

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

In the Matter of)
)
Reexamination of the Comparative Standards for) MM Docket No. 95-31
Noncommercial Educational Applicants)
)
Association of America’s Public Television)
Stations’ Motion for Stay of Low Power)
Television Auction (No. 81))

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: February 14, 2002

Released: February 25, 2002

Comment Date: April 15, 2002
Reply Comment Date: May 15, 2002

By the Commission:

INTRODUCTION

1. We adopt this Second Further Notice of Proposed Rulemaking to seek additional comment on the procedures the Commission should use to license “non-reserved” channels in which both commercial and noncommercial educational entities have an interest. In the year 2000, the Commission decided to resolve mutually exclusive applications between such entities by competitive bidding. As explained below, the United States Court of Appeals for the D.C. Circuit has vacated that decision. We now seek additional comment to adopt new procedures to license non-reserved spectrum in which both commercial and noncommercial educational entities have an interest, consistent with the court’s opinion, our statutory authority, and our responsibility to serve the public interest.

BACKGROUND

2. For some time, the Commission has reserved a portion of the broadcast spectrum for noncommercial educational (“NCE”) use only. In the FM service, the Commission currently reserves twenty specific channels (88.1 MHz to 91.9 MHz, the “reserved band”), out of a total of one hundred

1 As developed more fully below, the Commission’s rules provide for the licensing and operation of a “noncommercial educational broadcast station.” 47 C.F.R. § 73.503; 47 C.F.R. § 73.621. As also developed more fully below, these stations are licensed to nonprofit educational organizations for use in the advancement of educational programs. 47 C.F.R. § 73.503(a); 47 C.F.R. § 73.621(a). In this document, we use the term “NCE entities” to refer to entities that are eligible under the Commission’s rules to hold licenses for NCE stations.

2 National Public Radio v. FCC, 254 F.3d 226 (D.C. Cir. 2001).

3 The Commission first adopted rules governing NCE radio stations on January 26, 1938. 3 Fed. Reg. 364 (Feb. 9, 1938). The Commission, at that time, allocated twenty five channels between 41,000 and 42,000 kilocycles for the exclusive use of such stations.

channels, for FM full-power and FM translator NCE use.⁴ In the full power television service, the Commission has reserved a similar proportion of channels, but using different channels in different geographic areas across the country.⁵ The Commission has not reserved channels or frequencies in other services (*i.e.*, AM, low power TV, TV translator), but the Commission has allowed NCE entities to operate on channels generally available in these services.⁶ When NCE entities have elected to apply for operation on non-reserved channels or to apply for operation in a service in which spectrum is not reserved for NCE use, however, they historically have competed for these channels under the same rules as commercial entities.

3. Traditionally, the Commission resolved mutually exclusive applications filed by commercial or NCE entities through often lengthy, and litigious, comparative hearings. The Commission considered different comparative criteria for reserved and non-reserved spectrum.⁷ Both processes were called into question in the early 1990s. The Commission's former Review Board described the criteria used by the Commission to resolve competing applications for reserved channels as "meaningless" and "vague,"⁸ and the United States Court of Appeals for the D.C. Circuit held the principal criterion used by the Commission to resolve competing applications for non-reserved channels to be "arbitrary and capricious, and therefore unlawful."⁹ In 1992, the Commission initiated a rulemaking proceeding to reexamine its comparative licensing selection processes for both commercial and NCE entities.¹⁰ The Commission thereafter opened this separate docket and released a *Notice of Proposed Rulemaking* to consider revising the criteria used to select among competing applicants for new NCE broadcast facilities.¹¹ One of the proposals on which the Commission sought comments was the use of a point system, instead of comparative hearings or lotteries, to award licenses.¹²

4. While the Commission was considering the record, the Balanced Budget Act of 1997 ("1997 Budget Act") became law, amending certain provisions of the Communications Act ("Act") relevant to the Commission's review of its licensing policies. Section 309(j), which had been adopted in 1993 to authorize the Commission to use competitive bidding systems to resolve mutually exclusive applications under certain circumstances, was amended by the 1997 Budget Act to require the Commission to use such systems subject to several exceptions. Specifically, section 309(j)(1) was revised as follows: "If . . . mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this

⁴ 47 C.F.R. §§ 73.201, 73.501. By definition, the reserved band is excluded from the FM Table of Allotments. 47 C.F.R. § 73.202(a).

⁵ 47 C.F.R. §§ 73.606 (analog TV channels), 73.622 (digital TV channels).

⁶ The Commission licenses AM NCE stations on an application-specific basis. Such stations must demonstrate that they meet NCE eligibility requirements. The Commission allows NCE entities to hold LPTV and TV translator licenses, but it does not license them as NCE stations *per se*.

⁷ See, e.g., *Real Life Educational Foundation of Baton Rouge, Decision*, 6 FCC Rcd 2577, 2577 (Rev. Bd. 1991) (reviewing policy statement on comparative criteria and how it was modified for NCE stations).

⁸ *Id.* at 2580 n.8 (citing *Black Television Workshop of Santa Rosa, Inc.*, 65 RR 2d 34, 35 (Rev. Bd. 1984)).

⁹ *FCC v. Bechtel*, 10 F.3d 875, 878 (D.C. Cir. 1993).

¹⁰ Reexamination of the Policy Statement on Comparative Broadcast Hearings, GC Docket No. 92-52, *Notice of Proposed Rulemaking*, 7 FCC Rcd 2664 (1992).

¹¹ 10 FCC Rcd 2877 (1995).

¹² With respect to the LPTV service, the Commission originally used weighted lotteries to choose from among mutually exclusive applicants. Again, the Commission licensed LPTV stations without regard to the commercial or noncommercial nature of the entity or service to be provided.

subsection.”¹³ Section 309(j)(2) sets forth the types of authorizations to which the competitive bidding authority of section 309(j)(1) does not apply, including “licenses or construction permits issued by the Commission . . . (C) for stations described in section 397(6) of this Act,” *i.e.*, NCE stations. The 1997 Budget Act also amended section 309(i) of the Communications Act to restrict the Commission’s authority to issue licenses or permits through a system of random selection to “licenses or permits for stations described in section 397(6) of this Act.”¹⁴

5. The Commission sought comment on these statutory changes through a *Further Notice of Proposed Rulemaking (Further Notice)* in this docket.¹⁵ Given the difference in treatment of licensing mechanisms for NCE and other stations, the *Further Notice* sought comment on how to resolve conflicts between commercial and NCE applicants for non-reserved spectrum.¹⁶ The Commission also sought comment on whether section 309 of the Act prohibited it from using competitive bidding to resolve any mutually exclusive applications when they included at least one NCE entity, or instead only when they involved reserved channels. The Commission sought comment on five specific policy options.

6. In the year 2000, the Commission adopted a *Report & Order* and rules on the issue.¹⁷ On the matter of statutory construction, the Commission “conclude[d] that the exemption of NCE applicants from our general mandatory auction authority does not prohibit us from auctioning non-reserved channels, even when NCE entities apply for those channels.”¹⁸ As a result, the Commission decided to require NCE entities to compete with commercial entities for non-reserved channels via competitive bidding. Moreover, to mitigate any hardship that the auction process might impose on NCE entities, the Commission also decided to relax the criteria necessary to reserve a new channel in the otherwise non-reserved spectrum. Specifically, the Commission decided that, on a going-forward basis, NCE entities could seek to reserve a channel in the Table of Allotments for exclusive NCE use, based on two new conditions (discussed below). If NCE entities could not make this showing, the Commission would not reserve the channel, but NCEs could still compete with commercial entities for the channel at auction.¹⁹

7. Several parties sought review in court of the Commission’s decision to require NCE entities to compete for channels in the non-reserved spectrum via competitive bidding.²⁰ In *NPR v. FCC*, the U.S. Court of Appeals for the D.C. Circuit rejected the Commission’s construction of section 309.²¹ The court held that “nothing in the Act authorizes the Commission to hold auctions for licenses issued to NCEs to operate in the unreserved spectrum,” because section 309(j)(2) denied the Commission the authority to use competitive bidding “based on the nature of the station that ultimately receives the license, and not on the part of the spectrum in which the station operates.”²²

¹³ 47 U.S.C. § 309(j)(1).

¹⁴ *Id.* § 309(i)(5)(B).

¹⁵ 13 FCC Rcd 21167 (1998).

¹⁶ With respect to reserved channels, the *Further Notice* proposed specific criteria the Commission might use if it adopted a point system, and also solicited comment on the possibility of using lotteries. The Commission subsequently adopted a point system.

¹⁷ 15 FCC Rcd 7386 (2000).

¹⁸ *Id.* at 7429.

¹⁹ *Id.* at 7427-7436.

²⁰ The petitioners were National Public Radio, the Association of America’s Public Television Stations, the Corporation for Public Broadcasting, and the State of Oregon.

²¹ 254 F.3d 226 (D.C. Cir. 2001).

²² *Id.* at 229.

OPTIONS

8. Given the court's decision in *NPR*, we seek additional comment on the mechanisms we should use to resolve the competing interests of commercial and NCE entities for non-reserved spectrum. We outline below several specific options: (1) holding NCE entities ineligible for licenses for non-reserved channels and frequencies; (2) permitting NCE entities opportunities to acquire licenses for non-reserved channels and frequencies when there is no conflict with commercial entities; and (3) providing NCE entities opportunities to reserve additional channels in the Table of Allotments. We could adopt one of these options, or we could adopt several of them to work in tandem with one another in order to expand opportunities and mitigate any hardship for applicants for licenses for NCE stations. For example, we could allow entities that seek to operate an NCE FM or TV station the opportunity to reserve a channel at the allocation stage, and even if they fail, still permit them to apply and compete for the channel at the licensing stage, subject to certain caveats, as described below. We invite comment on these options, as well as the submission of any others that would be consistent with the court's decision.

9. Before turning to a discussion of these options, however, we seek comment on the breadth of the statutory language that describes the entities that are exempt from auctions. As indicated above, section 309(j)(2)(C) states that the Commission's competitive bidding authority does not apply to "licenses or construction permits issued by the Commission . . . for stations described in Section 397(6) of this Act."²³ Section 397(6) of the Communications Act defines the terms "noncommercial educational broadcast station" and "public broadcast station" as a radio or television broadcast station which "(A) under the rules and regulations of the Commission in effect on the effective date of this paragraph, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes."²⁴ Section 397(6) became effective November 2, 1978. Both at that time and currently, the Commission's rules for the FM service stated that NCE stations "will be licensed only to a nonprofit educational organization and upon a showing that the station will be used for the advancement of an educational program."²⁵ Likewise, the Commission's rules stated for the TV service that NCE stations "will be licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television service."²⁶ Reading these eligibility requirements in the rules in tandem with the statutory exemption, we request comment on which applicants are exempt from competitive bidding and under what circumstances. Specifically, are all "nonprofit educational organizations" exempt from auctions whenever they apply for any broadcast license,²⁷ or only when they make a "showing that the station will be used for the advancement of an educational program"? In other words, is the "showing" of an "educational program" or "service" requirement that appears in sections 73.503 and 73.621 of the Commission's rules, part of the "eligibility" requirement that is incorporated by reference in section 397(6) of the Act? Or is the eligibility requirement referenced in section 397(6) only that the applicant be a "nonprofit educational organization"? If the latter is the case, a nonprofit educational organization

²³ 47 U.S.C. § 309(j)(2)(C).

²⁴ *Id.* § 397(6).

²⁵ 47 C.F.R. § 73.503(a).

²⁶ *Id.* § 73.621(a).

²⁷ Since the section 309(j)(2)(C) exemption applies to licenses and permits issued by the Commission "for stations described in section 397(6) of the Act," and section 397(6) describes radio or television broadcast stations that meet certain eligibility requirements, we believe that it is clear that the section 309(j)(2)(C) exemption reaches no further than broadcast licenses.

could not participate in an auction for a broadcast license under any circumstances – even if it were applying to operate a commercial station. If the former is the case, a nonprofit educational organization could participate in an auction for a broadcast license if it does not make “a showing that the station will be used for the advancement of an educational program.” If a nonprofit educational organization may participate in an auction, is it precluded, once having obtained a broadcast license, from providing noncommercial educational service or from later converting to noncommercial educational operations? Is its transferee precluded from these activities?

10. As we construe section 309(j)(2)(C), we note that certain other construction permits and licenses are also exempt from competitive bidding. Section 309(j)(2)(A) states that these construction permits and licenses include those “for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations that (i) are used to protect the safety of life, health, or property, and (ii) are not made commercially available to the public.”²⁸ We seek to ensure that our construction of section 309(j)(2)(C) is consistent with our implementation of section 309(j)(2)(A), taking into account the differences in the statutory language between the two provisions, and the D.C. Circuit’s interpretation of section 309(j)(2)(C) specifically.

11. **Option #1: Hold NCE entities ineligible for licenses for non-reserved channels and frequencies.** One option the Commission considered in the *Further Notice* that remains viable after the *NPR* decision is simply to hold NCE entities ineligible to apply for licenses for non-reserved channels and frequencies. In effect, this option would reserve that spectrum – *i.e.*, non-reserved FM (including translators) channels, TV channels, all AM frequencies, and all secondary TV services – for commercial use. As the Commission stated in the *Further Notice*, “[s]uch an option would be a departure from current policy.”²⁹ This approach, however, is consistent with the statutory language, as interpreted by the court in the *NPR* case. We seek comment on this option. Do NCE entities have sufficient reserved spectrum available to them in the areas they wish to serve? Are future opportunities to obtain licenses disproportionately located in either the reserved or non-reserved bands?

12. **Option #2: Permit NCE entities to acquire licenses for non-reserved channels and frequencies when there is no conflict with commercial entities.** While a decision to hold NCE entities completely ineligible for non-reserved channels has the advantage of clarity and simplicity, such a decision would preclude NCE entities from applying for non-reserved channels even when commercial entities do not wish to do so. As an alternative to that approach, the Commission could open a filing window for both commercial and NCE entities, and resolve mutually exclusive applications as follows. If only NCE entities filed mutually exclusive applications, the Commission could resolve the conflict through the current NCE point system;³⁰ if only commercial entities filed mutually exclusive applications, the Commission could resolve the conflict via competitive bidding. If both commercial and NCE entities filed applications for channels or frequencies that created a technical conflict, the NCE applicant would be ineligible for a license to operate on such channels or frequencies and the Commission would dismiss its unacceptable application. In services that use the Table of Allotments (*i.e.*, FM or TV),³¹ the

²⁸ 47 U.S.C. § 309(j)(2)(A).

²⁹ *Further Notice*, 13 FCC Rcd at 21186.

³⁰ Under this system, the Commission awards points to competing applicants, based on ownership diversity, technical parameters, localism, and state-wide networks, and grants the license to the applicant that receives the most points. *See Report & Order*, 15 FCC Rcd at 7399-7413.

³¹ The Table of Allotments is a list of commercial FM and TV channels designated for use in communities across the U.S., its territories, and possessions. 47 C.F.R. § 73.202 (FM); 47 C.F.R. § 73.606 (TV). If an entity wishes to operate on a channel that is not listed in the table, it must file a petition for rulemaking to amend the table. Once a channel is in the table, the Commission opens a filing window to accept applications for the channel. Applicants

(continued...)

Commission could modify this approach by providing NCE entities a prior opportunity to reserve or acquire a license for a channel, as described below, in order to mitigate any hardship to them.

13. If both commercial and NCE entities file mutually exclusive applications for channels in services that do not utilize the Table of Allotments (*i.e.*, AM, FM translators, LPTV, TV translators),³² such that there has not been an opportunity to reserve channels for exclusive NCE use, the Commission could allow the applicants an opportunity to settle the conflict.³³ If the applicants could not resolve the conflict through settlement or technical resolution, the Commission would then simply reject the NCE applicant, and award the license to one of the remaining commercial applicants through competitive bidding. Under this approach, however, there would be little incentive for the commercial applicant to try to settle or reach an engineering solution in the first place. Is there anything the Commission could do, consistent with section 309(j) as interpreted in the *NPR* decision, to encourage good faith resolution of such conflicts?

14. Any decision to allow NCE entities to apply for non-reserved channels through auction filing window procedures, and thereafter provide them a period of time in which to resolve any conflicts, implicates the Commission's anti-collusion rule.³⁴ This rule provides that, after the filing deadline for FCC Form 175 (the "short form" application to participate in an auction), "all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the down payment deadline, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application. . . ."³⁵ Notwithstanding the general applicability of this rule to broadcast auctions, there are limited exceptions. For example, application groups consisting of either major modification applications that are mutually exclusive with each other, or major modification and new station applications that are mutually exclusive with each other, may submit settlement agreements or technical solutions during a limited period after the filing of short-form applications but before the start of an auction.³⁶ Similarly, mutually exclusive applicants for secondary broadcast services, such as LPTV and television and FM translators, may resolve their conflicts by means

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need not submit engineering data; applications specifying the same allotment are considered mutually exclusive. Applicants do not have an opportunity to resolve their mutually exclusive applications prior to auction.

³² In order to license AM, FM translators, and secondary TV services, the Commission opens a filing window to accept applications for the service. Applicants must submit engineering data that identifies the specific community of license and unique technical parameters of their proposed service. Applications are mutually exclusive if the engineering data indicates that the proposals are in technical conflict. As explained more fully below, certain applicants have an opportunity to attempt to resolve their mutually exclusive applications prior to auction.

The Commission uses this process with respect to the twenty reserved channels for NCE FM and NCE FM translator services as well.

³³ While section 309(j)(1) instructs the Commission to resolve mutually exclusive licenses for non-exempt classes through competitive bidding, it does so subject to the caveat in section 309(j)(6)(E). That section states: "Nothing . . . in the use of competitive bidding shall be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation . . . and other means in order to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. § 309(j)(6)(E).

³⁴ See 47 C.F.R. §§ 1.2105(c) and 73.5002(d).

³⁵ *Id.* § 1.1205(c)(1).

³⁶ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services, MM Docket No. 97-234, *First Report & Order*, 13 FCC Rcd 15920, 15927 (1998). See also *AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction*, Public Notice, DA 00-2416 (released October 27, 2000).

of engineering solutions or settlements during a limited period after the filing of short-form applications but before the start of an auction.³⁷ The Commission noted that allowing competing applicants to settle following the filing of the short form application was not consistent with the general Part I anti-collusion rules, but nonetheless concluded that, in these particular contexts, doing so would serve the public interest. For competing broadcast application groups that are subject to the anti-collusion rules and therefore may not participate in a settlement, should the Commission revise the anti-collusion rules to permit competing applications to pursue a settlement where at least one of the competing applicants is an NCE entity? In the interest of preserving the effectiveness of the anti-collusion rules in general, how can we accommodate settlements in this context? Should we amend our anti-collusion rules to accommodate engineering and other settlements to resolve mixed groups? Should we limit any such exceptions to engineering settlements, and prohibit financial and other types of settlements?

15. **Option #3: Provide NCE entities additional opportunities to reserve channels in the Table of Allotments.** Another option the Commission considered in the *Further Notice*, and ultimately adopted in the *Report & Order*, is to provide opportunities to reserve additional FM and TV channels for NCE use through relaxed reservation criteria. Specifically, the Commission decided to reserve a channel, at the allocation stage, if a proponent for reservation could demonstrate two things: (1) in the case of radio, the proponent is technically precluded from using a reserved channel, or in the case of TV, there is no reserved channel available in the proponent's community, and (2) the proponent will provide a first or second radio or TV NCE service to 10% of the population within, in the case of radio, the 1mV/m contour, and in the case of TV, the Grade B contour.³⁸ The Commission did not provide NCE entities an opportunity to reserve AM channels,³⁹ nor did it provide pending applicants for FM and TV channels in ongoing proceedings an opportunity to use the relaxed reservation criteria.⁴⁰ In order to provide NCE entities additional meaningful opportunities to reserve channels, the Commission now could further expand these criteria for future allocations, and apply and/or modify them for vacant allotments.

16. **Future Allocations.** As adopted in the *Report & Order*, if NCE entities could not satisfy the relaxed reservation criteria and the Commission ultimately allocated the channel as non-reserved, they could still file applications for the channel, with mutual exclusivity resolved by competitive bidding.⁴¹ After the *NPR* decision, the Commission may not permit applicants for authorization to operate an NCE broadcast station on a non-reserved channel to compete in an auction. Given that the result of an NCE entity's failure to reserve a channel is now more severe, should the Commission further relax the

³⁷ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services, MM Docket No. 97-234, *Memorandum Opinion & Order*, 14 FCC Rcd 8724, 8757-8759 (1999). See also *Low Power Television Auction No. 81 - Mutually Exclusive Proposals Subject to Auction*, Public Notice, DA 00-1289 (released May 25, 2001) (“*LPTV MX Notice*”).

³⁸ *Report & Order*, 15 FCC Rcd at 7434.

³⁹ *Id.* at 7435. The Commission explained its decision as follows: “AM is a mature service, already quite crowded, and in which little spectrum is available. No AM stations are reserved for NCE use. The Commission’s creation of an AM expanded band, to which some existing commercial stations will migrate, will relieve, but not eliminate, existing AM interference issues.” *Id.*

⁴⁰ There are pending 31 “mixed groups” (*i.e.*, mutually exclusive commercial and NCE applicants) for non-reserved FM channels, and 3 mixed groups for TV channels. The Commission expressly declined to give the NCE applicants in these groups an opportunity to reserve channels. *Id.* at 7435. There are also pending 4 mixed groups for FM translator channels, and 2 mixed groups for AM channels. We have recently provided all of these pending applicants the opportunity to settle their conflicts without regard to their reasonable and prudent expenses until February 15, 2002. See Public Notice, “Extended Settlement Period for Closed Groups Of Mutually Exclusive Broadcast Applications Announced,” DA 01-2890 (released Dec. 14, 2001). We seek comment on how we may treat these applicants consistent with our statutory obligations in the event they do not settle.

⁴¹ 15 FCC Rcd at 7435.

reservation criteria? If so, what should the criteria be? How should we define when NCE entities are “technically precluded” from using a reserved channel, as required by our current relaxed reservation criteria? Should the definition turn on the availability of equivalent facilities, or will the availability of some minimum class of facilities suffice? In order to assess the burden such a showing may impose on NCE entities, we also seek comment on how much it will cost for them to make the showing necessary to take advantage of the relaxed reservation criteria. What variables affect the cost?

17. **Vacant Allotments.** Also as adopted in the *Report & Order*, the opportunity to reserve additional channels is limited to future allocations, *i.e.*, for channels that have not yet been placed in the Table of Allotments. Prior to the *NPR* decision, however, the Commission had scheduled Auction No. 37 for approximately 350 vacant FM allotments.⁴² The Commission has also allocated more than 100 additional FM non-reserved channels subsequent to scheduling the vacant FM allotments for Auction No. 37. The Commission added many of these channels to the FM Table of Allotments prior to adopting the relaxed reservation criteria, with the result that NCE entities have not had the opportunity to take advantage of the relaxed criteria for those channels. Even in circumstances where NCE entities have already had that opportunity, they might not have reasonably foreseen that the court’s decision in the *NPR* case, coupled with the Commission’s regulatory response to that decision, might affect their ability to compete for non-reserved channels, where commercial entities file competing applications.

18. Should we establish a procedure for NCE entities to show that these vacant allotments should be reserved under the relaxed criteria? What reservation criteria should be used where the channel has already been allocated through a rulemaking? Should it be the same as the criteria to reserve a channel in a future allocation proceeding, set forth above in paragraph 14? While there is no “finder’s preference” for a successful proponent in a channel allocation proceeding, is it fair to commercial entities to permit NCE entities at this point an additional opportunity effectively to remove a channel from the reach of a commercial proponent? Should we create any additional opportunity for NCE entities to attempt to reserve these allotments? If so, how can the Commission create such further reservation opportunities and at the same time accommodate the competing needs of commercial broadcasters in a manner that serves the public interest? Would it be appropriate to extend further reservation opportunities but require any NCE proponent to demonstrate a greater need for the channel before attempting to have it reallocated as reserved? For example, we could require NCE entities to show that there are no other channels available that would serve at least 50% of the area within the protected service contour of the subject allotment, assuming full-class operation of a station at the allotment site. This approach would minimize reserving vacant allotments in areas where other non-reserved channels are available. The process could involve the Commission announcing a date by which interested entities must submit any required showings. The date would be prior to the Form 175 auction filing window. Under this proposal, FM allotments for which no NCE entities have expressed an interest or for which NCE entities fail to satisfy the adopted reservation criteria would proceed to auction.

19. **Other Options.** If we adopt one or more of the above proposals, NCE entities could be accorded more flexible approaches to reserving additional FM and TV channels for NCE use, including channels that have been allocated but not yet licensed, and the ability to operate on non-reserved channels and frequencies if no commercial entities apply for those channels and frequencies. We wish to ensure that NCE entities have reasonable opportunities to obtain the spectrum they need. Will these options satisfy that goal? Are there other options the Commission should consider that would be consistent with the *NPR* decision and the Communications Act? We invite commenters to submit additional proposals that are fully consistent with the governing legal standards and would otherwise serve the public interest.

20. **Additional Issue Concerning LPTV and TV Translators.** As we reconsider our

⁴² Public Notice, “Auction for FM Broadcast Construction Permits Postponed Until December 5, 2001,” DA 01-619 (rel. March 7, 2001).

licensing policies for non-reserved spectrum, we also seek comment on issues unique to LPTV and TV translators. In the year 2000, the Mass Media Bureau and the Wireless Telecommunications Bureau opened a limited filing window to auction the channels for certain LPTV stations.⁴³ Thereafter, the Association of America's Public Television Stations (APTS) filed a motion to stay the LPTV auction. APTS argued that the *NPR* decision prevented the Commission from auctioning the licenses for channels that included a mixed group of applicants. In this *Notice*, we now consider the impact of the *NPR* decision upon mutually exclusive LPTV and TV translator applications. Given that the Commission never established a date for the LPTV auction, and that we will not do so until we resolve how the *NPR* decision affects our licensing of LPTV and TV translators, we dismiss APTS's motion as moot.

21. As discussed above, while the Commission does not reserve channels in several services, it still licenses NCE entities to operate NCE broadcast stations on AM and FM translator channels, if they satisfy the eligibility criteria and licensing requirements set forth in our rules. The Commission, however, does not license NCE entities as such for LPTV and TV translator channels. As indicated above, section 309(j)(2)(C) states that competitive bidding procedures shall not apply to "licenses issued by the Commission . . . for stations described in Section 397(6) of this Act."⁴⁴ Section 397(6) of the Communications Act defines the terms "noncommercial educational broadcast station" and "public broadcast station" as one which "(A) under the rules and regulations of the Commission in effect on the effective date of this paragraph, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes."⁴⁵ Given that the Commission has never licensed LPTV and TV translator facilities to operate as NCE stations, subject to the restrictions that apply to those stations, we seek comment on whether section 309(j)(2)(C) applies to LPTV and TV translator, and if not, whether we must use competitive bidding to resolve competing applications for these services, even if they include applications filed by entities that meet the general NCE eligibility criteria set forth in the rules. If licenses for LPTV and TV translators are within the scope of section 309(j)(2)(C), such licenses would not be available for NCE stations under the proposals in this Second Further Notice, except when the application of an entity for an NCE license is not in conflict with the application of an entity for a commercial license. Commenters who believe that these licenses are within the scope of section 309(j)(2)(C) should address what changes, if any, the Commission could make to its procedures to ensure that entities that wish to operate NCE stations have opportunities to obtain these licenses. Commenters who believe that the LPTV and TV translator services are within the scope of section 309(j)(2)(C) should also address how to determine which applicants for these services are NCE entities, given that there are no NCE eligibility criteria in those services. While we are not inclined to establish NCE eligibility criteria specifically for LPTV and TV translator channels, should we do so in order to give full effect to the *NPR* decision and to implement the procedures outlined above? Does the Commission have the statutory authority to adopt such eligibility criteria, and then use them to exempt applicants for NCE stations from auctions, given that the statutory exemption is based on the "rules and regulations of the Commission in effect on the effective date of" section 397(6), *i.e.*, 1978? If the Commission has the authority to adopt eligibility rules and use them as a basis to exempt applicants for NCE stations from auctions, one approach could be to extend NCE status to any LPTV or TV translator applicant that the Commission has already licensed as an NCE entity in a full-power service. The Commission would then resolve mutually exclusive "mixed" groups through the same mechanism we establish for other services. In addition, if we do change our licensing practices in the LPTV and TV translator services to authorize NCE stations, we must address the issue of how to resolve mutually exclusive LPTV and TV translator groups that contain applications filed by only NCE entities. Should we

⁴³ See *LPTV MX Notice*, *supra* note 37.

⁴⁴ 47 U.S.C. § 309(j)(2)(C).

⁴⁵ *Id.* § 397(6).

resolve those mutually exclusive NCE-only groups through the NCE point system we have established for full-power broadcast services?

CONCLUSION

22. Through the record established in response to this *Second Further Notice*, we seek to create new licensing mechanisms for spectrum in which commercial and NCE entities have competing interests. We intend these policies and procedures to be fully consistent with the court's opinion, our statutory authority, and otherwise to fulfill our statutory duty to serve the public interest.

ADMINISTRATIVE MATTERS

23. Comments and Reply Comments. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. 1.415, 1.419, interested parties may file comments on or before April 15, 2002, and reply comments on or before May 15, 2002. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

24. Comments filed through ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Post 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, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

25. Parties who choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, William F. Caton, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street SW, TW-A325, Washington, DC 20554. Parties who choose to file by paper should also submit comments on diskette. These diskettes should be addressed to: Wanda Hardy, 445 Twelfth Street SW, 2-C221, Washington, DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Word 97 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, docket number of the proceeding, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy – Not an Original." Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street SW, CY-B402, Washington, DC 20554.

26. The full text of this document, and comments and reply comments filed in this proceeding, are available for public inspection and copying during regular business hours at the FCC Reference Center, Portals II, 445 Twelfth Street SW, Room CY-A257, Washington, DC 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0270, TTY (202) 418-2555, or bcline@fcc.gov. Comments and reply comments are available electronically in ASCII text, Word 97, and Adobe Acrobat. The full text of this document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street SW, Room CY-B-402, Washington, DC 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or via email qualexint@aol.com.

27. This document is available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Brian Millin at (202) 418-7426, TTY (202) 418-7365, or bmillin@fcc.gov.

28. Ex Parte Rules. This is a permit-but-disclose notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

29. Initial Regulatory Flexibility Analysis. With respect to this *Notice*, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in Appendix A. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared an IRFA of the possible significant economic impact on small entities of the proposals contained in this *Notice*. Written public comments are requested on the IRFA. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the *Notice*, and must have a distinct heading designating them as responses to the IRFA.

30. Initial Paperwork Reduction Act Analysis. This *Notice* may contain either proposed or modified information collections. As part of our continuing effort to reduce paperwork burdens, we invite the public to take this opportunity to comment on the information collections contained in this *Notice*, as required by the Paperwork Reduction Act of 1996. Public and agency comments are due at the same time as other comments on the *Notice*. 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) ways to enhance the quality, utility, and clarity of the information collected; (c) 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. In addition to filing comments with the Secretary, a copy of any comments on information collections contained in this *Notice* should be submitted to Judy Boley, Federal Communications Commission, 445 Twelfth Street SW, 1-C804, Washington, DC 20554, or over the Internet to jboley@fcc.gov and to Jeanette Thornton, OMB Desk Officer, 10236 NEOB, 725 17th Street NW, Washington, DC 20503, or over the Internet to JThornto@omb.eop.gov.

31. Additional Information. For additional information, contact Eric J. Bash, Mass Media Bureau, Policy and Rules Division, (202) 418-2130 or ebash@fcc.gov.

ORDERING CLAUSES

32. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, and 309, this *Second Further Notice of Proposed Rulemaking* is ADOPTED.

33. IT IS FURTHER ORDERED that America's Public Television Stations' Motion for Stay of Low Power Television Auction (No. 81) IS DISMISSED.

34. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Second Further Notice*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policy and rules proposed in this *Second Further Notice of Proposed Rulemaking (Second Further Notice)*. 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 *Second Further Notice* provided above. The Commission will send a copy of the *Second Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. See 5 U.S.C. § 603(a). In addition, the *Second Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.

Need for, and Objectives of, the Proposed Rules

The Commission adopts the *Second Further Notice* in response to *National Public Radio v. FCC*.² This court decision vacated the Commission's earlier decision to require all entities, including those that are eligible to hold licenses for noncommercial educational (NCE) broadcast stations, to compete at auction for licenses for "non-reserved" spectrum, *i.e.*, spectrum that the Commission has not reserved for use by NCE stations only. The Commission must revise its licensing mechanisms and policies, consistent with the court's opinion and the Communications Act, to manage conflicts between applicants for commercial stations and NCE stations for licenses for non-reserved spectrum. In the *Second Further Notice*, the Commission has proposed three specific options: (1) holding NCE entities ineligible for licenses for non-reserved channels and frequencies; (2) permitting NCE entities opportunities to acquire licenses for non-reserved channels and frequencies when there is not a conflict with commercial entities; and (3) providing NCE entities opportunities to reserve additional channels in the Table of Allotments.

Legal Basis

The Commission adopts the *Second Further Notice* pursuant to sections 1, 2(a), 4(i), 303, 307, and 309 of the Communications Act, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, and 309.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.³ The RFA defines the term "small entity" as having the same meaning as "small business," "small organization," and "small governmental jurisdiction."⁴ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁵ 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

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 *et. seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAA"). Title II of the CWAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

² 254 F.3d 226 (D.C. Cir. 2001).

³ 5 U.S.C. § 603(b)(3).

⁴ *Id.* § 601(6).

⁵ *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 32). Pursuant to the RFA, 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." 5 U.S.C. § 601(3).

established by the SBA.⁶ A “small organization” is generally defined as “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. . . .”⁷ Nationwide, as of 1992, there were approximately 275,801 small organizations.⁸ A “small governmental jurisdiction” is generally defined as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand. . . .”⁹ As of 1992, there were approximately 85,006 such jurisdictions in the United States.¹⁰ This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of less than fifty thousand.¹¹ The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (96 percent) are small entities.

All of the proposals in the *Second Further Notice* will affect applicants for NCE stations on non-reserved channels and frequencies. Licenses for NCE stations are available only to nonprofit educational organizations upon a showing that they will use their proposed stations for educational purposes. The proposals could also affect applicants for commercial stations on non-reserved channels and frequencies. Applicants for non-reserved channels and frequencies therefore could include “small business concerns,” “small organizations,” and “small governmental jurisdictions.” The number of possible applicants is unknown.

Radio

Applicants could also include existing radio stations. As of September 30, 2001, the Commission had licensed a total of 13,012 radio stations, of which 4,727 were AM stations, 6,051 were FM commercial stations, and 2,234 NCE FM stations.¹² As of the same date, the Commission had also licensed 3,600 FM translators and boosters (commercial and NCE).¹³ SBA defines a radio station that has less than \$5 million or less in annual receipts as a small business.¹⁴ According to the Commission staff review of BIA Publications Inc. Master Access Radio Analyzer Database on January 24, 2002, about 11,000 full-power commercial radio stations have revenue of \$5 million or less. Many commercial radio stations, however, are affiliated with larger corporations with higher revenue, with the result that the estimate of 11,000 commercial radio stations likely overstates the number that qualify as small entities. The Commission does not know how many of its NCE FM station licensees qualify as small entities.

Television

Applicants could also include existing TV stations. As of September 30, 2001, the Commission had licensed a total of 1,686 full-power TV stations, of which 1,309 were commercial TV stations, and 377 were NCE TV stations.¹⁵ As of the same date, the Commission had also licensed 4,762 TV translators,

⁶ *Id.* § 632.

⁷ *Id.* § 601(4).

⁸ U.S. Dep’t of Commerce, Bureau of the Census, 1992 Economic Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

⁹ 5 U.S.C. § 601(4).

¹⁰ U.S. Dep’t of Commerce, Bureau of the Census, 1992 Census of Governments.

¹¹ *Id.*

¹² News Release, “Broadcast Station Totals as of September 30, 2001” (released Oct. 30, 2001) http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2001/nrmm0112.txt (“Broadcast Station Totals”).

¹³ *Id.*

¹⁴ NAICS Code 513112.

¹⁵ “Broadcast Station Totals,” *supra* note 12.

424 Class A TV stations, and 2,212 low-power TV stations.¹⁶ SBA defines television broadcasting establishments that have \$10.5 million or less in annual receipts as a small business.¹⁷ According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database on January 24, 2002, fewer than 800 of the commercial TV stations have revenues of \$10.5 million or less. SBA's definition, however, indicates that revenues of TV station affiliates that are not TV stations themselves should be aggregated with the revenues of the TV station to determine when a TV station is a small entity. The Commission's revenues figures for TV stations do not include the revenues of their affiliates that are not TV stations themselves, with the result that the estimate of approximately 800 TV stations likely overstates the number of TV stations that qualify as small entities. The Commission does not know how many of its NCE TV station licensees qualify as small entities.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The Commission anticipates that none of the proposals in the *Second Further Notice* will result in an increase in the existing reporting and recordkeeping requirements of potential applicants.

Steps Taken to Minimize Significant Economic 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 and 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.¹⁸

The *Second Further Notice* seeks comment on several specific proposals to resolve competing interests of commercial and NCE entities for non-reserved channels and frequencies. Each of these would strike the balance between applicants for commercial and NCE stations at a somewhat different point. Proposals that expand opportunities for applicants for licenses for NCE stations would enhance opportunities for "small organizations." Proposals that limit their opportunities would expand opportunities for commercial applicants, some of which may qualify as "small businesses." For example, if the Commission decided to hold applicants for NCE stations ineligible for licenses in the non-reserved spectrum, it would limit their opportunities to hold such licenses, but expand them for commercial applicants. Thus, adoption of any of the proposals in the *Second Further Notice* by the Commission is likely to have an insignificant and mixed impact overall on the economic opportunities for small entities. We seek comment from small entities on this issue.

Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

¹⁶ *Id.*

¹⁷ NAICS Code 51320.

¹⁸ 5 U.S.C. § 603(c).