<sup>26</sup> *Ashbacker v. U.S.*, 326 U.S. 327 (1945) (Commission may not grant one of two mutually exclusive applications without affording the parties the opportunity for a hearing).

<sup>27</sup> *Id.* at 10-11; *One-Step Order*, 8 FCC Rcd at 4739 and n.28.

<sup>28</sup> *Id.* at 4739, citing *U.S. v. Storer*, 351 U.S. 192 (1956).

<sup>29</sup> 47 C.F.R. § 73.3517.

<sup>30</sup> Commenters supporting the proposal were Radio One, Inc. (“Radio One”); Station Resource Group (“SRG”); Vox Radio Group, LP (“Vox Radio”); Minority Media and Telecommunications Council (“MMTC”); Univision Radio, Inc. (“Univision”); Cox Radio, Inc. (“Cox”); Keymarket Licenses, LLC, Forever Broadcasting, LLC, Forever Communications, Inc., Forever of Johnstown, LLC, Megahertz Licenses, LLC and Forever of PA, LLC (collectively “Keymarket”); Michael R Birdsill (“Birdsill”); Mad Dog Wireless, Inc. (“Mad Dog”); Simmons Media Group (“Simmons”); Media Venture Partners (“Media Venture”); Powell Broadcasting Company, Inc.-Spies (“Powell”); Brantley Broadcast Associates, LLC and Scott Communications, LLC (“BBA/Scott”); Cumulus Licensing, LLC, Marathon Media Group, LLC, 3 Point Media, LLC, Desert Sky Media, LLC, Mill Creek Broadcasting, LLC, Apex Broadcasting, LLC, Great South RFDC, LLC, Hunt Broadcasting, Inc., Alexander Broadcasting Co., Inc. (collectively “Cumulus”); American Media Services (“AMS”); Ovie E. Sisk (“Sisk”); Susquehanna Radio Corporation (“SRC”); Charles M. Anderson and Associates (“Anderson”); and Mullaney Engineering, Inc. (“MEI”).

<sup>31</sup> Cox Comments at 3.

rule,<sup>32</sup> and proposes increasing the maximum number of contingent applications that may be filed from four to six.<sup>33</sup>

23. A number of commenters oppose First Broadcasting's proposal.<sup>34</sup> Clear Channel states that the proposal would "harm the rights of counter-proponents" as well as the integrity of Section 307(b), further arguing that expedience should not undermine the fair and equitable distribution of radio service.<sup>35</sup> Likewise, Hanselman opposes the proposal, believing that an application procedure would make it too easy for stations to move from small to large markets.<sup>36</sup> In its comments, Hatfield & Dawson echoes the sentiment that "the design of First Broadcasting's proposal is such that it supports and encourages the relocation of stations from rural areas (typically served by fewer stations) to urbanized areas (with a higher density of population)."<sup>37</sup> Hatfield & Dawson also states that the local service issues surrounding community of license changes require a higher degree of public notice than a minor modification application typically provides.<sup>38</sup>

24. It appears that a change in Commission procedures to permit the filing of city of license modifications as minor change applications could significantly compress the current lengthy and inefficient two-step licensing process. It also appears that these changes could be implemented in a manner allowing sufficient scrutiny to ensure their consistency with Section 307(b) principles, by requiring that applicants submit an exhibit detailing how the proposed community of license change comports with the goals underlying Section 307(b), and by implementing other procedural safeguards, e.g., local public notice requirements. Moreover, it is unclear how such proposed procedures would harm the rights of counter-proponents. As indicated above, a prospective applicant is not a party to whom the *Ashbacker* doctrine applies.<sup>39</sup> Also, the Commission has concluded that *Ashbacker* does not preclude it from adopting rules that foreclose the filing of competing applications where doing so serves the public interest.<sup>40</sup> In the *One-Step Order*, the Commission explained that "[i]n *Ashbacker*, the United States Supreme Court held that where two bona fide applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give it. However, the Court has noted that the Commission can promulgate rules limiting eligibility to apply for a channel when such action promotes the public interest, convenience, and necessity."<sup>41</sup> For similar reasons, we tentatively conclude that *Ashbacker* is not an obstacle to permitting AM and FM station community of license changes by minor modification applications. We invite comment on this conclusion.

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<sup>32</sup> 47 C.F.R. § 73.3517(e).

<sup>33</sup> BBA/Scott Comments at 2.

<sup>34</sup> Commenters opposing this proposal were: Clear Channel Communications ("Clear Channel"); Hatfield & Dawson Consulting Engineers, LLC ("Hatfield & Dawson"); Nick De Vogel & Guy FH Dickinson ("Vogel & Dickinson"); Scott A. Lanter ("Lanter"); Kameron J. Hanselman ("Hanselman"); and Fishers Communications ("Fishers").

<sup>35</sup> Clear Channel Comments at 5-7.

<sup>36</sup> Hanselman Comments at 3.

<sup>37</sup> Hatfield & Dawson Comments at 2.

<sup>38</sup> *Id.* at 4.

<sup>39</sup> See *supra* paragraph 20. See also *One-Step Order*, 8 FCC Rcd at 4739 and n.28.

<sup>40</sup> See *supra* paragraph 20, citing *One-Step Order*, 8 FCC Rcd at 4739.

<sup>41</sup> *One-Step Order*, 8 FCC Rcd at 4739.

25. Additionally, the Commission has relied on the Table for over forty years, and has added nearly 5,000 FM station allotments during that period. Thus, potential counter-proponents have had ample opportunity to identify and pursue new FM station allotments. Further, if we adopt the First Broadcasting proposal, all parties with *bona fide* interests in adding new station allotments will be on an equal footing with city of license modification proponents to pursue their competing proposals. We discount the argument that the greater preclusive effect of a community of license change requires more protection for “would-be competing proponents.” Moreover, Clear Channel does not explain why “would-be competing proponents” necessarily would propose such preferential arrangements of allotments in reaction to a community change proposal, as opposed to submitting such allotment arrangements through an original rulemaking petition or minor modification application.<sup>42</sup> Because parties would not be precluded from filing such original proposals or applications at any time, the “preclusive effect” would be substantially reduced or, indeed, eliminated for any filer that is prepared to move forward with its allotment proposal.

26. We also believe that FM Auction No. 37 has cast substantial doubt on the *bona fides* of new FM station allotment proponents (whether filed as initial petitions or as counterproposals) to construct and operate new FM stations in the specified communities of license. 456 bidders qualified to participate in FM Auction No. 37. 259 of the 288 allotments available for bidding were added to the Table in routine rulemaking actions. Only 18 of the 149 individuals or entities that initially proposed any of these 259 allotments qualified to bid in the auction.<sup>43</sup> The heavy volume of new allotment proposals that currently are being filed by a relatively small number of filers – none of which is a current licensee – also evidences a lack of *bona fides* in the pledge to seek and construct these proposed FM stations.<sup>44</sup> By way of contrast, *every* city of license modification proposal constitutes a specific facility modification sought by a current permittee or licensee.

27. Accordingly, we tentatively conclude that proposals to change AM and FM broadcast station communities of license should be resolved by minor modification application on a first come-first served basis, rather than by AM auction filing window applications or FM rulemaking proceedings to change the Table. To the extent that an FM change of community application requires other changes in the Table that themselves constitute minor changes, e.g., move to an adjacent channel or a one-step upgrade or downgrade in station class, we propose that such additional proposals be filed simultaneously with a community of license change application, subject to the four-application limit on contingent applications.<sup>45</sup> We seek comment on whether such FM application filings may propose non-minor changes to the Table, e.g., vacant allotment channel substitutions or reference coordinate changes and involuntary channel changes to existing facilities. We further tentatively conclude that such AM and FM applications should be limited to those proposals in which the new facility would be mutually exclusive with the existing facility. Finally, we tentatively conclude that an AM or FM application for change of community of license must include a detailed exhibit demonstrating that the proposed change constitutes a preferential arrangement of allotments under Section 307(b) of the Act as compared to the existing allotment.<sup>46</sup>

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<sup>42</sup> Clear Channel Comments at 6-7.

<sup>43</sup> This total excludes allotments made vacant, for example, as a result of revocations, voluntary cancellations, or automatic forfeitures pursuant to 47 U.S.C. § 312(g).

<sup>44</sup> See discussion at paragraph 30, *infra*.

<sup>45</sup> 47 C.F.R. § 73.3517(e).

<sup>46</sup> See *New Community MO&O*, *supra* note 12, 4 FCC Rcd at 4873.

28. We seek comment on these tentative proposals, particularly with regard to the effect on the fair, efficient, and equitable distribution of radio service under Section 307(b). Is it reasonable for the Commission to shift to first come-first served filing procedures now that licensees have had over forty years to propose new or modified allotments under the current rulemaking procedures? Both the allotment priorities and numerous policies developed in allocations rulemaking proceedings are designed to limit the clustering of stations in urbanized areas and to ensure adequate levels of remaining aural service when stations seek to change their communities of license. We also recognize that spectrum congestion limits or precludes move-in opportunities in many markets. We seek comment on whether these well-developed policies are sufficient to limit the relocation of radio stations from rural areas to communities in or adjacent to Urbanized Areas. Should we also limit community of license changes to situations in which the new community has fewer transmission services than the applicant's current community of license? Should additional conditions be placed on such applications to prevent such a shift in radio service, for example, should such changes be limited to communities with fewer transmission services than the applicant's current community of license? Should the proposed minor change filing procedure be limited to situations in which the applicant's current community of license satisfies a specific transmission or reception service floor? Should there be additional public notice requirements for such applicants, for example, should they be required to publish notice of the application in local newspapers and/or make on-air announcements disclosing the application and soliciting public comment? In the case of FM stations, should such applications be limited to those in which only the applicant's allotment would be changed, or should we allow simultaneous applications to modify different stations pursuant to the contingent application rule?<sup>47</sup> If the latter, should the contingent application rule be modified in order to allow more contingent applications to be filed simultaneously?<sup>48</sup> Are there other procedures that should be implemented to ensure that Section 307(b) or any other concerns pertaining to applications to change a station's community of license will receive full consideration?

29. Finally, as noted above First Broadcasting takes the position that the proposed minor modification procedure should not pose any difficulties under the Administrative Procedure Act ("APA").<sup>49</sup> However, to avoid any APA issues, and because we believe that rulemaking proceedings are no longer necessary to modify FM stations' licensed communities due to the maturity of the FM service, we seek comment on whether we should remove the Table from the Commission's rules and henceforth allocate existing FM stations among communities solely through adjudicatory proceedings. Under this approach, the Table would continue to function as the Commission's basic plan for allotting new FM channels, and would be revised to reflect changes to FM station authorizations under our one-step and proposed new community of license change procedures. We anticipate that we would publish the Table by some means, for example, as a continually updated list of FM allotments in the Media Bureau's publicly accessible Consolidated Data Base System. Furthermore, under this approach we would add new allotments to the Table using procedures similar to those currently set forth in Section 1.420 of the Commission's rules,<sup>50</sup> and we would continue to apply the same substantive Section 307(b) policies when comparing competing allotment proposals. Specifically, we would adopt in Part 73 procedures analogous to those contained in Section 1.420, to permit the filing of "petitions to amend the FM Table of

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<sup>47</sup> 47 C.F.R. § 73.3517.

<sup>48</sup> *Id.*, §§ 73.3517(c), (e).

<sup>49</sup> 5 U.S.C. § 551 *et seq.*

<sup>50</sup> 47 C.F.R. § 1.420.

Allotments.”<sup>51</sup> In the case of new allotments, these procedures efficiently populate FM auction inventories, in turn enabling more frequent FM auctions (compared to auctions in the non-tabled AM service). Moreover, these procedures are needed to comply with Section 307(b) principles, which control notwithstanding that the Table may no longer be contained in our rules. We seek comment on this approach and the related rule changes it would require.

30. **Mandate Filing of Form 301 When Filing Petitions to Amend the Table to Add an FM Allotment.** *Background.* Currently a petitioner filing a petition for rulemaking to amend the Table pays no fee at the time of filing. The only time a rulemaking proponent pays a fee is when the proponent is a permittee or licensee that seeks to change its station’s community of license or upgrade its allotment, and that fee is only payable if and when the proponent’s rulemaking proposal is granted.<sup>52</sup> The rulemaking fee is paid in connection with the filing of the construction permit application to implement the amended allotment, and is in addition to the application filing fee. A proponent for a so-called “drop-in” allotment, that is, one that would amend the Table to allot a new channel at a community, pays no rulemaking fee.

31. In the past several years, a disproportionate number of the drop-in allotment proposals have been filed by a relative handful of parties:

- In 1999, one petitioner filed 102 drop-in petitions, out of a total of 350 filed that year. Thus, one-half of one percent of all discrete petitioners in that year accounted for 29.1 percent of all the drop-in petitions filed.
- In 2001, five petitioners each filed over 40 drop-in petitions totaling 227 petitions, out of a total of 447 such petitions filed that year. Thus, 3.1 percent of all 2001 petitioners filed over half (50.8 percent) of the petitions.
- In 2003, one petitioner filed 101 drop-in petitions out of a total of 308, 32.8 percent of the drop-in petitions filed that year. That petitioner plus three others together filed 185 of the 308 2003 drop-in petitions, or 60.1 percent, despite comprising only 3.9 percent of the total petitioners.
- In 2004, one petitioner filed 36 drop-in petitions out of a total of 171, or 21.1 percent.
- All told, for the years 1997-2004, eight petitioners accounted for 573 of a total of 2,054 drop-in petitions filed, or 27.9 percent, with each of these filing between 32 and 151 petitions.

32. When filing a petition for rulemaking to amend the Table to include a new allotment, the petitioner is required to set forth an expression of interest: it must declare that, should the new channel be allotted to a community, it intends to apply for that channel. However, some of the parties responsible for many new FM allotments have not followed through on their expressions of interest. For example, 62 of the 288 FM allotments put up for auction in FM Broadcast Auction No. 37, which took place in November of 2004, were originally proposed by one of the petitioners noted above who, nonetheless, did not apply to participate in Auction No. 37.<sup>53</sup> Thus, there is evidence that a significant portion of the staff’s workload in analyzing and processing drop-in rulemaking petitions is devoted to petitions filed by

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<sup>51</sup> *Id.* Certain ministerial changes to other rules would also be necessary, *e.g.*, modifying references to “Section 73.202(b)” in other rules.

<sup>52</sup> *See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989*, 5 FCC Rcd 3558, 3659 (1990) (“1990 Fees Order”), *recon. granted in part*, 6 FCC Rcd 5919 (1991) (“1991 Fees Reconsideration Order”).

<sup>53</sup> Two of the other petitioners referenced above, responsible for adding, respectively, three and one new allotments offered in Auction No. 37, failed to apply to participate. None of the other petitioners noted in paragraph 43 of the text was responsible for any allotments offered for auction in Auction No. 37.

a relatively small number of parties. Moreover, even though such allotments have received bids at auction, to date the proponents of those allotments have seldom followed through on their expressed interest by bidding on those channels at auction. As a result, the actual auction bidders' choices are limited by allotments proposed by non-bidders, which may or may not represent optimal choices to the bidders. At the same time, auction bidders may be frustrated from attempting to petition for channels more desirable to them by the pendency of frequent filers' rulemaking petitions.

33. *Discussion.* Clear Channel, in its comments, notes the situation described above, and expresses concern not only about the diversion of staff time and resources, but about the preclusive impact of these filings.<sup>54</sup> Both licensees and future allotment proponents with *bona fide* interests in new and/or expanded service must protect these new allotments. Accordingly, Clear Channel proposes that we assess a filing fee for new petitions for rulemaking, payable upon filing, as a disincentive to insincere petitioners who would file drop-in petitions for reasons seemingly unrelated to a desire to apply for stations on those channels. Should we conclude that we lack the authority to assess such a rulemaking fee, Clear Channel alternately proposes that we require the simultaneous filing of a Form 301 application along with the drop-in proposal, and impose the application fee on the Form 301 filing.<sup>55</sup> Clear Channel's proposal received support from other commenters.<sup>56</sup> BBA/Scott suggests that, if we adopt Clear Channel's primary rather than its alternate proposal, the rulemaking fee should be the same as the Form 301 filing fee.<sup>57</sup> Cumulus likewise supports this proposal.<sup>58</sup>

34. We agree with Clear Channel that the evidence strongly suggests that a substantial portion of the allocations staff's time is spent processing drop-in petitions filed by parties that have no intention of applying for all of the allotments they propose. Thus, we tentatively conclude that it is in the public interest to encourage only *bona fide* proponents of new FM allotments. At the same time, we must comply with the law and assess fees only to the extent that they are authorized by Congress.<sup>59</sup> We therefore propose that a proponent or counter-proponent seeking to add a new allotment to the Table simultaneously file Form 301 for a new FM construction permit at the proposed community, and pay the required fee in connection with that filing. On the one hand, we recognize that this may impose additional staff processing burdens and delays. On the other hand, requiring the filing of such an application would tend to further discourage insincere proponents, by forcing them not only to pay the filing fee but also to complete a full application, including all required certifications and showings. Because this issue would exist even if we adopt the proposal to remove the Table from the Commission's rules,<sup>60</sup> we note that this proposal is not contingent upon that one, and would attach to whatever new procedures we establish if we remove the Table from the rules. To further ensure the *bona fides* of drop-

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<sup>54</sup> Clear Channel Comments at 2-4.

<sup>55</sup> *Id.* at 4 n.3.

<sup>56</sup> Commenters supporting this proposal were: Keymarket; BBA/Scott; Cumulus; MEI; and John W. Barger.

<sup>57</sup> BBA/Scott Comments at 6. The current fee for filing Form 301 is \$2,980. 47 C.F.R. § 1.1104(3)(a).

<sup>58</sup> Cumulus Comments at 14-16.

<sup>59</sup> 47 U.S.C. § 158(g). The Commission may only modify this schedule of fees to review and adjust them pursuant to 47 U.S.C. § 158(b)(1), to reflect changes in the Consumer Price Index. *See, e.g., Review of Commission Consideration of Applications Under the Cable Landing License Act*, 15 FCC Rcd 20789, 20828 and n.196 (2000). *See also 1998 Biennial Regulatory Review, Review of International Common Carrier Regulations*, 13 FCC Rcd 13713, 13726 (1998) ("Application fees are set by statute and may not be changed by the Commission.").

<sup>60</sup> *See supra* paragraph 29.

in proponents, we propose to add to Form 301 a certification, applicable only to those applicants simultaneously filing a drop-in petition or counterproposal for a new FM allotment, that the applicant intends to apply to participate in the auction for the new channel if allotted. We request comment on this proposal. We specifically seek comment on whether this proposal would create undue burdens and delays in processing or awarding new construction permits, and in particular invite comment on the likely effect of the proposal on the conduct of broadcast auctions and processing of auction applications. We also seek comment on whether this proposal would impact small businesses, which include some owned by minorities and women. We further invite commenters to submit other proposals designed to address the problem of non-*bona fide* allotment petitioners. Whatever procedures are ultimately used to add new allotments to the Table, we seek comment on the most effective means to ensure that those seeking to add those allotments are also those willing to bid for and construct facilities at those communities.

35. **Limit the Number of Channel Changes that May be Proposed in One Proceeding to Amend the Table.** *Background.* If a petitioner has filed a valid petition for rulemaking requesting a drop-in channel or a change to its or another station's channel(s), the staff will issue a notice of proposed rulemaking that gives notice, *inter alia*, of the fact that counterproposals may be filed and the date by which they must be filed. The petition for rulemaking may propose a large number of changes to the Table.<sup>61</sup> Also, it is sometimes the case that on or near the comment/counterproposal deadline, a party will file a counterproposal that involves a chain of channel changes or other modifications to existing facilities.<sup>62</sup> Large proposals and counterproposals such as those noted demand enormous amounts of staff time, as the staff attempts to untangle Gordian knots of interconnected proposals.

36. The Commission, in 1986, announced a policy whereby "absent special factors involving significant public interest benefits, or an assurance of agreement among affected stations to the proposal in advance of filing the petition, the staff has been instructed not to entertain proposals for changes in the [Table] which involve more than two other substitutions of channels occupied by existing FM or TV stations."<sup>63</sup> Implementation of this "Columbus, Nebraska Policy" has dramatically reduced burdens on the staff, yet as discussed above, significant staff resources are still consumed by large proposals and counterproposals even when all or most parties are in agreement as to the changes to the Table that are proposed.

37. *Discussion.* On our own motion, we propose to supplement the Columbus, Nebraska Policy. In addition to the prohibition on proposals involving more than two involuntary channel substitutions, we tentatively conclude that the total number of allotment proposals that may be set forth by a party in a given petition to amend the Table should be limited to five, unless the proponent(s) or counter-proponent(s) can demonstrate special factors involving significant public interest benefits. Failure to make such a showing would result in the proposal (or offending counterproposal) being returned with instructions to file separate proposals that conform to the numerical limit of five or fewer allotment proposals. We believe that while this might lead to greater numbers of petitions or other amendment proposals filed,<sup>64</sup> those filed would be considerably less complex, enabling the staff more

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<sup>61</sup> See, e.g., *Ardmore, Alabama, et al.*, 17 FCC Rcd 18101 (MMB 2002) (petition for rulemaking involving 19 communities).

<sup>62</sup> See, e.g., *Cross Plains, Texas*, 15 FCC Rcd 5506 (MMB 2000) (counterproposal involving 36 communities); *Farmersville, Texas, et al.*, 12 FCC Rcd 12056 (MMB 1997) (counterproposal involving 15 communities).

<sup>63</sup> *Columbus, Nebraska, et al.*, 59 R.R.2d 1184 (1986) (the policy announced therein shall be referenced as the "Columbus, Nebraska Policy").

<sup>64</sup> As with the previous proposal, this proposal would also be implemented in the event that we remove the Table from the Commission's rules and institute new procedures for amending the Table. See *supra* paragraphs 29 and 34.

efficiently to process them. We invite comment on this proposal, including comments as to whether the maximum number of channel changes or additions should be greater or smaller than that proposed. We also seek comment on ways in which to deter coordinated counterproposals designed to circumvent the limit on proposals by a party.

38. **Eliminate Rule Prohibiting Electronic Filing of Petitions for Rulemaking to Amend the Table.** *Background.* Currently, interested persons may file petitions for rulemaking with the Commission, and may submit such petitions electronically.<sup>65</sup> The rule allowing electronic submission of petitions for rulemaking, however, contains a specific exception for petitions filed in broadcast allotment proceedings.<sup>66</sup> When the Commission elected to allow electronic submission of petitions for rulemaking and other submissions and pleadings in rulemaking proceedings, it chose to exempt proceedings to amend the Table, owing to the large number of such proceedings and the fact that such rulemaking proceedings are restricted under our *ex parte* rules, increasing the chance that electronic submissions might not be properly served on the parties.<sup>67</sup> In the eight years since implementing electronic filing of rulemaking documents, however, we have gained much experience in the handling of pleadings submitted in this manner. At this point in time, 95 percent of all broadcast submissions are subject to mandatory electronic filing. Based on this experience, the Media Bureau and Consumer and Governmental Affairs Bureau have designed systems that will allow electronic filing of petitions to amend the Table, as well as other pleadings and comments associated with such proceedings.

39. *Discussion.* We believe that electronic filing of such documents will further streamline the process of amending the Table, enhance the accuracy and reliability of the FM database, and enable us to serve the public more efficiently in this regard. While the details of such filings will be fully implemented in later proceedings, we deem it appropriate at this stage to remove any impediments to full implementation of electronic filing. Accordingly, we propose to eliminate the current exception, contained in Section 1.401(b) of our rules, for electronic submission of petitions for rulemaking submitted in broadcast allocations proceedings. We seek comment on this proposal. Also, to the extent that we adopt the proposal to remove the Table from the Commission's rules,<sup>68</sup> we seek comment on whether and how best to enable electronic filing of proceedings to amend the Table.

40. **Seek Comment as to the Circumstances Under Which Relocation of a Community's Sole Local Transmission Service to Become Another Community's First Local Transmission Service is in the Public Interest.** *Background.* Our policies on allowing broadcast stations to change their communities of license are based, as they must be, on Section 307(b) and the goals of fair, efficient, and equitable distribution of radio service that underlie it. Our *FM Assignment Policies* delineate three core priorities: provision of first aural reception service to a community, provision of second aural reception service to a community, and provision of first local transmission service at a community.<sup>69</sup> The fourth priority is "other public interest matters," which encompasses any other factors that the Commission may take into consideration.<sup>70</sup> Very few proposals now purport to provide a first or second

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<sup>65</sup> 47 C.F.R. § 1.401(b).

<sup>66</sup> *Id.* ("The petition for rulemaking . . . shall be submitted or addressed to the Secretary, Federal Communications Commission, Washington, DC 20554, or (except in broadcast allotment proceedings) may be submitted electronically.").

<sup>67</sup> *Electronic Filing of Documents in Rulemaking Proceedings*, 13 FCC Rcd 11322, 11327 n.27 (1998).

<sup>68</sup> *See supra* paragraph 29.

<sup>69</sup> *FM Assignment Policies*, *supra* note 4, 90 F.C.C.2d at 91-93. Priorities (2) and (3) are co-equal.

<sup>70</sup> *Id.*

reception service to significant populations. There are, however, still many communities that lack a local transmission service, and many that only have one. Accordingly, the Commission prohibits the removal of an existing station representing a community's sole local transmission service.<sup>71</sup> This policy is subject, as are all Commission policies, to waiver under appropriate circumstances.<sup>72</sup> But the Commission has emphasized that "the fact that a proposal would create a new local service (at the expense of an existing service) is not sufficient, by itself, to warrant a waiver."<sup>73</sup> Rather, such a proposal "is presumptively contrary to the public interest."<sup>74</sup> In this regard, the Commission has stated that:

The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating of a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both. Removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service.<sup>75</sup>

41. *Discussion.* First Broadcasting contends that the policy of "promoting continuity of service over all other public interests is contrary to the intent of Section 307(b) and does not maximize service to the public."<sup>76</sup> Instead, it argues, the Commission's primary concern should be "to provide the most people with a first local service."<sup>77</sup> Accordingly, First Broadcasting urges us to establish a presumption that it is in the public interest to permit a station providing a community's sole local service to move to another community provided that (a) at least two other stations provide principal community service to the entirety of the current community,<sup>78</sup> (b) the station would be the first local transmission service in the proposed community, (c) the station moving would provide 70 dbμ service to a larger population in the proposed community of license, and (d) the move would not cause any short spacing and/or would fully or partially resolve existing short spacing. Thus, First Broadcasting essentially proposes to shift the presumption: it proposes that we require a party seeking to *retain* a sole local service, under certain circumstances, to demonstrate why the service should *not* be moved, rather than requiring a party seeking to relocate such a service to show why removal of the sole local service is in the public interest.

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<sup>71</sup> *New Community MO&O*, *supra* note 12, 5 FCC Rcd at 7097.

<sup>72</sup> *Id.* On waiver standards generally, see *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*") ("[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest," citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969) ("*WAIT Radio*").

<sup>73</sup> *New Community MO&O*, 5 FCC Rcd at 7097.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> First Broadcasting Petition at 15.

<sup>77</sup> *Id.* at 16.

<sup>78</sup> See 47 C.F.R. §§ 73.24(i) (principal community contour of 5 mV/m daytime for AM broadcast stations must encompass entire community of license, with 80 percent of community of license in non-expanded band being covered by 5 mV/m nighttime contour or nighttime interference-free contour, whichever value is higher), 73.315(a) (FM broadcast station must provide principal community service of 70 dbμ to entire community of license).

42. According to First Broadcasting, its proposal would provide two “significant benefits.” First, such an approach would enable the staff to consider multiple public interest benefits of such proposed community of license changes, rather than ending its analysis at preservation of local service.<sup>79</sup> Second, it urges that establishing such a presumption based on enumerated factors ensures that the staff’s Section 307(b) analysis will be conducted in an objective manner.<sup>80</sup> First Broadcasting concludes that its proposal “would provide the [Commission] with enough flexibility to permit modifications that serve the public interest and still prioritize first local service.”<sup>81</sup>

43. The comments on this proposal were, again, mixed. Most of the commenters who supported the proposal did so for the same reasons and under the same conditions put forward by First Broadcasting.<sup>82</sup> Keymarket suggests that, due to improvement in analog FM receivers and the soon-to-be-implemented digital audio broadcasting systems, the 60 dB $\mu$  contour should be used to determine adequate community coverage, rather than the 70 dB $\mu$  signal that First Broadcasting proposes.<sup>83</sup> AMS suggests two alternate conditions that should be satisfied when a licensee proposes to move a sole local transmission service to another community that has no local transmission service: (a) the interference-free “loss” area from the moving station should be abundantly served (served by five or more stations),<sup>84</sup> and (b) the interference-free contour of the facility should cover at least 50% more population than it did in the prior location.<sup>85</sup> Those opposing this proposal challenge First Broadcasting’s assertion that there is little value in continuity of service,<sup>86</sup> express concern that the proposal would encourage the move of facilities from rural communities to urban and suburban communities, and insist that the interests of those in rural areas should not be sacrificed in the name of “spectrum efficiency.”<sup>87</sup>

44. First Broadcasting proposes a fundamental change in the standard the Commission uses when evaluating first local transmission service proposals. Currently, the determining factor when comparing first transmission service proposals is the population of the respective communities, not the number of people provided reception service.<sup>88</sup> Because a station has a particular obligation to serve its

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<sup>79</sup> First Broadcasting Petition at 18.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Commenters supporting this proposal were: Radio One; SRG; Vox Radio; MMTC; Univision; Cox; Clear Channel; Keymarket; Birdsill; Bullock; Mad Dog; Simmons; Media Venture; Powell; BBA/Scott; Cumulus; AMS; Sisk; Anderson; and MEI.

<sup>83</sup> Keymarket Comments at 4 n.2.

<sup>84</sup> We consider five or more primary aural services to be “abundant.” *Family Broadcasting Group*, 53 RR2d 662 (Rev. Bd. 1983), *review denied*, FCC 83-559 (Nov. 29, 1983); *see also Bay City, Brenham, Cameron, Centerville, Edna, Ganado, Giddings, Harker Heights, Hearne, LaGrange, Matagorda, New Ulm, Point Comfort, Rollingwood, Rosenberg, and Seadrift, Texas*, 10 FCC Rcd 3337 (1995).

<sup>85</sup> AMS Comments at 6.

<sup>86</sup> Commenters opposing this proposal include: Hatfield & Dawson; Vogel & Dickinson; Lanter; Hanselman; and Fishers.

<sup>87</sup> *See, e.g.*, Hatfield & Dawson Comments at 2.

<sup>88</sup> *See Blanchard, Louisiana and Stephens, Arkansas*, 10 FCC Rcd 9828 (1995) (“Blanchard”).

community of license,<sup>89</sup> a proposal claiming to provide first local transmission service is properly evaluated based on the community itself, rather than the community plus any outlying areas that might also receive aural service from the proposed facility. First Broadcasting's proposal focuses exclusively on populations receiving service, rather than the size of the community principally to be served.

45. Moreover, while First Broadcasting proposes a service "floor" of two aural services covering the community from which a station is to be relocated, it does not specify whether any consideration should be given to the number of stations providing service to the new community, or to the population to be served by the station at its new location other than that it merely exceed the population being served by the current facilities. In support of its proposal, First Broadcasting offers a hypothetical situation which, it asserts, illustrates the potential inequity of our preference for retaining sole local service in a community.<sup>90</sup> Although First Broadcasting's hypothetical concerns a situation in which the incumbent community receives more aural reception services than the proposed new community, its proposal does not contain any provisions for taking into account the relative level of reception service between the two communities. It is just as easy to posit a situation in which removing a sole local service, under First Broadcasting's proposed criteria, would only exacerbate an existing imbalance in service between two communities.<sup>91</sup>

46. We believe it is appropriate to seek comment on whether we should more fully set out the factors under which a party could demonstrate that relocation of a community's sole local service is in the public interest. We also seek comment on whether adoption of this proposal would lead to the loss of service in rural and other underserved areas. Assuming that commenters believe such factors should be more clearly delineated, we request further comment as to what those factors should be and how they should be applied. For example, based on our current application of the first local service preference, should we require that the new community have a greater population than the community from which the station is to be relocated before allowing such a station move? If so, should the new community's population exceed the current community's by a certain percentage or (as is now our policy when comparing competing proposals for new first local transmission service) should we merely require that the move-in community have a larger population? Should the service floor at the community losing local service be higher than two stations, as AMS proposes? If so, what level of service should remain?

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<sup>89</sup> See, e.g., *Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, 13 FCC Rcd 15691, 15692 and n.3 (1998), *modified*, 14 FCC Rcd 11113 (1999) (Serving the needs and interests of its community is a "bedrock obligation" of every broadcast licensee," citing *Deregulation of Radio*, 84 F.C.C.2d 968, 977, 982, *on recon.*, 87 F.C.C.2d 797 (1981), *remanded on other grounds sub nom.*, *Office of Communication of the United Church of Christ v. F.C.C.*, 707 F.2d 1413 (D.C. Cir. 1983), and *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2312 (1960)). See also 47 C.F.R. §§ 73.1120, 73.3526(e)(12).

<sup>90</sup> First Broadcasting Petition at 16-17. In its hypothetical, First Broadcasting proposes a situation in which Community A receives eight aural services licensed to nearby communities, plus its own sole local transmission service, whereas Community B receives only two aural services, one of which is off the air, and which has no local transmission service of its own. First Broadcasting states that not allowing the local service to move from Community A to Community B, under these facts, would be contrary to the public interest.

<sup>91</sup> For example, one might propose the following hypothetical: Community A receives aural service from two stations, one licensed to each of two nearby communities, plus its own sole transmission service, WWW. Community B, adjacent to a large Urbanized Area, receives aural service from 15 stations, none of which is licensed at Community B. As long as WWW would provide principal community reception service to ten more people at Community B than at Community A, under First Broadcasting's proposal the move of WWW to Community B should be presumed to be in the public interest, notwithstanding that it would leave Community A with two aural reception services and Community B with 16.

Should the level of reception service at the new community of license be taken into account and, if so, how? For example, should we prohibit such station moves when the new community already receives abundant service? Is there a ratio of reception services between the new and old communities that should be employed in making this determination and, if so, what ratio of reception service would prohibit such a proposed move? By what percentage, if any, should we require that the population receiving principal community service at the new community exceed that receiving such service at the station's current community? Alternately, is it sufficient, as First Broadcasting proposes, that the station merely serve more people at its new location? Should there be increased local notice or publication requirements for such a proposal in addition to those that we might impose with regard to all city of license modification proposals?<sup>92</sup> Should we impose a transitional requirement on any licensee seeking such a move to serve the needs of both the old and move-in communities for a certain period of time? What other factors, if any, should be taken into account in making such a determination?

#### IV. ADMINISTRATIVE MATTERS

47. **Freeze on New Petitions for Rulemaking to Amend the Table.** Pending resolution of this rulemaking proceeding, we announce a freeze on the filing of all new petitions for rulemaking to amend the Table, effective as of the adoption date of this *Notice of Proposed Rulemaking*. Our principal aims are to reduce backlog and increase efficiency in handling allocations matters. We are concerned that this *Notice* could prompt the filing of an increased number of petitions by parties opposing some or all of the proposals herein. Thus, absent a freeze we could conceivably add to the allocations backlog faster than we clear it. Second, adoption of some or all of the proposals herein could substantially impact petitions filed while this proceeding is pending. For example, petitions to change an FM community of license would likely be dismissed in favor of applications to accomplish the same end. We direct the staff, in light of this freeze, to expedite its consideration of comments received in response to this *Notice*, as well as its preparation of recommendations to the Commission regarding a *Report and Order* in this proceeding.

48. **Settlement Window.** Currently, the Commission has 72 rulemaking petitions pending and awaiting release of an *NPRM*, with an additional 213 rulemaking proceedings in which *NPRMs* have been released, but no *R&O* has yet been released. Thus, currently there are a total of 285 pending allotment proceedings awaiting staff analysis and resolution. While these proceedings are at various stages of resolution, it could be several months to several years before these pending matters are disposed of, with more petitions being filed on an ongoing basis.

49. In the past, when faced with delays caused by a change in law or procedure, settlement windows have been opened to permit mutually exclusive applicants to resolve their mutual exclusivities and permit the expeditious authorization of new broadcast service.<sup>93</sup> In such circumstances, we have generally waived rules prohibiting the amounts that can be paid to resolve conflicts among mutually exclusive proposals.<sup>94</sup> In exchange for this waiver, we have generally required that settlements

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<sup>92</sup> See *supra* para. 28.

<sup>93</sup> See, e.g., *Public Notice*, "Window Opened to Permit Settlements for Closed Groups of Mutually Exclusive Broadcast Applications," 16 FCC Rcd 17091 (MMB 2001) ("*2001 Settlement Public Notice*"). The same approach is codified in Section 309(l)(3) of the Act, which was adopted as part of the Balanced Budget Act of 1997 to promote settlements of long-pending applications. 47 U.S.C. § 309(l)(3).

<sup>94</sup> *2001 Settlement Public Notice*, 16 FCC Rcd at 17091 (waiving provisions of 47 C.F.R. § 73.3525(a)(3)).

universally resolve all mutual exclusivities between or among applicants, so that no further staff analysis is required.<sup>95</sup>

50. Our rules permit a petitioner to amend the Table to withdraw its petition in exchange for consideration, provided that such consideration does not exceed the petitioner's legitimate and prudent expenses in pursuing its petition.<sup>96</sup> This limitation is necessary to prevent parties from filing frivolous, non-legitimate petitions solely for the purpose of obtaining cash settlements from serious petitioners.

51. First Broadcasting proposes a one-time 60- to 120-day settlement window to reduce the current backlog of pending proceedings to amend the Table. It believes that its other proposals will drastically reduce the number of such proceedings, and that reducing the backlog will allow the Commission to begin with a "clean slate" with regard to such proceedings.<sup>97</sup> To encourage such settlements, First Broadcasting proposes we waive the provisions of Section 1.420(j) of our rules, thus allowing payment of consideration in excess of the dismissing parties' legitimate and prudent expenses.<sup>98</sup>

52. We announce a 90-day settlement window, to open on a date to be announced by Public Notice released by the Media Bureau. The settlement window will be limited to those proceedings in which *NPRMs* have been released and for which the comment deadline fell on or before the release date of this *Notice of Proposed Rulemaking*. By limiting participation in this way, we address Clear Channel's concern that such a settlement window will encourage insincere filings for the sole purpose of receiving payment in exchange for dismissal. Those parties whose proposals and counterproposals are currently on file could not have known that a settlement window would open at the time they filed, thus there is no reason to question the legitimacy of their petitions or counterproposals.<sup>99</sup> The Bureau is to waive the provisions of Section 73.3525(a)(3) of our rules,<sup>100</sup> and must accept settlements that involve payments to petitioners in excess of their reasonable and prudent expenses. Settlements must be universal, *i.e.*, must result in the adoption or dismissal of all timely filed proposals and counterproposals and must be agreed to by all parties that have filed timely expressions of interest in any of the proposals or counterproposals in the particular rulemaking docket.

53. **Filing Requirements.** *Ex Parte Rules.* This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Commission's rules.<sup>101</sup> *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or

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<sup>95</sup> *Id.* But see *Public Notice*, "Window Announced for Noncommercial Educational FM Settlements and Technical Amendments – Settlement Reimbursement Cap Waived Until August 13, 2004," 19 FCC Rcd 10498 (MB 2004) (encouraging, but not requiring, universal settlements).

<sup>96</sup> 47 C.F.R. § 1.420(j).

<sup>97</sup> First Broadcasting Petition at 24-25.

<sup>98</sup> *Id.* at 25.

<sup>99</sup> We note that, while the First Broadcasting Petition proposing this settlement window was filed in early March 2004, fewer new petitions for rulemaking were filed in 2004 than in any of the past seven years except 1997. This further leads us to conclude that there has not been a rash of speculative rulemaking petitions filed in anticipation of a settlement window.

<sup>100</sup> 47 C.F.R. § 73.3525(a)(3).

<sup>101</sup> *Id.* § 1.1206(b), as revised.

otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.<sup>102</sup> Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

54. *Comments and Reply Comments.* Pursuant to sections 1.415 and 1.419 of the Commission's rules,<sup>103</sup> interested parties must file comments on or before 60 days after publication in the Federal Register, and must file reply comments on or before 90 days after publication in the Federal Register. Comments may be filed using: (1) the Commission's Electronic Comment Filing System ("ECFS"); (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.<sup>104</sup>

55. *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cbg/ecfs>, or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the Websites for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

56. *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, DC 20554.

57. *People with Disabilities:* Contact the FCC to request materials in accessible formats (braille, large print, electronic files, audio format, etc.) by e-mail at [FCC504@fcc.gov](mailto:FCC504@fcc.gov), or call the Consumer & Governmental Affairs Bureau at 202-418-0531 (voice), 202-418-7365 (TTY).

58. *Additional Information.* For additional information on this proceeding, contact Thomas Nessinger, [Thomas.Nessinger@fcc.gov](mailto:Thomas.Nessinger@fcc.gov), of the Media Bureau, Audio Division, (202) 418-2700.

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<sup>102</sup> See *id.* at § 1.1206(b)(2).

<sup>103</sup> *Id.* §§ 1.415, 1.419.

<sup>104</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

59. **Initial Regulatory Flexibility Analysis.** The Regulatory Flexibility Act of 1980, as amended (“RFA”), requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental 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).

60. With respect to this Notice, an Initial Regulatory Flexibility Analysis (“IRFA”) under the Regulatory Flexibility Act<sup>105</sup> is contained in Appendix A. Written public comments are requested in the IRFA, and must be filed in accordance with the same filing deadlines as comments on the *Notice*, with a distinct heading designating them as responses to the IRFA. The Commission will send a copy of this *Notice*, including the IRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, a copy of this *Notice* and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the *Federal Register*.

61. 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](mailto:Brian.Millin@fcc.gov).

62. **Paperwork Reduction Act Analysis.** This *Notice* may lead to a *Report and Order* that would contain information collection(s) subject to the Paperwork Reduction Act of 1995 (“PRA”), Public Law 104-13. This *Notice* will be submitted to the Office of Management and Budget (“OMB”) for review under the PRA. OMB, the general public and other Federal agencies are invited to comment on the possible information collections, such as FCC form revisions, contained in this proceeding. Comments should address: (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.

63. Written comments on possible new and modified information collections must be submitted on or before 60 days after date of publication in the *Federal Register*. In addition to filing comments with the Secretary, a copy of any Paperwork Reduction Act comments on the information collection(s) contained herein should be submitted to Cathy Williams, Federal Communications Commission, Room 1-A804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov), and to Kristy L. LaLonde, OMB Desk Officer, Room 10234 NEOB, 725 17th Street, N.W., Washington, DC 20503 via the Internet to [KristyL.LaLonde@omb.eop.gov](mailto:KristyL.LaLonde@omb.eop.gov) or by fax to 202-395-5167.

64. For additional information concerning the information collection(s) contained in this document, contact Cathy Williams at 202-418-2918, or via the Internet at [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov).

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<sup>105</sup> See 5 U.S.C. § 603.

**V. ORDERING CLAUSES**

65. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 307, 312(a)(7), 315, 317, 507, and 508 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 307, 312(a)(7), 315, 317, 508, and 509, that this *Notice of Proposed Rulemaking* IS ADOPTED.

66. IT IS FURTHER ORDERED that the Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, in a report to Congress pursuant to the Congressional Review Act, to the Chief Counsel for Advocacy of the Small Business Administration, and shall cause it to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”)<sup>106</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (“IRFA”) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *Notice of Proposed Rulemaking*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice of Proposed Rulemaking* provided in paragraph 54. The Commission will send a copy of this entire *Notice of Proposed Rulemaking*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).<sup>107</sup> In addition, the *Notice of Proposed Rulemaking* and the IRFA (or summaries thereof) will be published in the Federal Register.<sup>108</sup>

2. A small organization is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>109</sup> Nationwide, as of 2002, there were approximately 1.6 million small organizations.<sup>110</sup> The term “small governmental jurisdiction” is defined as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>111</sup> As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.<sup>112</sup> This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.<sup>113</sup>

3. **Need For, and Objectives of, the Proposed Rules.** This rulemaking proceeding is initiated to obtain comments concerning the Commission’s proposals to streamline the process of allotting and modifying FM broadcast channel allotments, and modifying AM broadcast station communities of license. The Commission believes these proposals will make the process of allotting and modifying such channel allotments and community of license assignments faster and more efficient. Additional proposals will discourage non-*bona fide* proponents of new FM channel allotments from filing petitions for rulemaking, thus providing more opportunity for *bona fide* proponents, including small businesses. Also, the Commission proposes eliminating a rule-based prohibition on filing allotment proposals electronically, the first step toward enabling electronic filing of such proposals, which will be less expensive and more

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<sup>106</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>107</sup> See 5 U.S.C. § 603(a).

<sup>108</sup> See *id.* § 603(a).

<sup>109</sup> 5 U.S.C. § 601(4).

<sup>110</sup> Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

<sup>111</sup> 5 U.S.C. § 601(5).

<sup>112</sup> U.S. Census Bureau, *Statistical Abstract of the United States: 2000*, Section 9, pages 299-300, Tables 490 and 492.

<sup>113</sup> See SBA, *Programs and Services*, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

convenient for applicants.

4. **Legal Basis.** The authority for this proposed rulemaking is contained in Sections 1, 2, 4(i), 303, and 307, of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 303, and 307.

5. **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 proposed rules.<sup>114</sup> The RFA generally defines the term "small entity" as encompassing the terms "small business," "small organization," and "small governmental entity."<sup>115</sup> In addition, the term "small Business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>116</sup> 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").<sup>117</sup>

6. **Radio Stations.** The proposed rules and policies potentially will apply to all AM and commercial FM radio broadcasting licensees and potential licensees. The SBA defines a radio broadcasting station that has \$6 million or less in annual receipts as a small business.<sup>118</sup> A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.<sup>119</sup> Included in this industry are commercial, religious, educational, and other radio stations.<sup>120</sup> Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.<sup>121</sup> However, radio stations that are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number.<sup>122</sup> According to Commission staff review of BIA Publications, Inc. Master Access Radio Analyzer Database on March 31, 2005, about 10,840 (95%) of 11,410 commercial radio stations have revenue of \$6 million or less. First Broadcasting, which filed the Petition for Rulemaking in this proceeding, is included in the definition of "small business." 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 allocation rules.

7. **Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.** The proposed rule and procedural changes may impose some additional reporting

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<sup>114</sup> *Id.* § 603(b)(3).

<sup>115</sup> *Id.* § 601(6).

<sup>116</sup> *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>117</sup> 15 U.S.C. § 632.

<sup>118</sup> *See* 13 C.F.R. § 121.201, NAICS Code 515112 (changed from 513112 in October 2002).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

requirements on existing and potential radio licensees and permittees, insofar as some of the proposed changes would require the filing of application forms rather than rulemaking petitions. However, the forms to be filed would be existing FCC application forms with which broadcasters are already familiar, so any additional burdens would be minimal. Additionally, we propose that parties seeking to add new allotments to the FM Table of Allotments simultaneously file FCC Form 301 with their petitions to add new allotments, and pay the Form 301 filing fee at that time. This would require petitioners for new allotments to file Form 301 earlier in the process than is the case now. However, it would be the same Form 301 as is currently filed by successful auction bidders. The only difference from Form 301 currently filed by applicants would consist of a certification that the proponent of the new FM allotment will participate in the auction for the new channel if allotted. We seek comment on the possible cost burden these requirements would place on small entities. Also, we seek comment on whether a special approach toward any possible compliance burdens on small entities might be appropriate.

**8. Steps Taken to Minimize Significant Impact on 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.<sup>123</sup> The Commission seeks comment on procedures to accomplish AM and FM community of license changes that will, in most instances, reduce the burdens on all broadcasters, including small entities, compared to current procedures. The Commission also seeks comment on whether certain aspects of its proposals would change or undermine current policies to limit the relocation of radio stations from small and/or rural communities to communities in or adjacent to urbanized areas. Proposed changes to Commission procedures for adding FM channel allotments to the FM Table of Allotments are designed to make the process faster and more efficient, reducing delays to broadcasters in implementing new radio service. The Commission also proposes requiring that petitioners for new FM channel allotments simultaneously file Form 301, and pay the prescribed filing fee for Form 301. While this requires payment of the filing fee earlier than is the case in current practice, to the extent that petitioners ultimately obtain construction permits for these allotments, it is a fee they would be required to pay in any event, therefore this requirement should impose a minimal burden on petitioners. To the extent that a rule change proposed herein enables electronic filing of petitions to amend the FM Table of Allotments and comments on such proposals, the Commission believes that such change will reduce burdens on all broadcasters, including small entities, by reducing the time and effort spent in preparing and submitting such documents in hard copy, as is the current practice. The Commission also seeks specific comments on the burden our proposals may have on small broadcasters. There may be unique circumstances these entities may face and we will consider appropriate action for small broadcasters at the time when a Report and Order is considered.

**9. Federal Rules Which Duplicate, Overlap, or Conflict With, the Commission's Proposals.**  
None.

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<sup>123</sup> 5 U.S.C. § 603(b).

## APPENDIX B

## COMMENTERS ON FIRST BROADCASTING PETITION

Radio One, Inc.  
Station Resource Group  
Vox Radio Group, LP  
Minority Media and Telecommunications Council  
Univision Radio, Inc.  
Cox Radio, Inc.  
Hatfield & Dawson Consulting Engineers, LLC  
Clear Channel Communications  
Keymarket Licenses, LLC, Forever Broadcasting, LLC, Forever Communications, Inc., Forever of  
Johnstown, LLC, Megahertz Licenses, LLC and Forever of PA, LLC  
Michael R Birdsill  
Nick De Vogel & Guy FH Dickson  
Powell Broadcasting Company, Inc.- Bullock  
Mad Dog Wireless, Inc.  
Simmons Media Group  
Media Venture Partners  
Scott A. Lanther  
Kameron J. Hanselman  
Powell Broadcasting Company, Inc.-Spies  
Brantley Broadcast Associates, LLC and Scott Communications, LLC  
Cumulus Licensing, LLC, Marathon Media Group, LLC, 3 Point Media, LLC, Desert Sky Media,  
LLC, Mill Creek Broadcasting, LLC, Apex Broadcasting, LLC, Great South RFDC, LLC, Hunt  
Broadcasting, Inc., Alexander Broadcasting Co., Inc.  
American Media Services  
Olvie E. Sisk  
Susquehanna Radio Corporation  
Charles M. Anderson and Associates  
Mullaney Engineering, Inc.  
John W. Barger  
Fishers Communications