

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

In the Matter of ) MM Docket No. 95-31  
 )  
 Reexamination of the Comparative )  
 Standards for Noncommercial )  
 Educational Applicants )

**REPORT AND ORDER**

**Adopted: April 4, 2000**

**Released: April 21, 2000**

By the Commission: Commissioners Furchtgott-Roth and Tristani approving in part, dissenting in part and issuing a joint statement; and Commissioner Tristani issuing a separate statement.

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## I. INTRODUCTION

1. The Commission hereby adopts new procedures to select among competing applicants for noncommercial educational ("NCE") broadcast channels. The new selection process replaces a subjective comparative hearing process that has been used for the past thirty years. We believe that the new system will be faster and less expensive than the former system but will continue to foster the growth of public broadcasting as "an expression of diversity and excellence, and . . . a source of alternative telecommunications services for all citizens of the Nation." 47 U.S.C. §396(a)(5).

2. The new system will use points to compare objective characteristics whenever there are competing applications for full-service NCE radio or television stations on channels reserved for noncommercial educational use. The point system will also be used, but to a more limited extent, to evaluate competing applications for NCE-FM translators. On non-reserved channels, we will generally use auctions to select among competing applications, even if NCE applicants are among the competitors. We have determined that we are not precluded from using auctions when an NCE entity applies for a commercially available

channel, and that the use of auctions on commercially available channels best reconciles conflicting directives in the statute. We will, however, provide additional opportunities for NCE entities to demonstrate -- prior to filing an application -- that a non-reserved channel should be reserved, and therefore not subject to auction. To make such a demonstration, the NCE entity will need to show that there is a greater need for permanent noncommercial educational service than for commercial service in its proposed service area.

3. For NCE radio station applications for frequencies on the reserved band, which can be mutually exclusive even if they specify different communities, we will first determine whether award of an NCE radio station to one locality over another would best achieve the goal of fair distribution of frequencies, and proceed to a point system only if this threshold issue is not dispositive. See 47 U.S.C. § 307(b). For mutually exclusive NCE television station applications, which are always for the same community due to the use of a television table of allotments, we will proceed directly to a point system. Under the new point-based selection process, we will award a construction permit for NCE radio and television stations to the applicant that receives the most points, with points awarded for local diversity, technical superiority, localism, and state-wide networks. If a tie results, and the parties are unable to settle among themselves, we will break the tie by awarding the permit to the applicant with the fewest existing authorizations and, if that fails to break the tie, with the fewest number of outstanding applications. For purposes of applying the point system, interests of related organizations and officers will be attributable to the applicant. As the point system is technically considered a form of comparative hearing, and hearings generally must be conducted by Administrative Law Judges or by the Commission, we will seek legislative authority to delegate responsibility for conducting the point system to our staff. In response to suggestions from commenters concerned about past abuses in the NCE licensing process and potential abuse in a process based on a point system, we will accept applications during filing windows, instead of using the current "A/B cutoff" method, and establish a four-year holding period for permits awarded through comparative consideration. To facilitate the transition to the new NCE application process, we will implement a temporary filing freeze on applications for new and major changes to existing NCE stations.

## II. BACKGROUND AND HISTORY

4. As fully described in the Further Notice of Proposed Rulemaking in this proceeding ("Further Notice"), 13 FCC Rcd 21167 (1998), the broadcast spectrum is divided into "reserved" and "non-reserved" channels. The reserved channels are for noncommercial educational use only, while the non-reserved channels are for all types of broadcasting, commercial and noncommercial. From the earliest days of broadcasting, and for both reserved and non-reserved spectrum, the Commission used traditional evidentiary hearings to select among competing applicants. The factors considered in hearings for reserved spectrum differed, however, from those used on nonreserved spectrum. In comparative hearings for reserved spectrum, the primary decisional factor used to choose between

applicants proposing to serve the same community was "the extent to which each of the proposed operations will be integrated into the overall educational operations and objectives of the respective applicants." See New York University, 10 RR 2d 215, 217-18 (1967). In comparative hearings for non-reserved spectrum, the Commission developed a variety of comparative criteria, including the "integration" of ownership and management, which presumed that a station would offer better service if its owners were involved in the station's day-to-day management. See Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965). If NCE applicants applied for non-reserved channels, all applicants - - NCE and commercial - - were evaluated using the commercial criteria.

5. Interest in changing the comparative selection process both for NCE and commercial stations dates back to the early 1990's. First, the Commission's Review Board described the NCE hearing criteria as "vague" and "meaningless," and indicated that it was often difficult to make a rational choice in noncommercial licensing cases. Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd 2577, 2580, n.8 (Rev. Bd. 1991). Shortly thereafter, a federal court held that the core integration criterion used to evaluate non-reserved applications, was "arbitrary and capricious, and therefore unlawful." FCC v. Bechtel, 10 F.3d 875, 878 (D.C. Cir. 1993) (Bechtel II). As a result, we initiated a broad inquiry into possible changes to the selection processes for both commercial and noncommercial broadcasters.<sup>1</sup> The Commission froze all ongoing comparative cases pending the establishment of new criteria. See Notice of Proposed Rulemaking, MM Docket No. 95-31, 10 FCC Rcd 2877, 2879 (1995) (Notice) (reserved channels); Public Notice, FCC Freezes Comparative Hearings, 9 FCC Rcd 1055 (1994), modified, 9 FCC Rcd 6689 (1994), further modified, 10 FCC Rcd 12182 (1995) (non-reserved channels).

6. Subsequently, Congress enacted the Balanced Budget Act of 1997 requiring the use of auctions to select among mutually exclusive applicants for commercial broadcast station licenses. See Balanced Budget Act of 1997, Pub. L. No. 105-33, 11 Stat. 251 (1997) (Balanced Budget Act). We recently implemented commercial auction procedures. Report and Order, Competitive Bidding for Commercial Broadcast and ITFS Service Licensees, MM Docket No. 97-234, FCC 99-74, 14 FCC Rcd 8724 (1999). (Competitive Bidding). However, the Balanced Budget Act does not extend mandatory auction authority to construction permits for "noncommercial educational broadcast stations" and "public broadcast stations," as defined by Section 397(6) of the Communications Act. See 47 U.S.C. §§ 309(j)(2)(C), and 397(6). With respect to such stations, the Commission has

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<sup>1</sup> See Notice of Proposed Rulemaking, Reexamination of the Policy Statement on Comparative Broadcast Hearings, GC Docket No. 92-52, 7 FCC Rcd 2664 (1992); Further Notice of Proposed Rulemaking, 8 FCC Rcd 5475 (1993); Second Further Notice of Proposed Rulemaking, GC Docket No. 92-52, 9 FCC Rcd 2821 (1994); Notice of Proposed Rulemaking, Competitive Bidding for Commercial Broadcast and ITFS Service Licensees, MM Docket No. 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, 12 FCC Rcd 22,363 (1997); First Report and Order, MM Docket No. 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, 13 FCC Rcd 15,920 (August 18, 1998), recon. denied Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999); modified Memorandum Opinion and Order, 14 FCC Rcd 12,541 (1999).

continuing authority to use other selection methods, such as lotteries and traditional comparative hearings.<sup>2</sup> See, e.g. Balanced Budget Act, § 3002(a), codified as 47 U.S.C. § 309(i)(5)(B). In this proceeding, the Commission issued a Further Notice of Proposed Rule Making asking whether a lottery, point system, or modified comparative hearing was the best selection procedure on channels reserved for NCE use. Further Notice of Proposed Rulemaking, Comparative Standards for Noncommercial Educational Applicants, MM Docket No. 95-31, 13 FCC Rcd 21167 (1998) ("Further Notice"). In view of the mandatory use of auctions for commercial stations, coupled with the exemption of NCE stations from auction, the Commission also sought comment on whether, and under what procedures, noncommercial entities may continue to compete with commercial applicants for non-reserved spectrum. In response to the Further Notice, we received approximately 60 comments, many of which were filed jointly with others, representing the views of well over 100 organizations. See Appendix B.

### III. DISCUSSION

#### A. Selection Methods on Reserved NCE Spectrum

7. The Further Notice sought comment on three possible ways to select among applicants competing for NCE reserved channels: (1) a simplified traditional hearing; (2) a weighted lottery; and (3) a point system. There is some support in the comments for each of the three options presented, as well as a new suggestion that permits be awarded to the first applicant to file. However, the vast majority of commenters favor use of a point system in which applicants would be awarded points for different aspects of their proposals and the applicant with the highest score would win. As discussed below, each method has some merit, but we agree with the majority of the commenters that a point system is best.

##### 1. Traditional Comparative Hearings

8. Several commenters believe that traditional hearings are necessary to select the very best applicant. Educational Information Corporation, for example, says that because hearings involve live interaction between the applicants and an Administrative Law Judge (ALJ), hearings result in reasoned decisions based on fine details, impossible to consider in other more mathematical or random selection procedures. The Center for Media Education maintains that an ALJ can differentiate between candidates who both have a certain characteristic, but who manifest that characteristic to different degrees. Pinebrook Foundation notes that the presence of an ALJ is very effective in exposing sham applications.

9. The vast majority of commenters, however, believe that the benefits of traditional hearings are outweighed by their disadvantages. Community Television, Inc. states that the

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<sup>2</sup> But see Section III(H) infra concerning NCE applicants on non-reserved "commercial" channels.

subjective nature of hearings makes it difficult for applicants to evaluate their chances of prevailing, resulting in lengthy proceedings, where the costs are prohibitive for many noncommercial educational organizations. Cornerstone Community Radio says that the traditional NCE hearing is more like a "war of attrition" than a process for selecting the best applicant. Several NCE licensees who have participated in the traditional hearing process maintain that cases were more often resolved by settlement among the parties than by ALJ decision.<sup>3</sup> Commenters, such as Mohave Community College, recognize that hearings can be much more thorough than other selection methods, but believe that there is a greater public interest in expediting new service to the public and in minimizing burdens on applicants and the Commission.

10. Upon considering the comments, we conclude that the primary benefits of traditional hearings (e.g., the ability to make fine distinctions between candidates and the ability to expose potential abuse by questioning applicants in front of a judge) are not substantial enough to justify maintaining that cumbersome approach. Lengthy traditional hearings are costly to noncommercial applicants (who often are less able to afford these costs than commercial applicants), require expenditure of substantial Commission resources, and significantly delay the implementation of noncommercial educational service to the public. The primary benefits of hearings can be accomplished to a large extent in shorter qualitative comparisons, coupled with safeguards to address any potential for abuse. Eliminating traditional hearings for NCE applicants would be consistent with our efforts to simplify and streamline our broadcast regulations overall, and with our elimination of commercial comparative hearings.<sup>4</sup> See First Report and Order, Streamlining of Radio Technical Rules, MM Docket No. 98-93, FCC 99-55, 14 FCC Rcd 5272 (1999); Report and Order, Streamlining of Mass Media Applications, Rules and Processes, MM Docket Nos. 98-43, 94-149, 13 FCC Rcd 23,056 (1998); Competitive Bidding, 13 FCC Rcd 15920 (1998). Accordingly, we reject proposals that ask us to retain the traditional hearing process.

## 2. Lotteries or First to File Approach

11. In response to the desire for a simpler, fairer, and less costly approach, several commenters support the use of lotteries, such as those once used in the Low Power Television Service.<sup>5</sup> In response to our concern that applicants selected through a random

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<sup>3</sup> Comments of Station Resource Group at 8; Comments of Alaska Public Telecommunications, Inc., et al. at 4.

<sup>4</sup> For commercial applications filed after July 1, 1997, the elimination of hearings was mandated by statute, but for applications filed prior to that date, the elimination of hearings was within the Commission's discretion.

<sup>5</sup> See, e.g., Comments of Educational Media Foundation. Competing LPTV applications are now resolved by auctions instead of lotteries pursuant to our Comparative Bidding decision. See note 1, supra.

process may not be the most likely to provide the highest level of public service, a few commenters state that, because NCE stations must satisfy the needs of listeners and underwriters to survive financially, they are as likely to provide a high level of service as applicants chosen through other processes.<sup>6</sup>

12. American Family Association also supports a simplified process, but believes that a "first in line" approach is preferable to a lottery. American Family would award a permit to the first qualified applicant to file. It views this as a way to encourage "pioneer" applicants who undertake the engineering work to identify an available NCE radio channel, and to discourage "copycat" applications that simply photocopy portions of the initial applications. American Family maintains that a first to file approach would be easily understood by the public, require no subjective decisions by the Commission, and be fair to every applicant.

13. The lottery and first to file suggestions are both opposed by other commenters. There is particularly strong opposition to lotteries from a broad range of NCE applicants who collectively voice three major concerns: (1) speculation; (2) failure to select the best applicant; and (3) the potential for judicial challenge and delay. With respect to speculation, commenters such as CSN International maintain that a lottery process would encourage an applicant to file more applications than necessary, just to "beat the odds." A few commenters conducted a study of our frozen proceedings, and believe that speculation has already begun based on the theory that we might have a lottery.<sup>7</sup> With respect to selection of the best applicant, commenters observe that the random nature of lotteries makes it entirely possible that the least qualified applicant could win. They maintain that even if a lottery is weighted to favor applicants with certain desirable qualifications, such weighting only gives an applicant additional chances, and that the outcome of a lottery remains random.<sup>8</sup> Finally, commenters are concerned that, as noted in the Further Notice, there are two lottery weightings, for broadcast diversity and minority ownership, that are mandated by statute, and which the Commission cannot change. See 47 U.S.C. § 309(i)(3). The commenters believe that these mandatory preferences may be difficult to apply to noncommercial broadcasters and/or unconstitutional in light of a

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<sup>6</sup> See, e.g., Comments of Pensacola Christian College at 14-15.

<sup>7</sup> Alaska Public Telecommunications, Inc., for example, states that it has analyzed information about competing NCE applications on the Commission's internet web site, and that over 400 of our current applications involve 15 to 20 NCE applicants who have overfiled against each other in virtually every state.

<sup>8</sup> See, e.g. Reply Comments of Educational Information Corp. at 6 ("We are very concerned and quite worried that the Commission is seriously considering a 'ping-pong ball, bingo machine' lottery approach . . . . The Commission should consider that even if the preponderance of evidence clearly shows that one applicant is better qualified in a particular comparative situation, the lottery method could still select . . . the least qualified of the lot.")

United States Supreme Court holding that racial preferences are subject to strict scrutiny.<sup>9</sup>

14. There is likewise little support for using a first to file approach as a stand alone selection method, although some commenters find it less objectionable as a component of a point system. Opponents to the first to file approach say that its only benefit is processing expedience. They believe that it would shift our applicants' focus from the quality of applications to the speed with which they can file.<sup>10</sup>

15. If our only goals were to select among competing NCE applicants easily and quickly, lotteries or first to file procedures would be excellent choices. Speed and efficiency are, however, only a part of what we seek to achieve. Public broadcasting holds a special place in meeting the informational, cultural, and educational needs of the nation. Neither a lottery nor a first to file approach is the optimal way to select applicants who will provide "diversity and excellence" in educational broadcasting to the public. See 47 U.S.C. § 396(a)(5). The statutory requirement that broadcast lotteries be weighted would increase the probability of selecting such an applicant, but, as noted by the commenters, would provide no assurance of such an outcome. It is also apparent from the comments that the statutory weightings will almost certainly become the subject of lengthy constitutional litigation, which would jeopardize the major benefit of lotteries: speed.<sup>11</sup> Accordingly, we reject these approaches.

### 3. Point Systems

16. There is broad support in the comments for use of a point system selection process. Under such a system, the Commission assigns points to various characteristics, evaluates applications for those characteristics, and awards a permit to the applicant with the highest score. Such a system has been used in the Instructional Television Fixed Service (ITFS), which also has educational goals. Commenters say that, in comparison to traditional

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<sup>9</sup> Adarand Constructors v. Peña, 515 U.S. 200 (1995). See also Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344; petition for rehearing denied, 154 F.3d 487; petition for rehearing en banc denied, 154 F.3d 494 (D.C. Cir.1998).

<sup>10</sup> Reply Comments of Center for Media Education, et al. at 16; Reply Comments of Mohave Community College at 5-6.

<sup>11</sup> One commenter argues that we could hold a straight lottery without statutory weightings because the simplicity of a lottery would in itself increase the applicant pool, and foster the statutory goals of diversity and minority ownership. See Comments of Pensacola Christian College at 9. In view of the specific language of the statute and its legislative history, as discussed in the Further Notice, we cannot accept this view that an unweighted lottery is legally permissible. See Communications Amendment Act of 1982, S. Rep. No. 97-101, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.C.A.N. 2237, 2291-92; Telecommunications Research and Action Center v. FCC, 836 F.2d 1349 (D.C. Cir. 1988).

hearings, a point system is an objective, inexpensive, and streamlined process.<sup>12</sup> Commenters also believe that a point system would make best use of scarce spectrum because the prevailing applicant would be the one proposing the most meritorious use, as defined by the points.

17. Commenters opposing a point system are generally those who strongly prefer one of the other options discussed above, and their reasons for disfavoring a point system generally correspond to their perception that another choice is superior. American Family Association, for example, a proponent of the simplicity of a first to file option, maintains that a point system, though simpler than a traditional hearing, is still too burdensome and time consuming because the Commission would continue to evaluate each application on the merits. Similarly, Educational Information Corporation, which strongly favors the thorough scrutiny that is possible in traditional hearings, believes that applicants can too easily manipulate a point system to obtain credits for which they do not truly qualify. Pensacola Christian College is concerned that a point system will discourage meaningful differences between applicants, because applicants will become homogeneous to conform to the ideals of the point system.

18. Nonetheless, after carefully weighing the pros and cons of all options, we have, as indicated, decided to use a point system to select among NCE applicants on reserved channels. We believe that an appropriately crafted point system can achieve a wide range of our goals for NCE broadcasting simultaneously. Through a point system, we can eliminate the vagueness and unpredictability of the current system, clearly express the public interest factors that the Commission finds important in NCE broadcasters, and select the applicant who best exemplifies these criteria. A point system would reduce the costs and time associated with comparative proceedings both for applicants and the Commission. NCE applicants, who often have limited financial resources, would not incur the large travel and legal expenses associated with preparing a case for hearing, giving live testimony, and cross-examining the testimony of others in traditional hearings. The Commission could render decisions relatively quickly by replacing lengthy narratives with simpler point tallies. Further, applicants that do not meet at least some of the criteria will be less likely to apply than in a random selection method in which they might win through luck alone. We recognize, as mentioned in the comments, that applicants may adopt various factors included in the point system, rather than those elements appearing spontaneously. If our point system provides an impetus for future NCE applicants to manifest characteristics that are genuine and in the public interest, we would view this as a positive result, regardless of any spontaneity. Of course, we would be concerned if these characteristics were merely feigned, and thus will select factors that are not easily subject to gamesmanship. We discuss below the factors we will include in our point system.

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<sup>12</sup> Comments of National Public Radio, et al. at 6; Comments of Roaring Fork Public Radio Translator, Inc., et al. at 2.

## B. Elements In An NCE Point System

19. In the Further Notice we proposed to award points to applicants who: (1) would offer a first or second NCE service to the community; (2) who had no other nearby stations; and (3) would serve at least ten percent more area and people than a competing proposal. The Further Notice also indicated our willingness to consider other factors. We specifically asked whether commenters would support credits for applicants: (1) controlled by minorities; (2) that have an established educational presence in the community; (3) that are part of an existing educational plan of a state or municipality; and/or (4) whose leadership would be significantly more representative of the community than other applicants. Although the commenters overwhelmingly support a point system, there is no corresponding level of agreement on the individual elements that would make up such a system, the number of points to be awarded to each element, or what to do in the event of a tie. However, the commenters' critique of the elements in our proposed system, together with their proposed modifications, form a good basis for our construction of a point system that will best serve the public interest. A summary of the point system that we have selected appears as Appendix A to this decision. In brief, we will consider fair distribution of stations to communities as a threshold issue and, if a decision is not reached on the basis of that factor, we will consider which applicant merits points for localism, technical superiority in terms of area and population served, and either diversity of ownership or service to accredited schools through a state-wide network.

### 1. Fair Distribution of Service as a Threshold Issue (Reserved Band Radio only).

20. In the Further Notice we proposed that, for mutually exclusive NCE FM radio applicants proposing to serve different communities on reserved channels, we would award points to the applicant that would serve a community receiving no other or limited other NCE service. We did not propose to consider this factor at the application stage for NCE television stations on reserved channels because reserved television channels are allotted to specific communities by table based on consideration of fair distribution standards. As a result, all mutually exclusive television applications necessarily propose service to the same community. Our analysis of NCE fair distribution also does not apply to AM channels because no AM channels are reserved for NCE use.

21. The Further Notice proposed to award a credit of two points for radio applicants offering first local NCE radio service received in a community. We proposed that radio applicants offering the second NCE service received or the first local service licensed to a particular community would receive one point. We noted that this proposal was based on Section 307(b) of the Communications Act, which states that the Commission must "provide a fair, efficient, and equitable distribution" of broadcast service among the states and communities. 47 U.S.C. § 307(b). The 307(b) factors proposed in the Further Notice are closer to those which have been used in commercial proceedings, than in NCE proceedings. The NCE 307(b) analysis, developed in New York University, 10 RR 2d 215 (1967) looked at "the number of other reserved channel educational FM services available

in the proposed service area of each applicant and the areas and populations served thereby." The first service/second service type of analysis proposed, while derived from commercial broadcasting, is more readily adapted to an NCE point system, and more consistent with our ongoing goal to evaluate applications quickly, with minimal burden on applicants and on the staff.

22. The commenters generally recognize that fair distribution of service is an important concept and that it is appropriate to consider when there are competing NCE radio applications proposing to serve different areas. See Seattle Public Schools, 4 FCC Rcd 625 (1989). For example, Colorado Christian University maintains that consideration of this factor is vital to provide educational broadcasting to unserved and underserved communities. Sacred Heart University urges the Commission to consider fair distribution of service issues first, as a threshold issue, as it has done in the past, before applying a point system.<sup>13</sup> Many of the commenters who support a credit for a first or second service to underserved areas believe that no corresponding credit should be awarded for first local NCE station licensed to a particular community. These commenters are concerned about the potential for abuse by applicants identifying small communities, when they propose facilities nearly identical to an applicant proposing to serve a large community and in fact intend themselves to serve that large community. Some comments, which were filed before we proposed in a separate proceeding to establish community coverage requirements for NCE facilities, argue that community of license is less meaningful in the NCE service because licensees are not required to cover their community of license with a specified signal strength.<sup>14</sup>

23. Several commenters, while supporting inclusion of a Section 307(b) component in the NCE selection system, believe that Section 307(b) factors will rarely be decisive. According to these commenters, about 91% of the country's population already receives at least one NCE radio signal.<sup>15</sup> There is also concern that the population receiving a first or second service be of a sufficient size to be meaningful. Commenters thus ask the Commission to define what constitutes a significant population receiving first or second service, and WAY-FM, Inc. suggests that the Commission establish one source or computer program, so that calculations can be consistent. To avoid abuse, Station Resource Group states that licenses awarded to applicants on the basis of Section 307(b) superiority should be conditioned on the applicant constructing substantially as authorized.

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<sup>13</sup> Reply Comments of Sacred Heart University, et al at 3.

<sup>14</sup> Since these comments were filed, we have proposed coverage requirements for NCE stations. See Notice of Proposed Rulemaking, MM Docket No. 98-93, Streamlining of Radio Technical Rules, 13 FCC Rcd 14,649, 14,876 (1998) ("Technical Streamlining").

<sup>15</sup> See Comments of NPR, et al. at 37, n. 86; Comments of Station Resource Group.

24. Upon consideration of the comments, we conclude that fair distribution of service should remain a threshold issue, rather than one of several factors considered together with others in a point system. This approach would be most consistent with our existing Section 307(b) approach, which has been upheld in court and recently followed in establishing auction procedures for commercial AM radio stations. See FCC v. Allentown Broadcasting Corp, 349 U.S. 358 (1955); Pasadena Broadcasting Co. v. FCC, 555 F.2d 1046 (D.C. Cir. 1977); Competitive Bidding, 13 FCC Rcd 15920, 16010 (1998). We recognize that there may not be a large number of cases in which Section 307(b) issues will be dispositive. Nevertheless, in those cases where there are substantial Section 307(b) differences, such matters will be addressed first. In examining fair distribution issues, we will use the general process set forth in the Section of our Competitive Bidding proceeding that addressed Section 307(b) considerations for AM stations. See Competitive Bidding 13 FCC Rcd 15920 (1998). Generally, a proposal to provide the first NCE service received by a comparatively large population will be preferred over another providing the first NCE service received by a significantly smaller population, or the second NCE service to any sized population. Similarly, a proposal that does not provide any significant first NCE service but which provides a second NCE service to a comparatively large population will be preferred over another such proposal providing second NCE service to a significantly smaller population. This threshold 307(b) analysis will not be undertaken at the application stage for NCE applications filed for channels identified in the television and radio Table of Allotments as reserved specifically for NCE use, as the 307(b) analysis has been previously conducted in the rulemaking component of the process when the designated community and channel were added to the table of allotments.

25. We agree with commenters that differences between proposals should be decisional only if they are significant. Mohave Community College, for example, suggests that we consider the provision of a first or a second NCE service insignificant unless the new service would reach at least 2,000 people or at least 5% of the people within the proposed coverage area. We generally concur with this suggestion, and with the 2,000 person minimum, but believe that the percentage difference in population coverage must be greater if it is to distinguish between applicants in well populated areas, as a threshold matter. Thus, for purposes of determining whether fair distribution of service dictates grant of one NCE radio application over another in a Section 307(b) context, we will first consider whether applicants who are proposing to serve different communities will provide the first or second NCE aural signal to at least 10% of the persons within the 60 dBu (1mV/m) service contours of their proposed NCE FM stations. For example, if census data indicates that 25,000 people live within a proposed NCE-FM station's service contour, the station would have to offer first or second NCE aural service to at least 2,500 people (10% of 25,000) to obtain a decisional preference. It is possible that more than one applicant might offer the same level (first or second) of NCE aural service to 10% or more of its coverage area. In such cases we will proceed to a second step, comparing the number of people receiving such new service from each station. We will grant the permit to the applicant which will provide the highest level (first or second) NCE aural service to

at least 5,000 more people than the other applicants.<sup>16</sup> Differences between competing proposals that amount to less than 5,000 people would be considered insignificant, and we would then compare the proposals under a point system. Thus, in our example of a service area covering 25,000 people, the applicant who would provide first or second NCE aural service to 2,500 people would be considered equivalent to a competing applicant that would provide that same level of new service to up to 7,499 people (2,500 people plus fewer than 5,000 additional people) and a point system rather than a dispositive threshold preference would be used to compare these applicants. If, however, the second applicant serving a different community would offer the same level of new service to 7,500 or more people, the applicant providing new service to the larger population would prevail as a threshold matter, because its proposal would be superior by at least 5,000 people.

26. As commenters rightfully stress, a consistent method must be used to count population. Based on our experience in examining population data supplied to us by various applicants, we conclude that population in NCE applications should be derived from figures provided by the United States Bureau of the Census. Applicants would determine population by counting persons within each of the relevant census blocks, the smallest unit of population measure of the Census Bureau.<sup>17</sup> Consulting engineers now commonly use this method to complete various types of broadcast application exhibits and its use here should produce consistent, reliable, and independently verifiable population data.

27. We also agree with commenters that a selection of one NCE applicant over another based on Section 307(b) considerations would not be meaningful were we to allow the prevailing applicant to amend its proposal and construct a facility with fewer or none of the benefits proposed. Therefore, we will adopt the suggestion that permits and licenses

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<sup>16</sup> This 5,000 population figure is larger than the de minimis standard used in allotment rule makings. See Seabrook, Texas, 10 FCC Rcd 9360 (1995). The higher number adopted here accounts for two differences between allotment proceedings and applications proceedings. First, allotment proceedings generally examine Section 307(b) issues in vastly underserved "white" and "gray" areas, so a difference in population of 1,000 people may be significant. When considering competing NCE applications, however, we will be focussing on the availability of NCE service, where presumably there will be other (commercial) service provided already. Second, in an allotment process, the party that "wins" gets a smaller advantage. When an allotment proposal succeeds, the result is merely the allotment of a station to a particular community, rather than the selection of a permittee. In contrast, the applicant prevailing in an application proceeding will receive a construction permit to the exclusion of other applicants.

<sup>17</sup> The inclusion of a particular census block will be based on the block's unique centroid coordinates. Applicants must use the most recent census block data made available by the Census Bureau. The Bureau of Census currently releases census block data following each decennial census but does not provide revised mid-decade census block population data.

awarded to applicants based on Section 307(b) considerations be conditioned on construction and operation substantially as proposed. Furthermore, we will prohibit an NCE radio applicant receiving a decisive 307(b) preference from downgrading service to the area on which the 307(b) preferences was based for a period of four years, the length of the holding period that we adopt *infra*. We note that, generally, under existing commercial radio policy a mutually exclusive applicant that receives an allotment as a result of a decisive Section 307(b) preference is not permitted to downgrade prior to one year of operation. Report and Order, Lower Classification of an FM Allotment, 4 FCC Rcd 2413, 2414 (1989). The longer (four year) period that we are adopting in the NCE context recognizes the greater benefit that this Section 307(b) preference provides to NCE applicants. An NCE applicant who prevails on Section 307(b) grounds at the application stage receives a construction permit, a definitive selection over other applicants, whereas commercial FM applicants who receive a Section 307(b) preference at the allotment stage must then file an application for a construction permit, which is subject to competition from others who also apply to be licensed on the allotted channel.

## 2. Points for Evaluating Applicants

28. For proceedings not resolved by our fair distribution analysis, we will apply the following point system to the competing applications. See paras. 114 and 115 *infra* (discussing allocation of nonreserved channels as reserved).

### a. Diversity of Ownership (2 points)

29. The first element in the point system will be diversity of ownership. In the Further Notice we proposed to award two points for "local diversity," *i.e.*, we proposed to award two points to the applicant if the principal community contour of the proposed NCE station does not overlap the principal community contour of any commonly controlled broadcast station. We stated that this proposal would foster our goal of broadcast diversity by enabling the local public to be served by differing NCE licensees. Further Notice at ¶ 21. We expressed concern, however, that favoring diversity might disadvantage state-wide educational networks, which often attempt to serve an entire state, and may have a state mandate to do so.<sup>18</sup> In an effort to achieve that goal, the contours of a state network's stations may overlap, which could disadvantage it under a point system favoring local diversity.

30. Most commenters favor some type of diversity credit, believing that diversity of ownership serves the public interest by promoting differences in programming and viewpoints.<sup>19</sup> The commenters disagree, however, over whether the credit should be for

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<sup>18</sup> See Further Notice at para. 14 (raised in the context of lotteries).

<sup>19</sup> See, e.g., Comments of WAY-FM, Inc., et al. at 4-5.

local diversity or national diversity. Commenters favoring consideration of only local diversity, such as St. Gabriel Communications, say that when one applicant already has a station serving an area, the public interest is best served by adding a new media voice. Colorado Christian University notes that without a credit for local diversity it would be easy for one entity to dominate in an individual community. Other commenters, however, believe that a credit for local diversity might harm existing local educational stations. National Public Radio and various individual NCE licensees state that a credit for local diversity would favor non-local applicants with hundreds of stations across the country over a local applicant with only one existing station. NPR states that local stations may seek to acquire a second station for various reasons, including a desire to improve service to outlying areas that receive the station's signal only marginally or a desire to develop dual program services in the same area. For example, it says that a university operating one station with a music format may apply for another station, and program it with news and information. Some commenters favor awarding separate points to state-wide networks, which presumably would balance any disadvantage such networks might experience if they were unable to receive a local diversity credit due to overlapping contours of stations within the network.<sup>20</sup>

31. Commenters opposed to local diversity as an element of a point system also are concerned that this factor might be subject to abuse. Station Resource Group believes that an experienced broadcaster with a good consulting engineer could "massage" the contour of the proposed station to avoid overlap with its existing station, and then modify the new station's contour later. Commenters state that relying on overlap of principal community contours is less than optimal in the NCE service because NCE stations are not currently required to place a principal community contour over their community of license.

32. Some commenters believe that the Commission's goals can better be achieved through a credit for national diversity. These commenters, such as National Public Radio, believe that small educators are being "squeezed out" by large groups wanting to establish national chains of NCE stations and propose that we apply a sliding scale of points to applicants, depending on the number of stations they control nationally. The points suggested vary from commenter to commenter. Alaska Public Telecommunications, for example, suggests 2 points for applicants with five or fewer stations in the same broadcast service (FM or TV); 1 point for applicants with 10 or fewer stations, a 2 point demerit for applicants with over 25 stations, and a 3 point demerit for applicants with over 50 same service stations nationwide. In response, Community Television maintains that applicants should not be penalized for their interests in other markets, such as by the demerit system discussed above, because this approach would attract novices to NCE broadcasting and drive out veteran broadcasters.

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<sup>20</sup> See para. 56 infra.

33. We have decided to include local diversity, but not national diversity, in the NCE point system. We have long considered diversity of local ownership a critical consideration because it enables the public to receive information reflecting a variety of viewpoints from different sources. In commercial broadcasting, even under the relaxed ownership provisions of the Telecommunications Act of 1996, local ownership of radio stations is restricted to a maximum of eight stations, no more than five of which can be in the same service (AM or FM), in the largest markets of 45 or more stations. Under recently adopted rules, local television ownership is still restricted to one or two stations, depending on the circumstances.<sup>21</sup> In contrast, the role of national diversity in our commercial ownership rules has recently been reduced. There are no national radio ownership limits, the national television ownership limit has been eliminated, and the national television audience reach cap has been raised from 25% to 35%.<sup>22</sup> We are not persuaded that national ownership plays such a significant role in NCE broadcasting that, contrary to the general trend in broadcasting, it should become a pivotal factor in licensing new stations.

34. Contrary to some commenters' views, we do not believe that a credit for local diversity would unduly limit the ability of the public to hear the viewpoint of existing NCE stations. With respect to the local NCE broadcaster who wants to offer better service to areas it now serves marginally, the broadcaster could achieve this result with a translator station, without constructing a second full service station.<sup>23</sup> With respect to the example of a college wanting to program multiple stations in different formats, the fewer existing stations licensed to that college, the easier it would be for it to plan its coverage to avoid any contour overlap, and therefore to qualify for the diversity credit. The college might be disadvantaged, as National Public Radio suggests, only if its multiple stations would cover the same area. In such circumstances we in fact do not think it is inappropriate to favor another applicant with no local outlet rather than permitting the local campus to express what may be the same editorial viewpoint through two separate outlets. We do recognize that different equities might apply to a larger university system providing educational services on multiple campuses throughout a state, for which it would be harder to avoid contour overlap. However, such applicants will not be disadvantaged because, if they did not qualify for the local diversity credit, they could likely qualify for an equal credit as a

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<sup>21</sup> See Report and Order, Broadcast Television National Ownership Rules, MM Docket Nos. 91-221 and 87-8, FCC 99-209 (Aug. 6, 1999).

<sup>22</sup> Order, National Television Ownership and Dual Network Operations, 11 FCC Rcd 12374 (1996); 47 C.F.R. § 73.3555 (e). See also Broadcast Television National Ownership Rules, MM Docket Nos. 96-222, 91-221, and 87-8, FCC 99-209 (Aug. 6, 1999).

<sup>23</sup> NCE radio licensees are able to operate translators more readily than their commercial counterparts because the restriction prohibiting a commercial station from operating a translator that extends the primary station's service area does not apply to NCE licensees. 47 C.F.R. § 74.1232.

state-wide network, as discussed in paragraphs 56 to 61 *infra*. As for the concern that small local educators could be "squeezed out" by large national chains of NCE stations, we consider this a valid concern, and will address it by including a localism factor in our point system, and by considering the extent of an applicant's national broadcast interests as a secondary factor, used as a tie breaker.

35. We believe that principal community (city grade) contour is the most appropriate benchmark for examining local diversity.<sup>24</sup> Most of a station's listeners generally are located within this contour. Accordingly, to foster diversity for most of a proposed NCE station's listeners, we will award two points to an applicant if the principal community (city grade) contour of the proposed station does not overlap the principal community (city grade) contour of any attributable NCE or commercial station (comparing radio to radio and television to television).<sup>25</sup> We discuss attribution in the NCE context in paragraphs 75 - 79 *infra*.

36. We specifically note that the principal community contour that we are using for purposes of determining this diversity credit, is smaller than the contours that we will use for purposes of determining whether a radio applicant should prevail based on fair distribution or whether a radio or television applicant should receive any points for its technical proposal. We have decided for purposes of considering diversity points, not to use larger contours (such as the 1 mV/m contour for FM radio and the Grade A or B contours for television), which are used for applying other points. Use of larger contours could preclude existing licensees from receiving diversity points, even if their existing stations are relatively distant from the proposed new station and would thus share few potential listeners. This is especially so for television stations, where the Grade A and Grade B contours can cover very large areas. Use of the principal community (city grade) contour focuses our diversity consideration on the area where the majority of a station's listeners are located.<sup>26</sup> We also note that, for radio, use of the principal community (city grade) contour follows existing policy, in which the Commission examines a somewhat smaller area for purposes of applying our commercial radio multiple ownership rules than for examining service area for our technical rules and fair distribution.

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<sup>24</sup> Unlike commercial stations, NCE FM stations are not required to provide a minimum field strength signal over their community. 47 C.F.R. § 73.315(a), Note a. We have, however, in a separate proceeding, proposed to begin requiring them to provide 60 dBu (1 mV/m) service to at least a portion of their community of license. Technical Streamlining, 13 FCC Rcd at 14,876 (1998).

<sup>25</sup> The principal community (city grade) contours are the 5 mV/m for AM stations under Section 73.24(i), the 3.16 mV/m for FM stations calculated in accordance with Section 73.313(c).

<sup>26</sup> For example, we have in a separate proceeding noted that a study by NBC shows that at least 72.4 percent of AM audiences are within the AM's station's principal community contour and that at least 63.8 of FM audiences are located with the FM station's principal community contour. First Report and Order, Broadcast Multiple Ownership Rules, MM Docket No. 87-7, 4 FCC Rcd 1723 (1989).

**b. Technical Parameters (generally 1 point)**

37. We proposed in the Further Notice to favor applicants who serve significantly larger areas and populations. Specifically, we proposed to award a point if there is a 10 percent or greater difference in the area and population to be served in one proposal than in a competing proposal. We proposed that, generally, this would be a one point credit, except that in certain rare instances an applicant with a far superior proposal could get two points. We proposed that applicants demonstrate both larger population and area because both are meritorious factors, and because it would otherwise be difficult, in the streamlined point system, to distinguish between mutually exclusive applications, one of which would serve a populous urban area with many existing radio stations, and the other of which would offer service to a wide area with fewer people and fewer existing service options.

38. Several commenters supported this proposal without revision.<sup>27</sup> Several others believe that clarifications would be needed to make this factor work, so that different engineers will derive consistent results. Mohave Community College suggests that the Commission should make the calculation of area and population itself or should require competing applicants to submit a joint engineering report calculating area and population in a manner agreed to by all parties. A few commenters oppose any credit for technical factors. Americans for Radio Diversity states that small community-focused stations sometimes better serve the public than stations reaching larger areas and populations. Community Television, Inc. is concerned that applicants may propose more than they are willing to build and then downgrade after receiving the credit.

39. We will adopt, with clarification and safeguards, a credit for technical parameters. We believe that for full power noncommercial educational stations, the public interest is best met when applicants maximize their facilities to reach the widest area and population. Thus we will give a one point credit to the applicant that covers the largest area and population, provided that this applicant covers at least 10% greater area and 10% greater population than the next best technical proposal. In rare instances in which the top applicant covers a 25% greater area and population than the next best proposal, we will award two points.<sup>28</sup> We are not suggesting that a small station that does not qualify for this credit cannot also provide excellent programming, only that fewer people and areas benefit from that programming.

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<sup>27</sup> E.g. Comments of Faith Broadcasting at 7; Comments of NPR, et al. at 23.

<sup>28</sup> The Further Notice, proposed a slightly different system of awarding these points based on whether a first application is 10% greater than a second application, which is in turn 10% greater than a third application. We believe that the method proposed, which compares only the best and second best technical proposals, is simpler for both the applicant and the Commission.

40. Of course, as commenters observe, this credit would not be meaningful if applicants could subsequently modify their facilities to cover smaller areas and populations. As with stations prevailing on Section 307(b) factors, we will condition new NCE authorizations that receive credit for technical parameters on construction of the facility substantially as authorized. If a modification is necessary, the applicant will be required to serve an equivalent area and population, unless the applicant makes a compelling showing that the modification would be in the public interest.<sup>29</sup> We also agree with commenters that all applicants must use the same standards so that they can be meaningfully compared. As established above, population should be based on the most recent census block data made available by the Census Bureau. See paragraph 26 *supra*. Area will be measured by the number of square kilometers within the 60 dBu service contour of FM stations and the Grade B contour of television stations. These contours will be calculated using the standard predicted contours established in our rules. 47 C.F.R. §§ 73.313(c) (FM) and 73.683 (TV).

### **c. Localism – Established Local Applicant (3 points)**

41. Among other factors on which we sought comment was a "local educational presence," giving certain established local organizations a credit over new or distant organizations. We based this proposal on spectrum efficiency, stating that it was more efficient to award a permit to a local applicant whose educational goals are limited to a specific geographic region, than to a non-local applicant who could apply in other locations where the spectrum was more readily available. For example, we anticipated that a college might be able to show that it could only use a station in the immediate vicinity of its campus. We specifically distinguished the local educational presence proposal from other localism indicia that might be based on assumptions of superiority of a local applicant's qualifications or its programming. We noted that we were concerned about whether such assumptions might raise issues under Bechtel v. FCC, which overturned as unsupported a core credit formerly used in commercial proceedings. Specifically, it overturned our "integration" credit, which awarded an applicant a significant comparative advantage if the applicant proposed to be an owner-manager, working at the station for which the applicant sought our authorization. Many commenters, however, express strong support for localism, urging us to adopt a greater point credit than originally proposed, and arguing that such a credit would not be inconsistent with the Bechtel case.

42. Given the strong support for localism in the comments, we have reviewed the concerns expressed by the court in Bechtel. A primary concern underlying the court's

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<sup>29</sup> We expressed similar concern about commercial stations proposing to downgrade after being awarded a permit in a comparative allocation proceeding based on technical superiority. Report and Order, Lower Classification of an FM Allotment, 4 FCC Rcd 2413, 2414 (1989).

decision invalidating the central comparative criterion used to select commercial broadcast licensees was that there was no obligation for a successful applicant to adhere to its integration proposal, and no evidence indicating the extent to which the applicants had kept such promises voluntarily in the past. In addition to this lack of permanence, the claimed public interest advantages of integration were, in the court's view, based on a mere "predictive judgment" not substantiated by adequate evidence. Finally, the court was concerned that the Commission's selection criteria for commercial applicants emphasized integration, and in particular quantitative integration, to the exclusion of other factors -- such as spectrum efficiency, broadcast experience, and local residence -- that could conceivably affect a station's performance.<sup>30</sup> By way of example, the court observed that, although licensee awareness of and responsiveness to community needs was integration's stated goal, "[a]n applicant whose owner-manager knows nothing about . . . the community but promises to work a 40-hour week" would prevail over a life-long resident of the community not proposing to work full-time. 10 F.3d at 882.

43. After careful review, we agree with commenters that, bearing in mind the concerns articulated in Bechtel, it is appropriate to adopt a localism credit in the unique circumstances presented by competing applications for a permit to construct a noncommercial educational broadcast station. The Bechtel court, although invalidating our integration criterion generally, nevertheless recognized that an applicant who is familiar with the community is likely to be aware of its special needs. Bechtel, 10 F.3d at 885.<sup>31</sup> In the context of noncommercial educational broadcasting, the Commission has long recognized the unique role played by localism, and its public interest significance is amply documented.

44. The history and mission of NCE broadcasting recognize the importance of localism, and localism has indeed been a linchpin to successful NCE services. As the Center for Media Education demonstrates, the 1967 report of the Carnegie Commission on Educational Television shows that localism was a principle on which the NCE service was built. The Carnegie Report, on which Congress relied to develop and improve noncommercial educational television stations, reflects the ongoing vision of local communities as the heart of educational broadcasting:

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<sup>30</sup> Quantitative integration measured the ownership percentages of those owners proposing to have a managerial position at the station and varied depending on whether the owner(s) would work full-time or part-time. Quantitative credit, in turn, affected the weight given to various qualitative "enhancement" factors, including local residence of integrated owners.

<sup>31</sup> "Familiarity with a community seems much more likely than station visitors or correspondence to make one aware of community needs." 10 F.3d at 885. See also Orion Communications, Ltd., 131 F.3d 176, 179-80 (D.C. Cir. 1997), suggesting the continuing relevance of local familiarity after Bechtel, at least in terms of selecting an interim operator who would best serve the public's interest in responsive programming.

Educational television is to be constructed on the firm foundation of strong and energetic local stations. The heart of the system is to be in the community. . . [T]he overwhelming proportion of programs will be produced in the stations. . . local skills and crafts will be utilized and tapped. . . . Like a good metropolitan newspaper, the local station will reflect the entire nation and the world, while maintaining a firm grasp on the nature and needs of the people it serves.

Reply Comments of Center for Media Education citing Carnegie Commission on Educational Television, Public Television: A Program for Action, 87 (1967).

45. The Communications Act itself also recognizes the importance of localism in educational broadcasting. For example, the portion of the Communications Act which establishes the Corporation for Public Broadcasting states:

Public television and radio stations constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs.

47 U.S.C. § 396.

46. The Commission, in another educational service, has likewise recognized the importance of localism. In the Instructional Television Fixed Service (ITFS) the Commission adopted a point system in which the local nature of the applicant was the most determinative factor.<sup>32</sup> See Second Report and Order, ITFS, MM Docket No. 83-523, 101 FCC 2d 50 (1985), recon. denied Memorandum Opinion and Order, MM Docket No. 83-523, 59 R.R.2d 1355 (1986). As we noted in the Further Notice, the ITFS and NCE services are not identical. NCE stations are broadcast services intended to educate the general public in a variety of settings, whereas ITFS stations are nonbroadcast services, intended primarily to provide formal educational programming to enrolled students of accredited schools. Nevertheless, education is a primary objective of both services, and our finding in the ITFS proceeding that education is essentially a local undertaking, is equally applicable to the NCE broadcast service. Likewise, our observation in the ITFS proceeding that local entities best understand the educational needs and academic standards of their communities and are the best authorities for selecting programming to meet those needs is relevant here. Second Report and Order, ITFS, MM Docket No. 83-523, 101 FCC 2d 49 (1985). While we recognized in that proceeding that non-local entities can complement the service offered by local licensees, and that there are actions that non-local entities can take to mitigate their lack of local credentials, we found local entities preferable from a public interest perspective because local entities have more expertise and accountability when it comes to serving the educational needs of the local community. Id.

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<sup>32</sup> The Balanced Budget Act of 1997 did not exempt ITFS from auction and, thus, point systems are not now used in ITFS. See 47 U.S.C. § 309(j).

47. The joint comments of National Public Radio, Association of America's Public Television Stations, and the Corporation for Public Broadcasting, provide publicly available data and studies evidencing the importance that localism plays in NCE broadcasting. They note that information compiled by the Corporation for Public Broadcasting (CPB) indicates that most of public broadcasters funded by CPB are local.<sup>33</sup> They maintain that the preponderance of local entities in NCE broadcasting results in local programming. Of 633 NCE radio stations participating in a study, 100% air some local programming. On average, local programming constituted 50% of public radio stations' weekly broadcasts.<sup>34</sup> In addition, 95% of all public television stations receiving CPB grants reported providing instructional service to schools during the 1995-96 academic year, including 81% providing instructional programming to elementary schools and 79% providing instructional programming to secondary schools during that time period.<sup>35</sup> We believe that such studies demonstrate the unique role of locally based entities providing NCE local educational programming and that our selection process should continue to foster this role.

48. Given the special, long-recognized, significance of localism to noncommercial educational broadcasting, we will award points for localism in a manner that does not implicate the concerns raised by the court in Bechtel. In addition to the ample documentation of the pivotal role traditionally assigned to localism, as reflected in the statute, Commission policies, and publicly available data evidencing industry practice, our experience has been that NCE licensees are transferred and assigned less frequently than commercial licenses.<sup>36</sup> As a result, the public interest advantages derived from localism are likely to have a more lasting impact than was the case in the commercial context, where the court found we lacked evidence as to "how long the typical successful applicant

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<sup>33</sup> Comments of NPR, et al. at 11, n. 20 citing Corporation for Public Broadcasting, Frequently Asked Questions About Public Broadcasting (1997) (www.cpb.org/content/faq).

<sup>34</sup> Comments of NPR, et al. at 12, n.21 citing Public Radio Programming Study, Fiscal Year 1996, Research Note No. 105 (November 1997).

<sup>35</sup> Comments of NPR, et al. at 12, n.22 citing Elementary and Secondary Educational Services of Public Television Grantees: Highlights from 1997 Station Activities Survey (November 1997).

<sup>36</sup> Typically, less than one percent of NCE radio or television stations are assigned or transferred in a year. For example in calendar year 1998, we received only three applications to assign or transfer NCE television licenses and permits, less than one percent of all NCE television stations. During the same period there were 230 applications to assign or transfer commercial television station licenses, which in relation to the number of commercial television stations is approximately 18 percent. Radio statistics are similar. In a recent 12-month period, less than one percent of the total radio assignment and transfer applications were for NCE FM radio stations.

adheres to his integration proposal." Bechtel, 10 F.3d at 880. Further, to ensure that the benefits of localism are not purely ephemeral and as supported by numerous commenters, we have, as discussed in greater detail below, decided to establish a four year holding period of on-air operations during which licensees would be required to maintain the characteristics for which they receive credit in a point system.

49. Finally, the public interest significance of localism is not diluted by an artificially complex formula that elevates quantitative over qualitative considerations. Rather, we adopt a straightforward credit, with minimum eligibility requirements only as necessary to ensure that the credit is reserved for truly local applicants and thus fosters participation by local entities in noncommercial educational broadcasting. See paragraphs 54-55 *infra*. Significantly, that credit is not tied to ownership or a promise to work a minimum number of hours each week at the station, and does not endorse a particular type of business structure or practice. Its premise, moreover, is not simply area familiarity or uniquely responsive programming but the recognition that education historically is a local undertaking, as evidenced by the historical importance of localism in noncommercial educational broadcasting.

50. Notwithstanding clear factual distinctions between the integration criterion invalidated by the court in Bechtel and the award of points for localism in selecting among competing applicants for the reserved band, we acknowledge that there is a certain tension with our decision to dispense with comparative hearings in the commercial context. Following Bechtel and the resulting freeze on the adjudication of comparative broadcast cases, Congress enacted legislation authorizing the use of auctions to resolve mutual exclusivity among competing applications for commercial broadcast licenses. Faced with a choice of using either auctions or comparative hearings to resolve a select group of pending cases, the Commission determined that the public interest would be better served by using auctions. Given the court's sweeping criticism of our integration criterion, and especially in light of the congressionally endorsed alternative of using auctions, we were reluctant to resurrect elements of that criterion -- such as local residence -- recognized by the Bechtel court as having potential public interest significance in selecting a broadcast licensee, at least in certain circumstances. Auctions would be speedier and fairer, we concluded, and would avoid the delay entailed in developing and defending new selection criteria to resolve the limited number of pending commercial cases in which auctions were not required.

51. Here, however, using auctions to select among competing applicants for spectrum reserved for noncommercial educational broadcasting is not a viable option from a policy standpoint and, in fact, such applications are beyond the Commission's competitive bidding authority under Section 309(j)(2)(C). In these circumstances and especially given that education historically is a local undertaking, we conclude that it is appropriate to incorporate a localism credit in the point system we adopt today to resolve competing applications for noncommercial educational channels.

52. We have considered, but disagree with, the minority viewpoint that a credit for localism would adversely impact religious organizations or small organizations. A localism credit is religion-neutral and size-neutral. Whether religious or secular, large or small, an organization based in the local community would qualify for the credit. Moreover, organizations both with and without religious affiliation, and of varying sizes support a credit for localism.<sup>37</sup>

53. Accordingly, we will adopt a credit for established local applicants. In the ITFS point system, local applicants received four out of a possible eleven points. See 47 C.F.R. § 73.913(b). We believe that local applicants should receive points in a similar proportion in the NCE point system, and thus will assign established local applicants three instead of the two points originally proposed. We had proposed that to qualify for the credit, local entities would demonstrate that they could meet their educational goals only with a local station, such as one on an applicant's college campus, and not with a station located further away. We will not adopt this proposal, finding it sufficient for applicants to demonstrate that they are local and established, as defined below.

54. There is disagreement in the comments about who should be considered local. NPR, for example, defines local as (a) located within 100 miles of the proposed facilities; (b) located within the same state; or (c) if part of a state-wide plan, located in the same state or a bordering state. Others think that this proposal is too broad, particularly with respect to stations located in large states. Americans for Radio Diversity would consider a group local if the licensee or the majority of the governing board is located within 25 miles of the transmitter. We will base the definition of local on the standards used in ITFS, as modified in response to commenter suggestions. Those physically headquartered, having a campus, or having 75% of board members<sup>38</sup> residing within 25 miles of the reference coordinates of the center of the proposed community of license<sup>39</sup> would be local for purposes of the credit. Governments would be local throughout the area within which

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<sup>37</sup> See, e.g. Comments of Colorado Christian University at 12-13 (organization with religious affiliation).

<sup>38</sup> We note that under basic eligibility requirements for NCE television applicants, there must be a majority (over 50%) of local board members in non-government entities. These local members must be broadly representative of elements of the community, as traditionally considered, (e.g. businesses, civic groups, professions, religious groups, schools, government). See Ascertainment of Community Problems by Broadcast Applicants, 41 Fed. Reg. 1372, 1384 (January 7, 1976).

<sup>39</sup> This mileage standard is similar to that which applies to the main studio location of commercial stations. See Report and Order, Commission Rules Regarding the Main Studio, MM Docket No. 97-138, 13 FCC Rcd 15691 (1998), aff'd 15 Com Reg. (P&F) 1158 (1999). A community's reference coordinates are generally the coordinates listed in the United States Department of Interior publication entitled "Index to the National Atlas of the United States." An alternative reference point, if none is listed in the Atlas Index, are the coordinates of the main post office. See 47 C.F.R. § 73.208(a)(1).

their authority extends. For example, the New York State government would be considered local throughout New York State, including New York City, but the New York City Board of Education would be local only in New York City (or within 25 miles from the reference coordinates of the proposed community of license). These characteristics would be maintained in various ways, including a holding period discussed *infra*; a local main studio in radio; or by-laws requiring a 75% local board for non-governmental NCE organizations. As in ITFS, a local headquarters or residence must be a primary place of business or primary residence and not, for example, a post office box, lawyer's office, branch office, or vacation home, which would not provide sufficient contact between the station's decision and policy makers and the area to be served. Our localism credit encompasses many of the other localism-based credits suggested by the commenters and thus we will not adopt separate credits for factors such as enhanced local representation on the governing board.

55. In the Further Notice we proposed that local applicants be "established" in order to receive the credit. This requirement would serve to limit the feigning of local qualifications, and also to establish the applicant's educational credentials in this particular area. The Further Notice proposed that an applicant be local for two years prior to application, as the standard for whether an organization qualified for a local credit. Few commenters address the time period. We will adopt the two year benchmark as proposed.

#### **d. State-Wide Network Credit (2 points)**

56. We asked whether we should award points for stations that would be part of an existing education plan of a state government. We noted in the Further Notice that since the very early days of NCE broadcasting, state-wide networks have ensured that educational programming is available throughout a specific area in a coordinated and organized manner most appropriate to that area, and especially to schools. Stations providing programming in furtherance of such plans have been pioneers in NCE service, often using the economic efficiencies of a centralized point of operation to bring new service to outlying areas within their jurisdiction. However, without a credit recognizing the merits of such applicants, an entity serving multiple schools, such as a state university system, might not be able to effectively compete in a point system. For example, the locations of a university system's campuses, and the possible overlapping signals of its associated broadcast stations, might consistently prevent the university system from receiving a credit for local diversity, making it difficult for the university to expand the reach of its educational programming.

57. Only a few commenters addressed this issue, and those discussing the issue focus on whether the credit would be available to government supported networks only, or also to private networks. National Public Radio proposes that governmental licensees who apply for a new station as part of a governmental state-wide plan would receive credit for diversity of ownership regardless of the number of stations already owned, because state licensees have a special interest in and responsibility for serving the diverse needs and

interests of their jurisdictions. Comments of NPR at 21. Sound of Life, Inc., opposes a credit for governmental state plans, which it views as a government choice of one type of program content over another. Others believe that private organizations should also qualify for a state-wide network credit. For example, Colorado Christian College, a private institution, considers itself to operate a state-wide educational network because it is an accredited school operating five full-time campuses throughout the state of Colorado, has three FM stations and many translators, and wishes to establish more stations as its college establishes campuses in more areas. Some commenters would extend the credit further to include all networks, including private networks covering regions larger than a single state.<sup>40</sup>

58. We have decided to adopt a two point credit that will be available to both public and private entities, a larger class of applicants than originally proposed. While we recognize above that applicants proposing new NCE stations in areas where they do not operate any other station provide the benefits accruing from diverse local ownership of broadcast facilities, we also recognize the distinct benefits afforded by state-wide networks providing service to accredited schools. In our efforts to recognize the benefits provided by the former category of applicants, we do not wish to disadvantage the latter applicants, where the proposed new station will increase the number of schools served. Therefore, we will award a credit to the following entities if they cannot claim a credit for local diversity of ownership:

- (A) an entity, public or private, with authority over a minimum of 50 accredited full-time elementary and/or secondary schools within a single state and encompassed by the combined primary service contours of the proposed station and its existing station(s), if the existing station(s) are regularly providing programming to the schools in furtherance of their curriculum and the proposed station will increase the number of schools it will regularly serve;<sup>41</sup> or
- (B) an accredited public or private institution of higher learning with a minimum of five full time campuses within a single state encompassed by the combined primary service contours of the proposed station and its existing station(s), if the existing station(s) are regularly providing programming to campuses in furtherance of their curriculum and the proposed station will increase the

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<sup>40</sup> E.g., Comments of Taylor University Broadcasting at 2; Comments of Cedarville College at 4-5.

<sup>41</sup> In selecting the number of schools, we relied on statistical information in the comments that small community television stations receiving funding from the Corporation for Public Broadcasting provide programming to a median number of 14 school districts with 103 schools. Comments of NPR, Chart II. Thus, a number of fifty elementary and secondary schools is approximately half the median number of schools currently served by the smallest NCE television licensees. We believe it is appropriate to adopt this number, to establish a standard that can apply both to radio and television, with radio capable of covering smaller areas than television.

number of campuses it will regularly serve;<sup>42</sup> or

- (C) an entity, public or private, with or without direct authority over schools, that will regularly provide programming for and in coordination with an entity or institution described in (a) or (b) above for use in its school curriculum.

59. Thus, the applicant need not be a government entity or a school itself to qualify for this credit. Both public and private licensees can provide educational programming material for use in accredited schools, in cooperation with an entity with authority over schools. One way for a private applicant to receive this credit would be for it to coordinate with a state government and to participate in the government's state-wide education plan. Because the state government has jurisdiction over schools, and the private entity would be operating in accordance with that plan, the Commission could be confident that stations broadcasting pursuant to the state plan would present programming that could be used in schools for educational purposes. Another way for a private applicant to receive this credit would be to coordinate with a private school system. For example, an archdiocese might, on its own, or in cooperation with a broadcast organization, wish to broadcast educational programming that could be used in schools under the archdiocese's jurisdiction. Thus, we clarify for the commenters who view this credit as favoring government speakers over private speakers, that is not our intention. In response to commenters who are concerned about fairness to nonprofit corporations, who are not themselves eligible for accreditation because they are not institutions of learning, we clarify that such corporations may nevertheless qualify for the credit if they are providing programming to accredited schools in coordination with those schools.<sup>43</sup> See 47 C.F.R. §§ 73.503 (a) and 73.621(a).

60. In this manner, applicants who will provide educational service to many schools, but who cannot achieve that goal without some signal contour overlap and resulting loss of the local diversity credit, will not be placed at a disadvantage in comparison to applicants serving a smaller number of schools. An applicant serving many schools would receive two points as a state-wide network, while a competing applicant serving fewer schools would likely receive an equal number of points for local diversity of ownership, because its service to fewer school locations increases its ability to avoid signal overlap. No entity may claim both the diversity credit and the state-wide network credit in any particular application. We recognize that there are also larger national and regional networks of noncommercial stations that enjoy some of the same operating efficiencies as the entities who will be eligible for this credit, but which do not have relationships with and provide program service to accredited schools. Those types of networks will not be eligible for

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<sup>42</sup> Colleges and universities, in general, draw students from larger areas and serve more students than elementary and secondary schools. We selected five full-time in-state campuses of an accredited institution of higher learning based on our view that Colorado Christian College was reasonable in believing that broadcast service to five such campuses was similar to a state government's network.

<sup>43</sup> Comments of Faith Broadcasting, Inc. at 8; Comments of Houston Christian Broadcasters at 13-14.

this credit. As those larger networks are spread out over wider areas, they would not generally experience the same level of difficulty achieving local diversity as state-wide networks. Further, we do not believe that national and regional networks are able to provide equivalently focused educational benefits. Such networks are generally satellite operations of distant stations, without the ability to set the educational policies for schools or have schools accountable to them. It would thus be unlikely for schools to rely on such networks to provide programming on a regular and ongoing basis that complements or reinforces a locally established curriculum. As we stated regarding national networks in the ITFS proceeding, "a national educational network may relay programming throughout the country including to schools but an in-state consortium is an adjunct of the schools themselves." Memorandum Opinion and Order, ITFS, MM Docket No. 83-523, 59 R.R.2d 1355 (1986).

61. We note that Section 73.502 of our rules currently states that we should consider in licensing NCE FM stations "the extent to which each application meets the requirements of any state-wide plan for noncommercial educational FM broadcast stations filed with the Commission, provided that such plans afford fair treatment to public and private educational institutions, urban and rural, at the primary, secondary, higher, and adult educational levels, and appear otherwise fair and equitable." 47 C.F.R. Section 502. This rule does not define the term 'state-wide plan,' but appears to use the term in a narrower sense than the state-wide network credit we are adopting today. Because Section 73.502 is superseded by the rules we adopt in this proceeding, we will eliminate it and incorporate the revised definition of state networks into our new point system rules.

#### **e. Consideration of Minority Control Deferred**

62. In the Further Notice we asked for comments on whether applicants controlled by minorities should be given any points, to further diversify the NCE mass media service. We noted that any race-based preference would need to withstand strict scrutiny pursuant to Adarand Constructors v. Pena, 515 U.S. 200 (1995). Most commenters addressing this issue are opposed to adopting a minority preference at this time. Alaska Public Telecommunications believes that such a preference is unnecessary because NCE broadcasters have a long history of providing diverse programming to underserved audiences, particularly minorities and children, without any such preference. Others are concerned about a possible constitutional challenge under Adarand.<sup>44</sup> We find particularly persuasive the views of the National Federation of Community Broadcasters (NFCB). NFCB suggests that we continue to conduct necessary fact-finding studies to justify minority preferences under Adarand. If the results of the studies support a minority preference, NFCB urges us to commence a rule making proceeding at that time to add a minority credit to the point system adopted herein. We will adopt this suggestion, and defer consideration of a minority control credit until we have additional information from ongoing studies.

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<sup>44</sup> E.g. Comments of Cornerstone Community Radio at 3; Comments of Pinebrook Foundation, Inc. at 6.

#### f. Other Factors Not Selected

63. We received several suggestions of other possible factors, which we have considered for inclusion in a point system but have decided not to adopt. Most of these factors were supported only by the commenter who proposed the idea. A few, however, received more support. We will address briefly the four ideas which received the most discussion.

64. **Existing Broadcasters.** There were several proposals that would favor existing broadcasters or existing stations in some way. For example, there are suggestions that existing translators be given preference to upgrade to full service stations, that experienced broadcasters receive additional points, and that existing stations making major changes be preferred over new stations.<sup>45</sup> While maintaining existing service is a good goal, so is obtaining new service. We do not believe that a case has been made for always favoring one over the other as a general practice in NCE broadcasting.<sup>46</sup> With respect to favoring experienced broadcasters over newer broadcasters, we also cannot categorically conclude that one is always preferable to the other. An experienced broadcaster has a level of expertise that a novice may lack. Thus, our old commercial comparative criteria considered an applicant's broadcast experience. We also recognize, however, that new entrants bring new ideas and diverse voices to broadcasting. Thus, we have, in commercial auctions proceedings, established a bidding credit for new entrants. Because we cannot conclude as a general matter that broadcast experience is always preferable to new voices and diversity in the context at issue here, we decline to adopt any credit for this factor.

65. **Locally-Originated Programming.** Several commenters address local programming as part of a point system. For example, the National Federation of Community Broadcasters suggests that we award one point if members of the local community will have access to the proposed station to air programming, and between two and five points depending on the percentage of locally originated programming (between 10% and 75%) that the applicant will provide. WAY-FM, Inc. opposes such a credit. It states that a local programming credit would amount to a government intrusion into issues of program content, implicitly supporting certain types of programming over other types of programming. It also states that it would be difficult to define local programming, and even more difficult to ensure that broadcasters fulfill their commitment.

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<sup>45</sup> Since the adoption of the Further Notice the Commission has, in a separate proceeding, more narrowly defined what constitutes a "major change." More NCE upgrades are now considered minor and not subject to competing applications. Report and Order, Streamlining of Radio Technical Rules, MM Docket No. 98-93, 19 Com Reg (P&F) 329 (1999).

<sup>46</sup> This decision is comparable to our decision in the Competitive Bidding proceeding to have applicants for new stations and applicants for major changes to existing stations compete equally in auctions.

66. We will not adopt points for local programming or local access. We have historically afforded full power broadcast licensees, commercial and noncommercial, maximum flexibility in selecting programming that the licensees, in their discretion, believe will address local needs. The record in this proceeding provides no basis for departure from that policy. We note that the local nature of programming is relevant to applicant selection in the newly created low power FM service<sup>47</sup> and to applicant eligibility in the Class A low power television service. However, both of those services are highly localized in nature, covering limited areas with reduced power facilities. We do not find the considerations that led us to give weight to program origination in authorizing these services of equal import in initial selection among applicants for full service NCE broadcast stations, which have broader goals and a wider signal range. We further note that there is currently an open question, in the digital television proceeding, of whether to quantify public interest programming requirements for all television licensees. We believe that such matters are most appropriately debated as service-wide rules, as in that proceeding, and not in the present proceeding which concerns only construction permits for new stations.<sup>48</sup>

67. **Funding Sources.** Several organizations support preferences based on funding. National Public Radio, for example, states that we should prefer applicants who have been found eligible for the government-administered Public Telecommunications Funding Program (PTFP). It says that PTFP qualified applicants have already passed a public interest test, based in part on the Commission's spectrum efficiency objectives. National Religious Broadcasters opposes such a credit because it says that organizations with religious affiliations are not eligible to apply for government funding. We do not believe that there is a sufficient basis for our adopting funding criteria as an additional credit. When we award a permit to a qualified applicant, the permittee may construct the station with public grant monies for which it is eligible, or with private monies which it has secured. The public interest factors that we believe are important to the selection of NCE licensees and incorporated in our point system, generally account for the public interest considerations that are applied in the PTFP award program. We therefore see no reason to include a separate point based on funding sources.

68. **Finder's Preference.** Related to the first to file approach rejected above, several commenters support awarding credit in a point system to the first applicant to file its application. These commenters seek to distinguish between applicants who undertake the engineering and legal studies needed to identify an available channel from challengers

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<sup>47</sup> See Report and Order, Creation of Low Power Radio Service, MM Docket No. 99-25 (January 27, 2000) (awarding points to LPFM applicants airing at least eight hours a day of programming produced within ten miles of the community.)

<sup>48</sup> See Notice of Inquiry, Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360 (Dec. 20, 1999).

filing "me too" applications.<sup>49</sup> The impetus for the finder's preference suggestion appears to be commenter frustration with the current A/B cut-off system for NCE applicants, in which initial applications are announced on a public notice, triggering an opportunity to file competing applications. This process often results in mutually exclusive applications. As discussed *infra*, we will address those concerns by changing the filing procedures to a window system. We therefore find further consideration of a finder's preference unnecessary.

### C. Tie Breakers

69. In a point system it is possible that two or more applicants may receive the same number of points. We asked for comments on how to break such ties. The *Further Notice* discussed, but tentatively rejected, use of a "finder's preference" as a tie breaker. Among the options that we considered more viable were mandatory share-time arrangements; a tie-breaker lottery weighted in accordance with statutory requirements; and use of a secondary factor, such as one considered for the primary point system but not adopted.

70. The commenters discuss various tie breaker options and there is some support and opposition to each. Some considered lotteries less objectionable as a tie breaker than as a primary selection process,<sup>50</sup> but others remained concerned about the required statutory weighting.<sup>51</sup> A tie breaker based on the first applicant to file would be an objective method, but commenters expressed concern that any first to file method would encourage "speed over need"<sup>52</sup> and "races" to the filing room.<sup>53</sup> One commenter suggests that we use traditional hearings to break ties,<sup>54</sup> but the record contains significant support for eliminating traditional hearings. Moreover, given the extensive resources required, it is difficult to justify conducting a full-blown hearing, when the differences among the applicants are admittedly slight. Many commenters considered mandatory timesharing unworkable for applicants and believed it should not be used as a tie breaker.<sup>55</sup>

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<sup>49</sup> Comments of Dale Jackson at 2-3; Comments of Cornerstone Community Radio, Inc. at 2.

<sup>50</sup> See Comments of CSN International at 3; Comments of Sound of Life, Inc. at 16.

<sup>51</sup> See Comments of National Public Radio at 27.

<sup>52</sup> See Comments of Colorado Christian University at 16.

<sup>53</sup> Comments of Roaring Fork Public Radio Translator, Inc., et al. at 5.

<sup>54</sup> See, e.g. Reply Comments of Center for Media Education, et al. at 16-17.

<sup>55</sup> E.g., Comments of Station Resource Group at 19; Comments of Alaska Public Telecommunications at 15.

71. Some commenters believe that tied applicants will be able to work out a tie breaker solution on their own, if given a reasonable settlement period, and that a tie breaker should only be used after providing such a settlement period.<sup>56</sup> For cases in which a settlement can not be reached, a number of commenters suggest that we should establish a new factor to serve as a tie breaker, such as awarding a license to the applicant with the fewest pending applications at the time of filing.<sup>57</sup> They state that an applicant with many applications is likely to secure a license elsewhere, while an applicant with few applications has likely determined that only these few locations would serve its educational purpose. Other commenters suggest that the Commission choose a solution that allows it to grant as many of the applications as possible, either by suggesting engineering solutions to the applicants or by granting whatever combination of licenses would result in the most successful proposals. For example, if two applications could be granted but for the existence of a competing third application, one commenter suggests that we should grant those two.<sup>58</sup>

72. After considering the comments, we have concluded that, if there is a tie, we will conduct a tie breaker that combines and follows several suggestions of the commenters, and that is structurally similar to the tie breaker formerly used in the ITFS service. Third Report and Order, Instructional Television Fixed Service, MM Docket No. 83-523, 4 FCC Rcd 4830 (1989). Under the tie breaker, a permit will be awarded to the applicant who, at the time of filing, had the fewest existing station authorizations (licenses and construction permits) in the same service( i.e. radio or TV whether commercial or noncommercial) nationally .<sup>59</sup> Stations of the applicant itself and those with attributable interests, as discussed below, will be counted for this determination. This should help to address the commenter concern that small local educators with no or few other broadcast interests should not be "squeezed out" by large national chains of NCE stations. As indicated above, we do not believe that national ownership factors are especially important in making an initial determination of the applicant's quality in the initial stages of a point system, but we do believe, among equally qualified applicants, that the public should have the opportunity to receive service from the applicant who has the fewest existing outlets to express a particular viewpoint.

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<sup>56</sup> See generally Reply Comments of Mohave Community College at 12.

<sup>57</sup> See Comments of National Public Radio, et al. at 26-27; Comments of KBPS Public Radio Foundation at 2.

<sup>58</sup> Comments of Colorado Christian University at 17.

<sup>59</sup> For purposes of counting same service stations in a tie breaker, we would require NCE radio applicants to count all attributable radio stations (AM and FM, commercial and noncommercial). NCE television applicants would count all attributable television stations, commercial and noncommercial. FM translator applicants would generally count all attributable FM translator stations that are not fill-in stations, except that if competing applicants have only fill-in translators, then we will compare the number of fill-in stations.

73. As a secondary tie breaker, we will consider which applicant has the fewest pending new and major change applications in the same service at the time of filing. This factor, suggested by the commenters, encourages applicants to file judiciously, to conserve spectrum, and to reduce the number of speculative "me too" applications. We choose this as a secondary tie breaker, although the commenters suggested it as a primary tie breaker, because an applicant with many pending applications merely has a greater possibility of obtaining more stations, whereas an applicant with more permits and licenses has already achieved that goal.

74. As a final tie breaker for full service stations we will impose mandatory time sharing. In so doing, we recognize that this option is very unpopular. Most commenters believe that time sharing is confusing to listeners, prevents consistency in programming, and is especially difficult for organizations that do not share the same ideologies.<sup>60</sup> We are not unsympathetic to the points raised by these commenters. Even some of these commenters, however, recognize that time sharing may be useful as a settlement tool or as a tie breaker of last resort. Although we are not adopting a formal settlement period, so as not to unduly delay the award of permits in cases where the parties are not interested in settlement, we stress that parties are free to settle at any time during the process. Our general rules for broadcast settlements will apply, including the requirement that the settling parties certify that they have not received consideration in excess of their legitimate and prudent expenses. See 47 C.F.R. § 73.3525. We are not adopting the suggestion of licensing two stations over one, in the event of a three-way tie. We see this suggestion as one best considered by the applicants themselves as part of any settlement negotiations that they may undertake voluntarily.

#### **D. Attribution Issues for NCE Point System**

75. Several of the factors in the NCE point system including local diversity, localism, and the tie breakers, are based on whether the applicant also has interests in other broadcast stations. As we discussed in the Further Notice, the methods for determining control of commercial broadcast applicants are not always applicable to noncommercial applicants, who are often non-stock corporations, governed by a frequently changing board of directors who serve voluntarily or by appointment. At present, our rules establish attribution policies for commercial stations, but not for noncommercial educational stations, because attribution has generally been considered only in the context of ownership limits, and there are no limits on the number of NCE stations that any one entity can own.<sup>61</sup> There was little discussion of this point in the comments. We have

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<sup>60</sup> E.g. Reply Comments of Center for Media Education, et al. at 18-19..

<sup>61</sup> See 47 C.F.R. § 73.3555, note 2. See also Notice of Inquiry, MM Docket No. 89-77, Transfers of Non-Stock Entities, 4 FCC Rcd 3403 (1989) (asking at what point we should consider a transfer of control to have occurred in non-stock organizations for purpose of requiring prior Commission consent).

decided, to the extent possible, to base noncommercial attribution standards for consideration in applying an NCE point system on the commercial framework, as well as on the policies that have been used in the educational ITFS service, with several adjustments to account for structural differences in NCE organizations.

76. In the ITFS point system, we looked to the composition of an entity's governing board to determine control. Memorandum Opinion and Order, ITFS, MM Docket No. 83-523, 59 RR 2d 1355 (1986). In that service, we did not specifically address changes that might occur in the governing board. We did, however, consider that local and nonlocal organizations might jointly form new corporations, and that it would only be appropriate for such organizations to receive points for localism if the local entity had the majority of representation on the board and if the board's officers were appointed by the board itself and none of the officers were affiliated with a nonlocal participant.

77. To determine an NCE applicant's other interests, for purposes of applying an NCE point system, we will attribute the interests of the applicant, its parent, and its subsidiaries, their officers and members of their governing boards. This standard is similar to commercial attribution standards in which directors, officers, and voting stockholders in a commercial entity have attributable interests. See 47 C.F.R. § 73.3555 note 2. Thus, even if an NCE organization and its parent organization do not have any other broadcast interests, we would also look to the interests of officers and directors, as we do for commercial applicants. For example, if the president of an applicant for a new NCE television station also serves on the board of another local television station, or if a board member of an NCE radio applicant has attributable interests in a nearby commercial radio station, those other stations would be attributed for determining whether the applicant qualifies for a local diversity credit in the NCE point system.

78. So that points awarded to an applicant based on the composition of its governing board will remain meaningful, despite anticipated board changes, we will award points only to organizations whose own documents, (e.g. by-laws, constitution, or their equivalent) establish requirements for maintaining the characteristics of the board for which it claims credit. For example, we would grant credits to an organization seeking a credit for diversity, if its governing documents limit the degree to which incoming Board members can have interests in other local stations. While we understand that NCE groups cannot control the resignation of Board members, we expect that they will act quickly to replace Board members to maintain characteristics of the Board for which credit was awarded. We understand that most organizations do not have such provisions in their current governing documents, and that amending the documents to provide this safeguard may require a vote by the organization's members. Accordingly, we will provide a period for amendment, as discussed in paragraph 91 infra.

79. We also recognize, as we have in commercial broadcasting, that people or entities not represented on the Board of Directors may nevertheless exert significant influence over an NCE licensee by supplying substantial funding and programming to a station. We

are already receiving applications for NCE stations, disclosing that, pursuant to an agreement between the applicant and an existing broadcast licensee, the existing licensee will finance construction of the new station in exchange for a commitment to air a majority of that licensee's programming. Accordingly, consistent with the attribution standards applied to commercial broadcasters, our point system will attribute the interests of entities providing more than 33 percent of equity and/or debt, and (1) who supply more than 15% of the station's weekly programming or (2) who have attributable interests in media in the same market. See Report and Order, Attribution of Broadcast and Cable Interests, FCC 99-207 (Aug. 5, 1999). We believe that this method of attribution is compatible with and should not have any impact on traditional NCE funding and programming relationships, because traditional sources of NCE funding (such as the Corporation for Public Broadcasting, financial institutions, and major donors) and of NCE programming, (such as the Public Broadcasting Service) are not generally broadcast licensees and thus will have no broadcast interests to attribute.

### **E. Delegated Authority**

80. By statute, only Administrative Law Judges, individual Commissioners, and the Commission are permitted to apply a point system. 47 U.S.C. § 155(c)(1); See Further Notice, n. 22. This is because a point system is technically considered a type of simplified hearing. We believe that it would be preferable and more streamlined to delegate responsibility for an NCE point system to the staff, and will seek appropriate legislation to do so. We secured similar legislation permitting staff consideration of ITFS point system proceedings. Id. See also ITFS Processing Issues, 11 FCC Rcd 12,380 (1996). So as to not further delay this process, the staff is directed to refer these cases to the Commission until legislation can be introduced and acted upon. If we receive legislative authority, we will delegate responsibility to process applications using the NCE point system to the Mass Media Bureau.

### **F. Application Procedures and Post-Award Requirements**

81. The Further Notice asked commenters to address application procedures and requirements that prevailing applicants must meet after award of the permit. We especially asked for suggestions on how to prevent speculation and abuse in NCE licensing. Among possibilities presented for comment were replacing the current A/B cut-off method, now used to receive applications, with periodic filing windows, and establishing a holding period during which applicants would be required to maintain the characteristics identified in their applications.

#### **1. Potential for Abuse**

82. Commenters believe that speculation is a problem in NCE broadcasting.<sup>62</sup> Among the

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<sup>62</sup> E.g., Comments of CSN International at 3; Comments of Alaska Public Telecommunications et.al. at 5-6;

factors that commenters believe lead to the potential for abuse are the lack of multiple ownership rules restricting the numbers of NCE applications that can be filed, a liberal main studio waiver policy for NCE stations, the filing freeze on (and now auction of) commercial channels which makes NCE the only new broadcast frequencies available, and the lack of filing fees and regulatory fees for NCE stations.<sup>63</sup>

83. A major concern was the filing of "copy cat" or "me too" applications in which groups become interested in applying for a radio station in a particular area only after learning that another applicant has applied.<sup>64</sup> Sometimes these "copy cat" applicants photocopy the first applicant's information and use it as their own. Commenters state that some applicants apply for the same channel as the first applicant even if there are several alternatives available in the same vicinity. Another concern was that, without the scrutiny of traditional hearings, applicants who are not truly educational might try to pass as NCE organizations.<sup>65</sup> Similarly there was a concern that applicants might claim credits for which they did not qualify, or would alter the characteristics for which they received credits shortly after the permit issued.<sup>66</sup> Accordingly, the commenters support various options for limiting speculation at the application stage, and for ensuring that successful applicants live up to their promises.

## 2. Filing Windows to Replace A/B Cut Off

84. We will adopt a filing window process for accepting NCE applications, both for full service stations and for FM translators. Under current procedures, when we receive an NCE application we issue an "A cut off" public notice announcing its acceptance. The public notice triggers the filing of competing applications by announcing a date certain by which any such applications are due (commonly referred to as "B" applications). Ideally, this process would notify others already considering similar proposals to file an application quickly, or lose that opportunity. In practice, however, the process has apparently led to speculation, in which "B" applicants with no prior interest in an area file applications in response to numerous "A" cut off notices. In the Further Notice we asked whether we

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Comments of Educational Information Corporation at 14-16.

<sup>63</sup> Comments of Station Resource Group at 3.

<sup>64</sup> E.g. Comments of West Coast Public Radio, et al. at 15; Comments of Minnesota Public Radio at 3; Comments of American Family Association at 2-3.

<sup>65</sup> E.g. Comments of Educational Information Corporation at 17-19.

<sup>66</sup> E.g. Comments of National Public Radio, et al. at 28-30; Comments of Alaska Public Telecommunications, et al. at 12-14.

should replace the current procedures with a window filing system. Under a window system, the Commission would periodically announce a window during which all applications could be filed. Thus, Commission action, rather than a specific application, would open a window in which all NCE applications could be filed. Applicants might thus file at the end of the window so as to lessen the potential for "copy cat" proposals. For commercial broadcast applications, we have replaced the previous A/B cut off system with filing windows. See Competitive Bidding supra.

85. The commenters support a move to a window filing system in the NCE service. According to commenters, cut off lists have become "shopping lists" for aggressive speculators, who monitor the lists to determine where to file next.<sup>67</sup> As noted earlier, Alaska Public Telecommunications indicates that over 400 of our current applications involve 15 to 20 applicants who have overfiled against each other in virtually every state. To further reduce the possibility of speculation, commenters suggest that we place a limit on the number of applications that an applicant can file within one window and within a year. West Coast Public Radio suggests that applicants be limited to five applications per window and up to a maximum of ten in a calendar year.

86. Upon consideration of the comments we conclude that it will serve the public interest to adopt a window filing system for NCE applications. We delegate to the staff the decision of when to open windows, and the length of advance notice given before a window opens, and other details concerning implementation of an NCE window filing system. We will not adopt the suggestion that applicants be limited in the number of applications per window or calendar year. We believe that the criteria in the point system established herein, combined with window filing procedures, should be sufficient to ameliorate the filing of large numbers of mutually exclusive applications by speculative, barely qualified, applicants. If the number of mutually exclusive applications received under the new system exceeds our expectation, we reserve the right to establish by public notice a limit on the number of filings per applicant in a given period.

87. At the end of a filing window we will review the applications only to determine which are mutually exclusive, and issue a public notice identifying applications that are mutually exclusive. Under the new window filing procedures, the specific facilities proposed in applications filed during a filing window will receive cut-off protection, and will be protected pursuant to our existing interference rules, as of the date of the closing of the window filing period. After the closing date of the filing window, no applications (such as minor modification applications) may be filed that would conflict with the applications filed during the window. The staff may, in its discretion, temporarily freeze the filing of minor modification applications during the window to limit the number of potentially conflicting applications. Applications for minor modifications to existing stations are not limited to filing within windows, and would best be filed at any time

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<sup>67</sup> Comments of Station Resource Group at 7; Comments of Pensacola Christian College.

before a window opens for major changes and new stations. The window filing procedures adopted herein do not change the acceptability criteria for noncommercial educational applicants.

### 3. Documentation/Petitions to Deny

**88.** A number of commenters request that we require applicants to file documentation of their claimed points, to enable applicants to verify or dispute claims made in competing proposals and file petitions to deny. According to West Coast Public Radio, the Commission will thus be able to rely on certification check off boxes without sifting through the documentation, but interested parties would have the opportunity to submit meaningful comments. NPR suggests that within 30 days of application, the applicant should supply its articles of incorporation, bylaws, audited financial statement, names and addresses of parent entities, officers and directors, sources of proposed funding, description of local elements on the board, lists of their other stations and pending applications, and engineering support for their claims of fair distribution. Alaska Public Telecommunications identifies additional types of documents that might be useful. For example, it suggests that applicants claiming to be established local organizations should document the length of their connection with the local area, such as with a certification by the Secretary of State where the organization was established. For applicants who are part of state-wide plans, this commenter would have the applicant provide a copy of the plan or similar documentation of participation. NPR states that applicants would then file petitions to deny, with the FCC looking only at the petitions against the selectee.

**89.** We agree with the commenters that, while the application should be a simple one in which the Commission can rely on certifications, competing applicants should be able to verify that competing applicants qualify for the points claimed, and that the Commission should have access to the documentation for purposes of random audits. We have revised several of our application forms in this manner as a result of our Streamlining proceeding, and will institute random audits to verify the accuracy of the certifications. Likewise, we direct the staff to design a new certification-based NCE application form. The form should identify appropriate documentation that must be made available for the different points claimed. At the time of application, applicants must submit the required information to our public reference room, and place it in a file available locally. The Commission's staff will examine these documents in random audits and as described infra. This information will also assist parties in determining whether it is appropriate to file Petitions to Deny. Future applicants will submit documentation concurrently with filing.

**90.** We will examine each applicant's claimed points to determine the tentative selectee(s). Once we select our tentative selectee(s), we will conduct an acceptability study for the selected application(s). If a tentatively selected application is found unacceptable, it will be returned to the applicant. As under our existing standards for NCE stations, the applicant will be given one opportunity to submit a curative amendment, provided that the amendment is minor and that the application, as amended, has the same number of qualitative points as originally claimed, or more than the points claimed by the next highest applicant. An applicant that does not meet acceptability requirements after this opportunity will be removed from the mutually exclusive group and will not be

provided an additional opportunity to amend. This applicant may not apply for a station until the next filing window. A new tentative selectee will be chosen from the remaining applicants according to the point system. We thus caution applicants to take great care in preparing their applications. Once a tentative selectee's application is found acceptable we will announce that fact in a public notice, which would establish a due date for Petitions to Deny against the tentative selectee. See 47 C.F.R. § 73.3584.

#### 4. Amendment of Pending Applications to Claim Points

91. All mutually exclusive NCE proposals, including any previously filed and/or designated for hearing will be evaluated by the point system. Mutually exclusive NCE applications already on file do not, however, contain the information that the Commission will need to make a selection under a point system. These existing applicants will be required to supplement their applications to make those applications consistent with the standards adopted.<sup>68</sup> We delegate authority to the staff to issue public notices announcing the procedures to be used in this process.

#### 5. Holding Period

92. In the Further Notice we asked about steps that we could take to ensure that our selection process is meaningful and not undermined by the rapid re-assignment or transfer of stations. We proposed to implement a holding period for NCE stations granted on a comparative basis, as a means of protecting the integrity of these grants. The Further Notice did not propose a specific length for a holding period, but discussed three and five year periods of on-air operations as possibilities. A few commenters, such as Community Television, Inc., think that a holding period is not necessary because frequent turnover of stations is not a problem in NCE radio, unlike commercial broadcasting. Most of the commenters, however, agree that NCE licensees should be required to hold stations for some minimum period of time. The commenters differ on the amount of time that they believe is an adequate holding period, but most suggest either three, five, or eight years.

93. We believe that if applicants are to be selected on the basis of their different characteristics, those characteristics should be maintained for a minimum period to be meaningful. We also believe that a holding period will limit speculation that might accompany reliance on a point system. We have chosen a four-year holding period of on-air operations because it is one which we think is sufficient to establish meaningful service for the community without any undue burden on the licensee.<sup>69</sup> This will generally begin

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<sup>68</sup> Where the relevant period for filing competing applications has closed, we will not reopen the filing period for additional competing applications.

<sup>69</sup> Prior to elimination of our anti-trafficking policy, we had a three year holding period on commercial broadcast licenses. See Elimination of Three Year Rule and Underlying Anti-Trafficking Policy, 52 RR 2d 1081 (1982), reconsidered in part, 99 FCC 2d 971 (1985). The Bechtel court questioned whether a three year holding period would have been sufficient to give meaning to the commercial integration credit given the Commission's expectation that successful applicants adhere to their integration proposals on a permanent basis. But, as we noted

at the time of program tests. Four years is one half of the current eight year license period. Within a four year period, a new station would generally have established and implemented its educational programs, received feedback from the public it serves and the underwriters from which it is seeking financial support, and adjusted its programming accordingly. Thus, a four year holding period will apply to applicants selected through a point system. We do not adopt a holding period on assignments or transfers for licensees receiving no such points (such as non-mutually exclusive applicants, or licenses awarded through settlement), or for permits awarded through decisive Section 307(b) preferences. We direct the staff to modify the requisite assignment and transfer forms to reflect the holding period restrictions.

94. One commenter suggests that, to deter speculative applications, we should randomly audit the applicants within the holding period to see that they are maintaining the factors for which they received points.<sup>70</sup> We will adopt this suggestion and conduct random audits during the holding period, instead of our original proposal which would have required prevailing applicants to certify annually to their continued eligibility for the points they received. This will ensure that applicants are maintaining the factors for which points were awarded, without imposing reporting requirements on the applicants. Some factors will be maintained by conditions on the license itself. For example, we will condition permits on construction as proposed (or in the event of an involuntary loss of site, on replacement with an equivalent coverage of area and population). During the holding period, we will consider complaints alleging that the permittee is not operating pursuant to a proposal for which it received points, and take appropriate enforcement action.

95. We recognized in the Further Notice that circumstances may arise requiring some applicants to assign or to transfer control of a station before the end of the holding period, and asked how to address such circumstances. One option presented was to limit the permittee to recovery of its reasonable and prudent expenses. We asked commenters favoring this solution to address how to define reasonable and prudent expenses in the context of an operational station. We also asked for any other ways to address this issue.

96. Commenters such as Kaleidoscope Foundation would support limiting any licensee that transfers the station before the end of the holding period, to recovery of its reasonable and prudent expenses.<sup>71</sup> The Center for Media Education states that gradual changes in the composition of the board, which commenters view as inevitable, should not be

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in the Further Notice, the court's reasoning was based on considerations that are not applicable to the NCE service. Further Notice at note 29 citing Bechtel v. FCC, 10 F.3d at 880.

<sup>70</sup> Comments of Dale Jackson at 7-8.

<sup>71</sup> E.g. Comments of Kaleidoscope Foundation, Inc. at 4-5.

considered violations of the holding period, provided that the licensee maintains the factors for which it received points. Commenters agree that reasonable expenses would include those associated with the application and construction. They differ on whether to include expenses for operating the station. Cedarville College says that such expenses should be reimbursable to the extent that operating costs are not offset by the station's or licensee's income. Station Resource Group argues that we should not allow recoupment of operating costs or of compensation to board members because these are not capital expenditures. Faith Broadcasting and Moody Bible Institute of Chicago believe that NCE applicants who experience difficulties during the holding period should be allowed to donate the station to another nonprofit organization for no consideration. Sound of Life argues that the station should go to the next applicant in the queue.

97. We have decided that from the grant of the construction permit through the four year holding period, NCE entities who must assign or transfer their permit or license will be limited to recovery of their legitimate and prudent expenses. We conclude that "legitimate and prudent expenses" as relevant here will include the costs of obtaining the permit and constructing the station, but will not include costs of station operations. To further ensure that the public receives the benefits to which it is entitled, during the holding period a proposed assignee of such a station will be required to demonstrate that it would qualify for the same or a greater number of points as the assignor originally received. We do not favor the suggestion that the licensee donate the station to any other non-profit organization of its choice, without regard to how well qualified that organization may be. This would not maximize the benefits that the point system is intended to achieve.

98. We generally agree with commenters that gradual changes in the board, of the type that ordinarily occurs in most NCE organizations, will not for purposes of a holding period be treated as the equivalent of a sudden transfer of control or assignment. Nevertheless, we note that we have adopted several point factors that are board dependent, including diversity of ownership and localism. Such factors must be maintained despite board turnover. To address inevitable changes in board composition, we will award diversity and localism preferences only to organizations whose own governing documents ensure that these factors are preserved despite Board changes (e.g. whether existing and incoming board members can have other media interests and whether outgoing board members will be replaced with others who are similarly representative of the community).

#### **G. FM Translators Operating on Reserved Channels**

99. Translators are secondary stations that rebroadcast the signals of primary stations. Generally translators operate in areas where reception of the primary station would otherwise be poor. The Further Notice asked whether the same point system and procedures used for NCE primary stations should apply to NCE-FM translator stations operating on reserved channels. The Further Notice did not ask about television translator stations on reserved channels because there are no channels reserved for noncommercial television translators. We asked whether our new selection method should maintain any

of the selection preferences in the current translator rule, 47 C.F.R. § 74.1233. We noted in particular that our rules currently favor "fill-in" translators, which fill in gaps in a primary NCE station's service area, over "other area" translators, which extend a primary NCE station's signal beyond its service area. We also noted that our current translator rules use a first come, first served approach as a tie breaker.

100. Only two commenters addressed this issue in any depth. Alaska Public Telecommunications suggests that we maintain all of the current translator selection procedures without change. NPR suggests that we first examine translator applications as to fill-in/other area status, as we do currently, and apply a point system only if fill-in status is not dispositive. We will adopt NPR's suggestion. As in the current translator selection method, if there are any fill-in proposals, only those would be eligible for further consideration. Thus, if there is only one fill-in translator among the applications filed during the filing window, the permit will be awarded to that station. If there are multiple fill-in proposals to be compared, or if no applicant proposes fill-in service, we will apply the same point system as discussed above for full service NCE stations. As a tie breaker of last resort, however, we will retain the first come, first served method currently in our rules for NCE-FM translator tie breakers, rather than switching to the mandatory timesharing adopted for full service stations. We indicated in the Further Notice, that we were more inclined to adopt a first come, first served tie breaker for translators than for full service stations because we did not anticipate the same rush to file for translator stations. There was no significant discussion of this issue, and we continue to believe that a filing rush is unlikely for FM translator stations, which lack several advantages of full service stations, including interference protection from other full service stations and the authority to originate, rather than rebroadcast, programming.

#### **H. Noncommercial Educational Applicants on "Commercial" Channels**

101. Perhaps the most difficult question posed in this proceeding concerns NCE use of frequencies that are not specifically reserved for NCE use. In the past, NCE and commercial applicants were both able to compete for this spectrum under the rules applicable to commercial applicants. For example, NCE radio applicants on non-reserved radio channels had to meet the stricter engineering requirements applicable to commercial stations. When noncommercial educational applicants competed with commercial applicants for commercially available channels, they were all compared in a hearing using the standards applicable to commercial applicants. Given changes that have occurred in the commercial selection process, we must decide whether noncommercial educational entities can continue to compete with commercial applicants on non-reserved channels and, if so, how to select among competing commercial and noncommercial applicants.

102. The Balanced Budget Act generally requires that the Commission award licenses and permits through a system of competitive bidding if mutually exclusive applications are accepted for any initial license or construction permit. 47 U.S.C. § 309(j)(1). There are a few limited exceptions to the auction requirement, however. 47 U.S.C. § 309(j)(2). The

exception relevant here, 47 U.S.C. § 309(j)(2)(C), states that auctions "shall not apply to licenses or construction permits issued by the Commission ... for stations described in section 397(6)" of the Communications Act. Section 397(6) defines the terms "noncommercial educational broadcast station" and "public broadcast station."<sup>72</sup> In the Further Notice, we observed that some parties construed the statutory language as limited in scope, merely indicating that auctions cannot be used on channels reserved for NCE use. Others, however, believed the language to have broader implications, requiring the Commission to design new non-auction procedures for use whenever an NCE applicant applies for a non-reserved channel. We did not find the legislative history to provide clarification. The Further Notice requested additional comment on this issue, and on whether NCE entities should remain eligible to compete for non-reserved channels.

### 1. Statutory Construction

103. The comments filed in response to the Further Notice continue to offer different interpretations of Section 309(j)(2)(C), and whether it pertains to applications by NCE entities for non-reserved channels. Generally, NCE organizations read the statute to always exempt NCE entities from auction, and commercial applicants read it as exempting only those channels reserved for NCE use. NCE entities argue that the statutory exception to auctions clearly is based on the applicants' eligibility to construct an NCE station and not on the particular channel for which the entity is applying. Thus, they maintain that NCE applicants are equally exempt from auctions on non-reserved channels as on reserved channels. As support for this position, NPR notes that the original House and Senate bills, which were not enacted, would have limited the auctions exception to reserved channels, but that this language was eliminated in the conference committee.<sup>73</sup> It argues that when Congress includes limiting language in an earlier version of a bill, but deletes it prior to enactment, it may be presumed that the limitation was not intended. Russello v. U.S., 464 U.S. 16, 23-24 (1983). The commenters also supply various reasons why Congress could have intended NCE entities always to be exempt from auction. For example, they say that substantial public monies support NCE broadcasting, and that an NCE organization would have little hope of prevailing in an auction against a commercial enterprise.

104. NCE commenters particularly oppose the statement in the Further Notice that, if we

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<sup>72</sup> The terms "noncommercial educational broadcast station" and "public broadcast station" mean a television or radio 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 educational purposes. 47 U.S.C. § 397(6).

<sup>73</sup> S. 947, 105th Cong., 1st Sess., § 3001(a)(1)(not enacted); H.R. 2015, 105th Cong., 1st Sess., § 3301(a)(1) (enacted as amended).

read the language as an absolute exemption of NCE stations from auction, NCE entities may become disqualified from competing for non-reserved channels. Commenters say that non-reserved channels are important to NCE organizations, and that they operate on non-reserved channels for various reasons. These reasons include TV Channel 6 interference to certain reserved FM channels, interference by foreign stations, historic use of AM stations by NCE radio pioneers, historic use of VHF channels for wide area geographic coverage to fulfill statewide plans, donation of stations on non-reserved channels from commercial broadcasters to NCE entities, purchase of stations from commercial broadcasters, and vacant non-reserved allotments.<sup>74</sup> As an indication of the importance of non-reserved channels to NCE entities, NPR and AAPT report that 37 of their members operate on non-reserved FM channels, 20 on non-reserved AM channels, and 15 on non-reserved TV channels. With respect to translators they say that many NCE-FM translators are on the non-reserved band, including 12 of Minnesota Public Radio's 18 translators, and that all TV translators operate on non-reserved channels because there are no TV channels reserved for educational translators.

105. In marked contrast, commercial applicants believe that Congress' clear intent was to mandate auctions on all non-reserved channels to balance the budget, and that the NCE language was meant only to clarify that reserved NCE channels are not to be auctioned.<sup>75</sup> DeLaHunt Broadcasting and Big Sky Broadcasting say that applying the auction exemption in Section 309(j)(2)(C) to non-reserved channels would subvert the statute's intent to balance the budget by overriding auctions every time an NCE entity applies for channels that could also be used commercially. As these commenters read the language of the Act, it is the nature of the allotment, and not the nature of the particular applicant, that determines whether auctions should be used. They maintain that non-reserved channels are allotted for commercial use and that a decision to program a station on these channels with noncommercial educational material amounts to a choice of program format. Thus, they say that each applicant on a non-reserved channel chooses between a commercial or noncommercial format on a channel that is allotted for commercial use. They therefore maintain that nonreserved channels are always subject to auction, regardless of the voluntary program choices that applicants may propose.

106. After considering the comments and reviewing the statute, we conclude 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. Section 309(j) contains conflicting statutory directives. On the one hand, it directs the Commission to grant licenses and permits by a system of competitive bidding when mutually exclusive applications are filed, and to design a system of competitive

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<sup>74</sup> Comments of University of California.

<sup>75</sup> E.g., Comments of Jack I. Gartner at 2-3.

bidding that recovers for the public “a portion of the value of the public spectrum resource made available for commercial use. . . .”<sup>76</sup> On the other hand, it exempts from competitive bidding licenses or construction permits issued by the Commission “for stations described in section 397(6) of the Act.”<sup>77</sup> These provisions do not conflict with respect to the allocation of reserved channels or with respect to the allocation of non-reserved channels for which only commercial applicants apply. In the first instance, an auction is prohibited, while in the second it is mandated. But neither the statute nor the Conference Report provide us with any guidance on how we should award authorizations when NCE applicants file mutually exclusive applications for channels that are made available for commercial use.<sup>78</sup> Since Congress has not “directly spoken to the precise question at issue,”<sup>79</sup> we construe Section 309(j) in the manner that we believe best reconciles its conflicting directives: to exempt NCE applicants for reserved channels from auctions, and to auction all channels made available for commercial use, even if NCE entities choose to apply for those channels.

107. Section 309(j)(3) of the Act provides that “in identifying classes of licenses and permits to be issued by competitive bidding . . . and in designing the methodologies, . . .

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<sup>76</sup> 47 U.S.C. § 309(j)(1) and (j)(3)(C).

<sup>77</sup> 47 U.S.C. § 309(j)(2)(C).

<sup>78</sup> We acknowledge that H.R. 2015, which was later amended in the Conference Committee and adopted as the Balanced Budget Act of 1997, initially had an exemption for “public telecommunications services, as defined in section 397(14) of the Communications Act of 1934 (47 U.S.C. 397(14)), when the license application is for channels reserved for noncommercial use.” See H.R. Rep. 105-149, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., Section 3301(a)(1)(A) (1997). National Public Radio argues that the fact that the Conference Committee did not adopt the clause limiting the exemption to reserved channels reflects an intent that the exemption extend to non-reserved as well as reserved channels. Comments of National Public Radio at 32. While we are mindful of the canon of statutory construction relied upon by National Public Radio, we do not find it decisive in this instance because the exemption that was originally proposed in the House bill was quite different from the exemption that was ultimately adopted. As is apparent from the exemption quoted above, the House bill incorporated by reference the definition of “public telecommunications services,” as defined in section 397(14) of the Act, while the exemption that was enacted as part of Section 309(j) incorporates by reference the definition of “noncommercial educational broadcast station” and “public broadcast station” set forth in Section 397(6) of the Act. See 47 U.S.C. § 397(6). Since the Commission does not license “public telecommunications services,” that term does not seem an appropriate term to use in the Section 309(j) exemption, and the House may have added the reference to reserved channels in an attempt to tie the definition of “public telecommunications services” to the Commission’s licensing authority. When the Conference Committee completely changed the wording of the exemption to rely on the more appropriate definition in Section 397(6), it may have found it unnecessary to add the additional clause because the Commission does license noncommercial educational broadcast stations, so the link between the exemption and the Commission’s licensing authority is apparent. Thus, under these circumstances, we do not believe that the deletion of the clause in question reflects a Congressional intent to expand the exemption to channels made available for commercial use.

<sup>79</sup> See *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

the Commission shall include safeguards to protect the public interest in the use of the spectrum." 47 U.S.C. § 309(j)(3).<sup>80</sup> One of the enumerated public interest objectives included in this section of the statute is "recovery for the public of a portion of the value of the public resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource." 47 U.S.C. §309(j)(3)(C)(emphasis added). This provision makes it clear that the Commission is charged with designing competitive procedures that recover the value of spectrum made "available" for commercial use, regardless of who applies for it. A reading of 47 U.S.C. § 309(j)(2)(C) which permits NCE applicants to exercise "a right of first refusal" over commercial spectrum otherwise subject to auction would severely limit, if not defeat, our ability to meet this objective when an NCE entity applies for a non-reserved channel. It is an elementary canon of statutory construction that a statute should be interpreted so as not to render one part inoperative. Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985).

108. As commenters note, the decision to operate noncommercially on the non-reserved channels is a voluntary choice on the part of the applicant, not a Commission requirement. Furthermore, it is a choice that is easily undone from a regulatory standpoint. If an applicant asks the Commission to designate its non-reserved permit or license as noncommercial educational, we will generally do so, provided that the applicant demonstrates NCE eligibility and consents to operate the non-reserved channel station in a noncommercial educational manner. If the station determines at any time that it wishes to operate commercially, however, it can simply file FCC Form 302, to voluntarily change the nature of its station and its regulatory status back to commercial again. Similarly, if one of these non-reserved channel stations is sold to another party, the new party can elect whether the station will be operated on a commercial or noncommercial basis.<sup>81</sup> Even an applicant indicating in its initial application that it wants to be licensed as noncommercial could amend that application at any time to propose commercial operations. In this manner, stations operating on non-reserved channels differ greatly from those operating on reserved NCE channels, which are not made available for commercial use. Noncommercial educational operation is mandated and permanent on the reserved channels, not voluntary and temporary as on the non-reserved channels.

109. Given the relative ease with which broadcasters choosing to operate on commercially available channels can both obtain and discard "NCE" status, we can not conclude that Congress intended to limit the "recovery for the public of a portion of the value of the [spectrum] . . . available for commercial use" to the proceeds from the auction of only those frequencies that NCE applicants do not want. Such a broad interpretation of

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<sup>80</sup> This is pre-existing auctions language that Congress, in the Balanced Budget Act, left unchanged.

<sup>81</sup> See WNYC Communications Group, 11 FCC Rcd 13841, 13843 (Mass Media Bur. 1996).

Section 309(j)(2)(C) would seem to contravene apparent congressional intent to limit the situations in which licenses are awarded by comparative hearings, as reflected in our expanded auction authority. Interpretation of the language in such a manner would also create a statutory conundrum. Except for a select group of applications filed before July 1, 1997, the Commission is required to use auctions to award commercial broadcast licenses, when mutually exclusive applications are filed. Auctions would be precluded, however, under a broad reading of Section 309(j)(2)(C) whenever any one of the competing applicants for a station in the non-reserved band is a noncommercial educational entity. How the Commission is to resolve this dilemma is not spelled out in the statute or in the legislative history. If Congress had intended to exempt from our auction authority all licenses for noncommercial stations (whether authorized on the reserved or on the non-reserved channels), we believe that it would have done so explicitly, and that it would have also prescribed procedures for the Commission to follow when both commercial and noncommercial entities file applications for a non-reserved channel. But Congress did neither. This reinforces our conclusion that, consistent with our expanded auction authority generally and the public interest objectives enumerated in Section 309(j)(3)(C), Congress intended the exemption specified in Section 309(j)(2)(C) to apply only on the reserved band. We thus consider Section 309(j)(2)(C) of the statute as a direction that the Commission identify NCE stations as exempt from auctions for reserved noncommercial channels but not for non-reserved channels that are also available to commercial broadcasters.

110. Our interpretation of the statute in the manner described reaches a result consistent with our decision in a case in which we interpreted a similar public safety exception from mandatory competitive bidding. See Order on Reconsideration of the Second Report and Order, Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, 14 FCC Rcd 1339 (1999) (interpreting 47 U.S.C. §309(j)(2)(A)). We determined there that the applicant's voluntary intention to use a channel for public safety purposes did not bring the applicant under the auction exception, when that channel could also be used commercially. That case involved a wireless service called the Location and Monitoring Service (LMS), which is used for automatic vehicle monitoring. Like the dual use non-reserved broadcast channels at issue here, the LMS service can be used for a variety of purposes, some of which are related to public safety, and others of which are commercial. An applicant who intended to use an LMS frequency to locate emergency vehicles such as ambulances and police cars maintained that the statute prohibited the Commission from auctioning the right to use an LMS channel any time that an applicant proposed to use the channel for public safety purposes. We rejected this argument, stating that we must look beyond a particular applicant's intended use of the channel, to how the channels are allocated. Automatic Vehicle Monitoring, 14 FCC Rcd at 1343. Because the LMS was not allocated by the Commission as a public safety service, we found that the exemption from mandatory auction did not apply. Similarly, non-reserved channels are not allocated solely for noncommercial educational stations, and the nature of the allocation determines

whether they are subject to competitive bidding.<sup>82</sup>

111. We thus conclude that applications to construct noncommercial educational stations are exempt from auctions if the proposed station will operate on a channel that is reserved for NCE use. Mutually exclusive applications for new broadcast stations on channels available for commercial use, i.e. stations whose commercial or noncommercial nature can be changed voluntarily at the applicant's option, will be auctioned regardless of whether one or more of the applicants is eligible to use reserved channels. Such auctions will, in general, be conducted using our newly established auction rules.

## 2. Reserving Additional Spectrum for NCE Use

112. To mitigate any potential hardship that the auction process might impose on noncommercial entities, we discussed in the Further Notice the possibility of facilitating the reservation process. Currently, NCE applicants can file a Petition for Rule Making requesting a reallocation of a channel from non-reserved to reserved only if they demonstrate that they are precluded from using reserved channels due to such channels' receipt of interference from TV Channel 6 or foreign stations. The Further Notice suggested that we also allow spectrum to be reallocated for NCE use if (a) the NCE entities would be precluded from serving their proposed communities of license using reserved channels by existing reserved channel stations or pending applications; and (b) the proposed allotment would provide the first or second NCE aural or video service received in the community. We asked whether such a reallocation would be sufficient to meet the public's need for NCE service. Pensacola Christian College proposes that we allow reallocation if there is no reserved channel available and no interference to other stations. Faith Broadcasting and Houston Christian Broadcasting suggest that the channel be reallocated if no reserved channels are available that would allow an NCE station to serve the community to which a non-reserved channel is assigned, with a 70 dbu service contour. Minnesota Public Radio proposes that the Commission make TV Channel 6 available to NCE stations when these stations move to digital channels.

113. However, several commenters object to a relaxed reservation approach. Elgin FM, a commercial broadcaster, states that additional NCE reservations are not fair to commercial broadcasters that are also competing for scarce spectrum. The University of Arizona says that although reserving additional spectrum at the allocations stage is a good idea for future applications, it does not address applications already on file. According to the University of Arizona, some pending applications are seeking the last frequencies available in an area, so a future ability to reserve another frequency will not help. To

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<sup>82</sup> We observe that the facts of the LMS case are not identical to the current situation. For example, the LMS applicant did not raise its public safety argument until the reconsideration stage of a rule making, after the LMS service had been found auctionable, whereas the current NCE question was raised in a more timely manner. Nevertheless, the Commission in that case addressed a similar question involving a related section of the statute.

address this situation, it suggests a needs test that would apply to pending proceedings, based on the number of existing NCE stations in relation to commercial stations.<sup>83</sup>

**(a) Future NCE Allocations (non-reserved channels)**

114. Upon consideration of the comments, we have decided, for future FM and television applicants, to expand opportunities to allocate channels from non-reserved to reserved. In addition to considering TV channel 6 (radio only) and foreign station interference (radio only), we will also adopt a needs test for future rule making requests which ask that non-reserved channels not already in the Table of Allotments be added and reserved for NCE use. For these future allocations requests, an NCE entity can show that the need for an NCE station is greater than the need for a commercial station. An NCE proponent could so demonstrate by showing that:

(A) the NCE radio proponent is technically precluded from using the reserved band by existing stations or previously filed applications or an NCE television proponent shows that there is no reserved channel assigned to the community; and

(B) the NCE proponent would provide a first or second radio or television NCE service to 10% of the population within the proposed allocation's 60 dBu (1 mV/m) service contour (radio) or Grade B contour (TV).<sup>84</sup> New NCE service to fewer than 2,000 people would be considered insignificant for purposes of this determination.

While we recognize that commercial broadcast applicants may also have limited spectrum available to them, we nevertheless believe that NCE applicants should have the opportunity to rebalance the commercial/noncommercial channel mix of FM and TV channels if they can demonstrate that there is a greater need for noncommercial service in an area. We adopt a limited expansion of existing policy today, and can evaluate the

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<sup>83</sup> University of Arizona, et al., suggests a five pronged tests for determining whether NCE needs exceed commercial needs. NCE needs would be demonstrated by (1) first or second service; (2) ratio of NCE radio to commercial radio less than 20%; (3) ratio of NCE television to commercial television less than 33%, (4) technical reasons for lack of radio coverage, e.g. TV channel 6 and terrain obstructions; and (5) technical reason for lack of television coverage in top 100 TV markets. Comments of University of Arizona, et al. at 9-10.

<sup>84</sup> We assume that there would likely already be a first or second commercial service received in the area. In the unlikely event of an NCE applicant seeking reservation of nonreserved spectrum in an area not already served by two commercial channels, we delegate to the staff to consider on a case-by-case basis, whether commercial or NCE service is most needed.

sufficiency of this limited change in the future if necessary.<sup>85</sup> We will not, however, apply this analysis to AM channels. 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. Thus, we do not anticipate establishing reserved NCE stations on the AM band.

115. If an NCE applicant demonstrates a greater need for NCE service than for commercial service under this test, the channel will be allocated as reserved, and only NCE applicants could apply to use the channel in the next application filing window. NCE applicants would then compete for the channel pursuant to the point system described above. The NCE station permit awarded would be for NCE use only, and could not be voluntarily switched to a commercial station by later application. If a greater need for NCE service is not demonstrated, however, and a channel thus remains available for commercial use, we would conduct an auction among the applicants and NCE applicants would be eligible to participate. As the prevailing applicant in such an auction would be awarded a permit for a commercial channel, the station could be programmed with either a commercial or noncommercial format. As under current practice, the permittee would have the option to voluntarily request that the station be licensed as NCE instead, as well as the option to voluntarily request a change back to commercial if it so desired. We will not establish bidding credits for NCE stations in such auctions, in view of the commercial nature of the non-reserved channels. We also note the lack of any supporting comments in response to the Further Notice's discussion of NCE bidding credits. Those NCE applicants, as well as non-NCE applicants, that are eligible for our new entrant auction credit will, of course, be able to claim that credit. See Competitive Bidding supra.

### 3. Existing Applications

116. As indicated above, the University of Arizona is concerned that easier allocation of spectrum in the future will not help existing NCE applicants who already have filed applications to use commercially available channels. The University of Arizona suggests that we apply a needs test to existing proceedings similar to that adopted for future proceedings. We have considered, but have decided not to adopt, this suggestion. We currently have approximately 250 applications in which commercial and noncommercial educational applicants are competing for approximately 45 channels which were commercially available at the time of application.<sup>86</sup> The nature of each such channel has

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<sup>85</sup> Thus, we will not adopt at this time more expansive changes to our policies, such as establishing set ratios of noncommercial stations, as the University of Arizona suggests.

<sup>86</sup> As of March 2000 there were 39 radio proceedings affecting 220 applicants in which NCE applicants are competing with commercial applicants for non-reserved channels. (33 FM proceedings and 6 FM translator proceedings). In the same period, there were five television proceedings affecting 22 applicants in which NCE and commercial television entities were competing for non-reserved channels.

been considered previously in a rule making proceeding and, after the opportunity for public comment, was identified as commercially available in the table of allotments in our rules. Both commercial entities and noncommercial entities that applied for those channels did so with full knowledge that their applications would be considered under commercial standards.

117. It is in accord with the original expectations of all applicants to require NCE applicants to "play by commercial rules" as anticipated, even if that means participating in auctions. Accordingly, as in the Competitive Bidding proceeding, existing applications for commercially available channels will be resolved by auction. We recognize that, due to funding concerns, many NCE applicants may be unable to participate or prevail in an auction. We would encourage such applicants to use the new needs test discussed above to initiate rule making proceedings to allocate other channels exclusively for NCE use.

118. Applicants with pending applications for nonreserved channels may wish to settle prior to auction. Pursuant to our existing rules, settlement will be permitted provided that consideration does not exceed the settling applicant's reasonable and prudent expenses (including, for a commercial applicant, any fees paid to the Commission). A final date for settlement will be announced in a public notice, establishing auction dates. Applicants voluntarily dismissing their applications, for reasons other than settlement, may request a refund of fees from the Commission.

## **I. Conclusion**

119. We will use a point system to select among competing applicants for reserved channels and will hold auctions to select among applicants for nonreserved channels. The nature of the channel (reserved or nonreserved) will govern, not the commercial or noncommercial nature of the individual applicants. We conclude that this method is consistent with the intent of the Balanced Budget Act, which exempted noncommercial educational stations from auction, while requiring auctions for commercial stations, and with other sections of the Communications Act, which require the Commission to recover the value of spectrum made available for commercial use. In recognition, however, of the possibility of a compelling need for NCE service in a particular area that may arise on a case-by-case basis, and the potential limited financial resources of NCE entities who may wish to serve such an area, we provide a new mechanism for noncommercial applicants to request allocation of additional (currently non-reserved) spectrum as reserved.

## **IV. Administrative Matters**

### **A. Application Form**

120. We intend to modify the Application to Construct a Noncommercial Educational Broadcast Station (FCC Form 340), to reflect the information required to apply a point system as well as the other changes adopted in this Report and Order. We direct the Mass

Media Bureau to make the necessary modifications to the form to reflect these changes for future applications and to fashion a form or other method to receive information from pending applicants who filed on the existing form.

## **B. Filing Freeze**

121. To facilitate a smooth transition from the A/B cutoff filing method to the window filing system, and transition from comparative hearings to point systems, we will implement a filing freeze on applications for new NCE TV, FM, and FM translator stations and for major changes to such existing NCE stations operating on reserved channels. From the release of this Report and Order we will only accept reserved channel NCE applications if they are filed in response to "A" cutoff notices that have already been issued and for which the deadline for filing "B" applications has not yet occurred. Other new and major change applications for reserved NCE channels must await the opening of an NCE filing window. Any applications filed before release of this Report and Order, for which "A" cutoff public notices have not yet issued, will be included in the first educational window opened for new applications in the relevant service. The filing freeze is limited to reserved NCE channels. There is a similar freeze in place on non-reserved channels, while the Commission transitions to an auction environment for those channels. Should the staff lift the freeze on non-reserved channels prior to lifting the freeze on reserved channels, NCE applicants will have the option at that time to apply for non-reserved channels, subject to their participation in any auctions that may result consistent with the policies and regulations established herein.

## **V. PROCEDURAL MATTERS AND ORDERING CLAUSES**

122. **Paperwork Reduction Act of 1995 Analysis.** This Report and Order contains either new or modified information collections. Therefore, the Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this Report and Order as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from the date of publication of this Report and Order in the Federal Register. Comments should address: (a) whether the new or modified 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. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1C1804, 445 12th Street, S.W., Washington, D.C. 20554, or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov) and to Virginia Huth, OMB Desk Officer, 725 17th Street, N.W., Room 10236, NEOB, Washington, DC 20503 or via the Internet to:

VHuth@omb.eop.gov.

123. For additional information concerning the information collections contained in this Report and Order contact Judy Boley at 202-418-0217.

124. **Final Regulatory Flexibility Analysis.** The Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq, is attached as Appendix C.

125. Accordingly, IT IS ORDERED, that pursuant to the authority of Sections 4(i) and (j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), 309(l), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), 309(l), and 403, this Report and Order IS ADOPTED, and Parts 73 and 74 of the Commission's Rules ARE AMENDED as set forth in Appendix D below.

126. IT IS FURTHER ORDERED that, pursuant to the Contract with America Advancement Act of 1996, the rule amendments set forth in Appendix D SHALL BE EFFECTIVE 60 days following publication in the Federal Register.

127. IT IS FURTHER ORDERED that, effective upon release of this Report and Order and continuing until the opening of filing windows for NCE stations, the Commission shall not accept applications for new and major changes to NCE stations on reserved channels, except for applications filed in response to previously announced A cutoff periods that have not yet closed.

128. IT IS FURTHER ORDERED, that pursuant to 47 U.S.C. § 155(c), the Chief of the Mass Media Bureau IS DELEGATED AUTHORITY to prescribe application format and day-to-day procedures concerning the filing and processing of applications in accordance with the guidelines set forth herein.

129. IT IS FURTHER ORDERED, that any traditional comparative hearing proceedings to which a noncommercial educational applicant is a party ARE HEREBY TERMINATED.

130. IT IS FURTHER ORDERED, that the Commission's Office of Legislative Affairs SHALL SEEK an amendment to the Communications Act, 47 U.S.C. § 155(c)(1) that would permit the Commission to delegate authority to conduct review of applications pursuant to a point system to the Chief, Mass Media Bureau.

131. IT IS FURTHER ORDERED, that until such time as 47 U.S.C. § 155(c)(1) is amended, the staff is directed to refer mutually exclusive NCE applications to the Commission to apply the point system procedures established herein to applications for broadcast construction permits.

132. IT IS FURTHER ORDERED, that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Memorandum Opinion and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

133. IT IS FURTHER ORDERED, that the new or modified information collection contained in this Report and Order are subject to approval by the Office of Management and Budget and will become effective 60 days after OMB approval, unless a notice is published in the Federal Register stating otherwise.

134. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

135. For additional information concerning this proceeding, contact Irene Bleiweiss, Mass Media Bureau, Audio Services Division, (202) 418-2780.

**FEDERAL COMMUNICATIONS COMMISSION**

Magalie Roman Salas  
Secretary

**STATEMENT OF COMMISSIONERS HAROLD FURCHTGOTT-ROTH AND GLORIA TRISTANI, DISSENTING IN PART**

*In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants -- MM Docket No. 95-31*

We would have found that Section 309(j)(2)(C) of the Communications Act precludes us from using competitive bidding to award a broadcast license to a noncommercial educational broadcast or public broadcast station to operate on a commercial channel. We believe that Congress' mandate is clear: the Commission lacks authority to employ auctions to issue licenses to such stations, regardless of whether they operate on a reserved or on a commercial frequency. Since the statute is clear on its face, we are obligated to give it effect.<sup>87</sup>

The specific exemption to our competitive bidding authority in section 309(j)(2)(C) provides that such authority "shall not apply to licenses or construction permits issued by the Commission . . . for stations described in section 397(6) of this title." Section 397(6), in turn, defines the terms "noncommercial educational broadcast station" and "public broadcast station" as "a television or radio broadcast station which . . . under the rules and regulations of the Commission . . . 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 "is owned and operated by a municipality and which transmits only noncommercial programs for education purposes."

Nothing in section 309(j)(2)(C) limits its reach to licenses issued for noncommercial and public broadcast stations *on reserved channels*. The statute makes no distinction between licensees granted to section 397(6) stations to operate on reserved spectrum and licensees granted to such entities to operate on unreserved spectrum; the prohibition on the licensing of these stations pursuant to auctions is, in this regard, unqualified. The Commission simply has no competitive bidding authority when it comes to licenses issued for stations described in Section 397(6).

Similarly, nothing in section 397(6) limits the definition of noncommercial educational and public broadcast stations to those operating on reserved channels. Rather, section 397(6) defines the stations exempt from auctions under section 309(j)(2)(C) in terms of the station's *eligibility* under Commission rules to be licensed as a noncommercial educational or public broadcast station. Commission rules do not require broadcast stations to operate only on reserved bands in order to be eligible for status as a noncommercial educational or public broadcast station.<sup>88</sup> To the contrary, our rules specifically address the situation in which noncommercial educational stations are licensed to operate on unreserved channels.<sup>89</sup>

Had Congress intended to limit the exemption for noncommercial educational and public broadcasters from competitive bidding to cases in which such broadcasters were applying for reserved frequencies, we believe that Congress would have done so explicitly. Indeed, prior versions of both the

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<sup>87</sup> See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

<sup>88</sup> See 47 C.F.R. § 73.503.

<sup>89</sup> See 47 C.F.R. § 73.513.

House and Senate bills expressly provided for an auction exemption limited to "channels reserved for noncommercial use," but those limitations were eliminated prior to passage.<sup>90</sup> Where Congress deletes limiting language from a bill prior to enactment, it may be presumed that the limitation was not intended.<sup>91</sup> We would not read this limitation back into the statute.

The majority's reasoning to the contrary is unpersuasive. Although the majority tries to paint itself as caught between two "conflicting statutory directives," para. 106 (juxtaposing sections 309(j)(1) & (j)(3)(C) with section 309(j)(2)(C)), this characterization of section 309 is just not tenable. The statutory language is not in equilibrium, leaving the Commission free to choose one side or the other, but clearly weighs in favor of exempting NCEs from auctions across the board.

The directive in section 309(j)(1) to auction all mutually exclusive applications, on which the majority places such reliance, is by its clear terms subject to the exemptions set forth in the very next subsection. That subsection, of course, includes the exemption for noncommercial stations. *See* 309(j)(1) ("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. . . .). Section 309(j)(1) is simply not an order to auction all mutually exclusive applications, as the majority suggests, and cannot be relied upon as such. Furthermore, the directive in section 309(3)(C) is simply to "seek to promote" – not to accomplish at all costs, and surely not where inconsistent with the actual statutory scheme – recovery of the value of spectrum made available for commercial use.

On the other side of the scale, there is section 309(j)(2)(C), which follows immediately the mandate to auction mutually exclusive applications except in certain situations. It provides that one of those situations is where "licenses or construction permits [are] issued by the Commission for stations described in section 397(6) of the Act." This exemption speaks *specifically* to the question of how to treat NCE applicants in a mutually-exclusive application situation. Accordingly, under the canon of construction that the specific governs the general, *see, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), we think it should trump whatever directives one might find in sections 309(j)(1) and (2)(C). As explained above, however, section 309(j)(1) is not an absolute mandate to auction all commercial spectrum and the hortatory "seek to promote" language of section (j)(C)(3) must give way to the mandatory language of the statutory exemption for NCEs.

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<sup>90</sup> *See* H.R. 2015, 105th Cong., 1st Sess., § 3301(a)(1); S. 947, 105th Cong., 1st Sess., § 3001(a)(1).

<sup>91</sup> *See Russello v. United States*, 464 U.S. 16, 23-24 (1983).

**STATEMENT OF COMMISSIONER GLORIA TRISTANI, DISSENTING IN PART***In the Matter of Reexamination of the Comparative Standards for  
Noncommercial Educational Applicants -- MM Docket No. 95-31*

While I generally support the point system adopted in the Order, I would have given an additional boost to stations that promised to provide a minimum level of locally-originated programming. Local-origination programming is one of the foundations on which the noncommercial educational service was built. As the Order notes, the 1967 Carnegie Report, which Congress relied upon to develop and improve noncommercial educational television stations, provided that:

The heart of the system is to be the community . . . [T]he overwhelming proportion of programs will be produced in the stations . . . local skills and crafts will be utilized and tapped . . . Like a good metropolitan newspaper, the local station will reflect the entire nation and the world, while maintaining a firm grasp on the nature and needs of the people it serves.<sup>92</sup>

Congress and the Supreme Court have repeatedly endorsed the preservation of local-origination programming as a legitimate and substantial governmental interest. In its official findings underlying the 1992 Cable Act, Congress stated: “A primary objective and benefit of our Nation’s system of regulation of television broadcasting is the local origination of programming. There is a substantial government interest in ensuring its continuation.”<sup>93</sup> In *Turner*, the Supreme Court expressly cited this finding in rejecting the argument that Congress’ “legitimate legislative goals” would be satisfied by the preservation of a truncated broadcasting industry providing a minimum level of service.<sup>94</sup> Similarly, in *Midwest Video*, the Court upheld an FCC requirement that cable operators make facilities available for local programming production as reasonably furthering the goal of “increasing the number of outlets for community self-expression.”<sup>95</sup>

In the Community Broadcasters Protection Act of 1999 (“CPBA”), Congress recently reaffirmed the value it places on local-origination programming. In the CPBA, Congress provided additional “Class A” protection to certain low-power television stations who have “operated their stations in a manner beneficial to the public good.” One of the primary qualifications for Class A status is that the station must broadcast at least 3 hours a week of locally-produced programming. Similarly, in the Commission’s recent Order on low power radio, it gave additional points to applicants who would air at least eight hours a day of local-origination programming.

The majority argues that the examples of Class A LPTV and LPFM are inapposite because they

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<sup>92</sup> Carnegie Commission on Educational Television, *Public Television: A Program For Action* 87 (1967).

<sup>93</sup> *Cable Television Consumer Protection and Competition Act of 1992*, 102 P.L. 385 (1992) Sec. 2(a)(10).

<sup>94</sup> *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997). See also *Chicago Cable Communications, et al. v. Chicago Cable Commission*, 879 F.2d 1540 (7<sup>th</sup> Cir. 1989).

<sup>95</sup> *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 (1972). See also *National Broadcasting Co. v. United States*, 319 U.S. 190, 203 (1943) (“A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.”).

involve services that are highly localized, unlike full-service NCE stations that have broader goals and a wider signal range. In adopting the LPFM local program origination rule, however, the Commission expressly stated that “[t]his criterion derives from the service requirements *for full-service broadcast stations*, which are required to maintain the capacity to originate programming from their main studios.”<sup>96</sup> Thus, awarding additional credit for local-origination was *not* based on the localized nature of the service, as the majority now asserts, but on the obligation of full-power stations to maintain the ability to produce local programming.

In sum, awarding additional points for local-origination programming would: (1) promote the purpose of the noncommercial educational service; (2) advance Congress’ goal of preserving local origination programming; and (3) pass muster in court. The majority’s argument against adoption is specious. I therefore dissent.

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<sup>96</sup> *Report and Order*, MM Docket 99-25, para. 144 (rel. January 27, 2000) (emphasis added).

**Appendix A: Summary of NCE Selection Procedures****Preliminary Determinations:**

**A. For Translators Only: Does any proposal provide fill-in service (within the primary station's protected contour)?** If yes, dismiss non-fill-in applications. If a mutually exclusive (fill-in or non-fill) group remains, proceed directly to point system.

**B. THRESHOLD 307(b) ISSUE (Full service radio only): If the mutually exclusive proposals would serve different communities does one service area need an NCE station radio significantly more than the other, e.g. would one applicant provide first or second NCE aural service to a significantly larger population?** If yes, grant that proposal. If not proceed to point system.

**Point System:****1. Local Diversity (2 points):**

Principal community contour of proposed station does not overlap the principal community contour of any attributable station (comparing radio to radio and television to television, and based on attributable interests of entity and parent, and their directors and members of their governing boards at time of filing).

**2. State-Wide Network (2 points, but only to applicants not claiming a local diversity credit):**

Applicant does not qualify for local diversity points but provides services within a single state to a minimum of 50 accredited elementary and/or secondary schools or 5 full-time campuses of an accredited college or university, under applicant's authority or in coordination with such authority, in furtherance of the curriculum.

**3 Technical Parameters (1 to 2 points):** One point is awarded to top applicant if, as of close of the filing window, it covers the largest area and population, and this differs by at least 10% from the proposal of the applicant with the second best technical proposal, as of that same time. Two points are awarded to the top applicant for a difference of 25% from the second best technical proposal.

**4. Established Local Entity (3 points):** Those physically headquartered, having a campus, or having 75% of board members residing within 25 miles of the community for at least two years would be local. Governments would be local throughout the area within which their authority extends.

**Tie Breakers: (Settlement permitted at any time)**

**(A) Primary Tie breaker: Fewest Existing Stations.** If the case does not settle, award the permit to the tied applicant who had the fewest existing same service (FM or TV) authorizations (licenses and permits) at the time of filing;

**(B) Secondary Tie breaker: Fewest Pending Applications.** If any applicants are still tied, award the permit to the applicant with fewest pending applications at the time of filing;

**(C) Tie Breaker of Last Resort.**

**Full Service Stations: Mandatory Time Sharing.** If a tie nevertheless remains award the tied applicants an equal opportunity to operate on a part-time basis.

**FM Translator Stations: First To File.**

**APPENDIX B**  
**List of Commenters**

Alaska Public Telecommunications, Inc., et al.  
American Family Association  
Americans for Radio Diversity  
Augusta Radio Fellowship Institute, Inc.  
Big Sky Broadcasting Company  
Michael Black  
Boston University, et al.  
CSN International  
Cedarville College  
Center for Media Education, et al.  
Colorado Christian University  
Community Television, Inc.  
Cornerstone Community Radio, Inc.  
DeLaHunt Broadcasting  
Educational Communications of Colorado Springs, Inc.  
Educational Information Corporation  
Educational Media Foundation  
Elgin FM Limited Partnership  
Faith Broadcasting, Inc.  
Francis Marion University  
Jack I. Gartner  
Houston Christian Broadcasters, Inc.  
Dale Jackson  
Penny Jackson  
Jimmy Swaggart Ministries  
KBPS Public Radio Foundation  
KDNK Board of Directors  
Kaleidoscope Foundation, Inc.  
Lakefront Communications, Inc.  
Laredo Community College  
Maranatha, Inc.  
Minnesota Public Radio  
Mohave Community College  
Moody Bible Institute of Chicago  
National Association of Broadcasters  
National Federation of Community Broadcasters  
National Public Radio, Inc., Association of America's Public Television Stations, and Corporation  
for Public Broadcasting  
National Religious Broadcasters  
New Life Evangelistic Center, Inc.  
New Mexico Commission on Public Broadcasting  
Pensacola Christian College  
Manuel F.V. Pereira

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Pinebrook Foundation, Inc.  
Public Radio for the Front Range  
Real Life Educational Foundation of Baton Rouge, Inc.  
Residents of Ponce, NE  
Roaring Fork Public Radio Translator, Inc.  
State of Oregon  
Sacred Heart University, et al.  
St. Gabriel Communications, Ltd.  
Sister Sherry Lynn Foundation, Inc.  
Sound of Life, Inc., et al.  
Station Resource Group  
Student Educational Broadcasting  
James J. Stephens, Jr.  
Taylor University Broadcasting, Inc.  
University of Arizona, et al.  
University of California  
WAY-FM, Inc., et al.  
Robert T. Wertime  
West Coast Public Radio, et al.  
Western Baptist College

**APPENDIX C**  
**Final Regulatory Flexibility Analysis**

Report and Order  
MM Docket No. 95-31

As required by the Regulatory Flexibility Act ("RFA"),<sup>97</sup> an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the Further Notice of Proposed Rulemaking for the docket in this proceeding.<sup>98</sup> The Commission sought written public comments on the proposals set forth in the Notice, including comment on the IRFA. The Commission's Final Regulatory Flexibility Analysis ("FRFA")<sup>99</sup> in this Report and Order ("Order") conforms to the RFA.<sup>100</sup>

A. Need For and Objectives of the Rule: The Commission previously determined that traditional hearings, the method used to select among competing applicants for new noncommercial educational broadcast construction permits, were time consuming and burdensome, and that the criteria used in those hearings were vague and difficult to apply. This Order amends the Commission's rules to establish a simpler, clearer, and more streamlined process for selecting among competing noncommercial educational applicants. Specifically, it 1) establishes a point system, a type of simplified paper hearing on channels reserved for NCE use; 2) clarifies that auctions will apply on non-reserved broadcast channels; and 3) provides additional circumstances in which an NCE entity can have a non-reserved channel allocated as reserved.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA: No comments were received specifically in response to the IRFA in MM Docket No. 95-31. However, one commenter, in expressing support for the use of lotteries, an option not selected, stated that it thought lotteries would have a positive effect on small businesses.<sup>101</sup>

C. Description and Estimate of the Number of Small Entities to which Rules will Apply: Under the RFA, small entities may include small organizations, small businesses, and small governmental

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<sup>97</sup> 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) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

<sup>98</sup> Further Notice of Proposed Rule Making, In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants, MM Docket No. 95-31, 13 FCC Rcd 21167 (1998) (Further Notice).

<sup>99</sup> This FRFA conforms to the RFA, as amended by the Contract with America Advancement Act of 1996, Pub. L. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Subtitle II of the CWAAA is The Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

<sup>100</sup> See 5 U.S.C. § 604.

<sup>101</sup> See Comments of Pensacola Christian College at 12.

jurisdictions. 5 U.S.C. S 601(6). The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA"). Pursuant to 5 U.S.C. S 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term that are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."<sup>102</sup> We received no comment in response to either IRFA on how to define radio and television broadcast "small businesses." Therefore, we will continue to utilize SBA's definitions for the purpose of this FRFA.

The rules adopted in this Order will apply to television and radio stations licensed to operate on channels reserved as "noncommercial educational." With respect to television stations, the Small Business Administration defines a television broadcasting station that has no more than \$10.5 million in annual receipts as a small business. Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Television stations that the Federal Communications Commission (FCC) would consider commercial, as well as those that the FCC would consider noncommercial educational, are included in this industry. Also included are other establishments primarily engaged in television broadcasting and which produce taped television program materials. Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.

For 1992 the total number of television stations that produced less than \$10.0 million in revenue was 1,155 of the 1,509 television stations then operating, both commercial and noncommercial, or 77 percent. As of July 31, 1999, of the 1,599 total television stations, 370 are noncommercial educational. Thus, we estimate that the proposed rules will potentially affect 285 (77 percent of 370) noncommercial educational television stations that are small businesses. These existing stations would only be affected if they file an application for major modification of their existing facilities, and if another applicant files a mutually exclusive application. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies. On the other hand they may understate the number of small entities, because we believe that a larger percentage of noncommercial educational stations are small businesses than the percentage applicable to the television industry as a whole. We recognize that the proposed rules may also affect minority and

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<sup>102</sup> While we believe that the SBA's definition of "small business" greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the proposals on small television and radio stations, for purposes of this FRFA, we utilize the SBA's definition in determining the number of small businesses to which the proposed rules would apply, but we reserve the right to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations or other entities subject to these rules and to consider further the issue of the number of small entities that are radio and television broadcasters or small media entities in the future. See Report and Order in MM Docket No. 93-48 (Children's Television Programming), 11 FCC Rcd 10660, 10737-38 (1996), citing 5 U.S.C. S 601(3).

women owned stations, some of which may be small entities. In 1997, minorities owned and controlled 38 (3.2%) of 1,193 commercial television stations in the United States. Comparable figures are not available for noncommercial stations. According to the U.S. Bureau of the Census, in 1987 women owned and controlled 27 (1.9%) of 1,342 commercial and noncommercial television stations in the United States. The proposal would also affect pending and future mutually exclusive applications for noncommercial television stations. As of August 1999, there are currently 67 pending applications for 22 channels reserved for noncommercial educational television usage.

The rule changes would also affect noncommercial educational radio stations. The SBA defines a radio broadcasting station that has no more than \$5 million in annual receipts as a small business. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public. Radio stations that the Federal Communications Commission (FCC) would consider commercial, as well as those that the FCC would consider noncommercial educational, are included in this industry. Also included are entities which primarily are engaged in radio broadcasting and which produce radio program materials. However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number. The 1992 Census indicates that 96 percent of radio station establishments produced less than \$5 million in revenue in 1992. Official Commission records indicate that 11,334 individual radio stations were operating in 1992. As of July 31, 1999, official Commission records indicate that 12,582 radio stations are currently operating. Of the current radio station total, 2,055 stations are noncommercial educational. Thus, we estimate that 1,923 (96%) of these noncommercial educational stations are small businesses, possibly more because we believe that a greater percentage of noncommercial educational stations are small businesses than of the radio industry overall. These existing stations would only be affected by the proposal if they choose to file applications for major modification of facilities and if their applications are mutually exclusive with the application of another noncommercial entity. Applicants for new NCE radio stations would also potentially be affected. As of August 1999 there were 371 pending mutually exclusive groups of 1,102 applications, for new noncommercial FM radio stations. We also note that this proposal will affect future applications. With respect to minority ownership of radio stations, no information is available for noncommercial stations, but it is available for commercial stations. In 1997, minorities owned 284 (2.8%) of 10,282 commercial radio stations.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements: The measures adopted in the Order are anticipated to reduce the overall administrative burden of the Commission's application processes on applicants and the Commission. Use of a point system will eliminate the expense of preparing for and appearing at lengthy traditional hearings. Applicants should also receive decisions faster, because the Commission will make numerical calculations instead of preparing detailed hearing decisions. These savings should more than offset the time that would be required for applicants to gather and submit documentation supporting the points claimed. No additional professional services are required by applicants filing under these revised rules. Further, the cost of compliance will not vary between large and small entities.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered: This Order sets forth the Commission's new streamlined procedures for selecting among competing noncommercial educational applicants. All significant alternatives

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presented in the comments were considered. Small entities participating in auctions for non-reserved channels may be eligible for a new entrant auction credit. Small entities may be eligible for points in the point system based on diversity of ownership, established local entity, and in a tie breaker for number of existing authorizations and applications.

F. Report to Congress The Commission will send a copy of the Reexamination of the Comparative Standards for Noncommercial Educational Applicants, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. See 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of this Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order, including this FRFA, (or summaries thereof) will also be published in the Federal Register. See 5 U.S.C. § 604(b).

G. Further, the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this Order, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

**APPENDIX D  
Revised Rules**

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

**PART 73 - RADIO BROADCAST SERVICES**

1. The authority citation for part 73 continues to read:  
Authority: 47 U.S.C. 154, 303, 334, and 336.

2. Section 73.202 is amended by revising paragraph a(1) to read as follows:

§ 73.202 Table of Allotments.

(a) \*\*\*

(1) Channels designated with an asterisk may be used only by noncommercial educational broadcast stations. The rules governing the use of those channels are contained in Part 73, Subpart C. An entity that would be eligible to operate a noncommercial educational broadcast station can, in conjunction with an initial petition for rulemaking filed pursuant to Part 1, Subpart C of the Commission's rules, request that a nonreserved FM channel (channels 221 through 300) be allotted as reserved only for noncommercial educational broadcasting by demonstrating the following: (i) no reserved channel can be used without causing prohibited interference to TV channel 6 stations or foreign broadcast stations; or (ii) the applicant is technically precluded from using the reserved band by existing stations or previously filed applications and the proposed station would provide a first or second noncommercial educational radio service to 2,000 or more people who constitute 10% of the population within the proposed allocation's 60 dBu (1 mV/m) service contour.

\*\*\*\*\*

3. Section 73.502 is deleted and reserved for future use.

4. Section 73.503 is amended by adding a new paragraph (e) to read as follows:

§ 73.503 Licensing requirements and service

\*\*\*\*\*

(e) mutually exclusive applications for noncommercial educational radio stations operating on reserved channels will be resolved pursuant to the point system in Subpart K.

\*\*\*\*\*

5. Section 73.513 is amended by designating the existing language as paragraph (a) and adding a new paragraph (b) to read as follows:

§ 73.513 Noncommercial educational FM stations operating on unreserved channels.

(a) Noncommercial educational FM stations other than Class D (secondary) which operate on Channels 221 through 300 but which comply with § 73.503 as to licensing requirements and the nature of service rendered, must comply with the provisions of the following sections of subpart B: §§ 73.201 through 73.213 (Classification of FM Broadcast Stations and Allocations of Frequencies) and such other sections of subpart B as are made specially applicable by the provisions of this subpart C. Stations in Alaska authorized before August 11, 1982, using Channels 261 through 300 need not meet the minimum effective radiated power requirement specified in §73.211(a). In all other respects, stations operating on Channels 221 through 300 are to be governed by the provisions of this subpart and not subpart B.

(b) When a noncommercial educational applicant is among mutually exclusive applications for an unreserved FM channel, the mutually exclusive applications will be considered pursuant to Subpart I - Competitive Bidding Procedures and not Subpart K – Application and Selection Procedures On Reserved Noncommercial Educational Channels.

6. Section 73.621 is amended by adding a new paragraph (h) to read as follows:

§ 73.621 Noncommercial educational TV stations.

\*\*\*\*\*

(h) mutually exclusive applications for noncommercial educational TV stations operating on reserved channels shall be resolved pursuant to the point system in Subpart K.

7. Section 73.622 is amended by adding new language immediately preceding the last sentence of paragraph (a) to read as follows:

§ 73.622 Digital television table of allotments.

(a) \*\*\* Rules governing noncommercial educational TV stations are contained in §73.621. Where there is only one technically available channel available in a community, an entity that would be eligible to operate a noncommercial educational broadcast station may, prior to application, initiate a rulemaking proceeding requesting that an unoccupied or new channel in the community be changed or added as reserved only for noncommercial educational broadcasting upon demonstrating that the noncommercial educational proponent would provide a first or second noncommercial educational TV service to 2,000 or more people who constitute 10% of the population within the proposed allocation's noise limited contour. Stations operating on DTV allotments designated with a "c" are required to comply with paragraph (g) of this section.

\*\*\*\*\*

8. Section 73.1150 is amended by adding a new paragraph (d) to read as follows:

§ 73.1150 Transferring a station

\*\*\*\*\*

(d) Authorizations awarded pursuant to the noncommercial educational point system in Subpart K are subject to the holding period in Section 73.7005. Applications for an assignment or transfer filed prior to the end of the holding period must demonstrate the factors enumerated therein.

9. Section 73.3522 is amended to revise paragraph (b) to read as follows:

§ 73.3522 Amendment of applications

\*\*\*\*\*

(b) *Reserved Channel FM and reserved noncommercial educational television stations*— Applications may be amended after Public Notice announcing a period for filing amendments. Amendments, when applicable, are subject to the provisions of Sections 73.3514, 73.3525, 73.3572, 73.3573, 73.3580, and Section 1.65. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration. Amendments will be accepted as described below and otherwise will only be considered upon a showing of good cause for late filing or pursuant to Section 1.65 or Section 73.3514:

(i) Section 73.7002 Selectee. A Public Notice will announce that the application of a Section 73.7002 Selectee (selected based on fair distribution) has been found acceptable for filing. If any Selectee's application is determined unacceptable the application will be returned and the Selectee will be provided one opportunity for curative amendment by filing a petition for reconsideration requesting reinstatement of the application. All amendments filed in accordance with this paragraph must be minor and must not alter the Section 73.7002 preference.

(ii) Section 73.7003 Tentative Selectee. A Public Notice will announce that the application of a Section 73.7003 Tentative Selectee (selected through a point system) has been found acceptable for filing. If any Tentative Selectee's application is determined unacceptable the application will be returned and the Tentative Selectee will be provided one opportunity for curative amendment by filing a petition for reconsideration requesting reinstatement of the application. All amendments filed in accordance with this paragraph must be minor and must claim the same number of qualitative points as originally claimed, or more points than claimed by the applicant with the next highest point total.

(iii) A Public Notice will identify all other reserved channel applications, such as non-mutually exclusive applications and the sole remaining application after a settlement among mutually exclusive applications. If any such application is determined unacceptable the application will be returned and the applicant will be provided one opportunity for curative amendment by filing a petition for reconsideration requesting reinstatement of the application. All amendments filed in accordance with this paragraph must be minor.

10. Section 73.3527 is amended by revising the first sentence of paragraph (e)(2) to read as follows:

§ 73.3527 Local public inspection file of noncommercial educational stations.

\*\*\*\*\*

(e)\* \* \*

(2) *Applications and related materials.* A copy of any application tendered for filing with the FCC, together with all related material, including supporting documentation of any points claimed in the application pursuant to Section 73.7003, and copies of FCC decisions pertaining thereto. \*\*\*

\*\*\*\*\*

11. Section 73.3555 is amended by revising paragraph (f) to read as follows:

§ 73.3555 Multiple ownership.

\*\*\*\*\*

(f) The ownership limits of this section are not applicable to noncommercial educational FM and noncommercial educational TV stations. However, the attribution standards set forth in the Notes to this section are relevant to evaluation of mutually exclusive noncommercial educational FM and TV applicants pursuant to Subpart K.

\*\*\*\*\*

12. Section 73.3572 is amended by revising paragraph (d) to read as follows:

§ 73.3572 Processing of TV broadcast, low power TV, TV translator and TV booster station applications.

\*\*\*\*\*

(d) (1) The FCC will specify by Public Notice, a period for filing applications for new television stations on reserved noncommercial educational channels or for major modifications in the facilities of an authorized station on reserved channels. TV reserved channel applications for new facilities or for major modifications will be accepted only during the appropriate filing period or "window." Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely. Mutually exclusive applications for reserved channel television stations will be resolved using the point system in Subpart K.

(2) Concurrently with the filing of a new or major modification application for a reserved noncommercial educational channel, the applicant shall submit to the FCC's public reference room and to a local public inspection file consistent with Section 73.3527(e)(2), supporting

documentation of points claimed, as described in the application form.

\* \* \* \* \*

13. Section 73.3573 is amended by revising paragraphs (d), and (e) to read as follows:

§ 73.3573 Processing FM broadcast station applications.

\* \* \* \* \*

(d) If, upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of an application for FM broadcast facilities, the same will be granted. If the FCC is unable to make such a finding and it appears that a hearing may be required, the procedure given in § 73.3593 will be followed. In the case of mutually exclusive applications for reserved channels, the procedures in Subpart K will be followed. In the case of mutually exclusive applications for unreserved channels, the procedures in Subpart I will be followed.

(e) *Processing reserved channel FM broadcast station applications*

(1) Applications for minor modifications for reserved channel FM broadcast stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and will be processed on a "first come/first served" basis, with the first acceptable application cutting off the filing rights of subsequent, competing applicants. The FCC will periodically release a Public Notice listing those applications accepted for filing. Conflicting applications received on the same day will be treated as simultaneously filed and mutually exclusive. Conflicting applications received after the filing of the first acceptable application will be grouped, according to filing date, behind the lead application in the queue. The priority rights of the lead applicant, against all other applicants, are determined by the date of filing, but the filing date for subsequent conflicting applicants only reserves a place in the queue. The right of an applicant in a queue ripens only upon a final determination that the lead applicant is unacceptable and that the queue member is reached and found acceptable. The queue will remain behind the lead applicant until the construction permit is finally granted, at which time the queue dissolves.

(2) The FCC will specify by Public Notice a period for filing reserved channel FM applications for a new station or for major modifications in the facilities of an authorized station. FM reserved channel applications for new facilities or for major modifications will be accepted only during the appropriate filing period or "window." Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

(3) Concurrently with the filing of a new or major modification application for a reserved noncommercial educational channel, the applicant shall submit to the FCC's public reference room and to a local public inspection file consistent with Section 73.3527(e)(2), supporting documentation of points claimed, as described in the application form.

(4) Timely filed applications for new facilities or for major modifications for reserved FM channels will be processed pursuant to the procedures set forth in Subpart K (Section 73.7000 et seq.)

Subsequently, the FCC will release Public Notices identifying: mutually exclusive groups of applications; applications selected pursuant to the fair distribution procedures set forth in Section 73.7002; applications received during the window filing period which are found to be non-mutually exclusive; tentative selectees determined pursuant to the point system procedures set forth in Section 73.7003; and acceptable applications. The Public Notices will also announce: additional procedures to be followed for certain groups of applications; deadlines for filing additional information; and dates by which petitions to deny must be filed in accordance with the provisions of Section 73.3584 of this chapter. If the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the application, it will be granted. If an application is determined unacceptable for filing, the application will be returned, and subject to the amendment requirements of Section 73.3522.

14. Section 73.3584 is amended by adding a new first and second sentence to paragraph (a) to read as follows:

§ 73.3584 Procedure for filing petitions to deny

(a) For mutually exclusive applications subject to selection by competitive bidding (non-reserved channels) or fair distribution/point system (reserved channels), petitions to deny may be filed only against the winning bidders or tentative selectee(s), and such petitions will be governed by Sections 73.5006 and 73.7004, respectively. For all other applications the following rules will govern. \*\*\*

15. Section 73.3593 is amended by adding a new last sentence to read as follows:

§ 73.3593 Designation for hearing.

If the FCC is unable, in the case of any application for an instrument of authorization, to make the findings specified in § 73.3591(a), it will formally designate the application for hearing on the grounds or reasons then obtaining and will forthwith notify the applicant and all known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. If, however, the issue to be resolved is limited to the mutual exclusivity of applications for initial authorizations or for major changes to existing stations, that mutual exclusivity shall be resolved pursuant to competitive bidding procedures identified in Subpart I (unreserved channels) or point system procedures identified in Subpart K (reserved channels).

16. Part 73 is amended by adding a new Subpart K to read as follows:

Subpart K - Application and Selection Procedures On Reserved Noncommercial Educational Channels

Source: [Federal Register Publication of Report and Order in MM Docket 95-31, unless otherwise noted].

§ 73.7000 Definition of Terms (as Used in Subpart K only)

**Attributable Interest:** An interest of an applicant, its parent, subsidiaries, their officers, and members of their governing boards that would be cognizable under the standards in the notes to Section 73.3555. Also an interest of an entity providing more than 33 percent of an applicant's equity and/or debt that also either (1) supplies more than 15% of the station's weekly programming, or (2) has an attributable interest pursuant to Section 73.3555 in media in the same market.

**Local Applicant:** an applicant physically headquartered, having a campus, or having 75% of board members residing within 25 miles of the reference coordinates for the community to be served.

**Established Local Applicant:** an applicant that has, for at least the two years (24 months) immediately preceding application, met the definition of local applicant.

**Nonreserved (Unreserved) Channels:** Channels which are not reserved exclusively for noncommercial educational use, and for which commercial entities could thus be eligible to operate full power stations. Such channels appear without an asterisk designation in the FM Table of Allotments (Section 73.202) and TV Table of Allotments (Section 73.606)). In the event of a request to allocate a nonreserved channel as reserved pursuant to Sections 73.202(a) or 73.606(a), the channel remains classified as nonreserved until release of a Commission decision granting such request.

**On-Air Operations:** Broadcast of program material to the public pursuant to Commission authority, generally beginning with program test authority, for periods of time that meet any required minimum operating schedule, e.g. Section 73.561(a).

**Population:** the number of people calculated using the most recent census block data provided by the United States Census Bureau.

**Reserved Channels:** Channels reserved exclusively for noncommercial educational use, whether by the portion of the spectrum in which they are located (i.e. FM channels 200 to 220) or by a case-by-case Commission allotment decision (channels that appear with an asterisk designation in the FM Table of Allotments (Section 73.202) or TV Table of Allotments (Section 73.606)).

§ 73.7001 Services subject to evaluation by point system.

(a) A point system will be used to evaluate mutually exclusive applications for new radio, television, and FM translator facilities, and for major changes to existing facilities, on reserved channels.

(b) Mutually exclusive applications for nonreserved broadcast channels are not subject to a point system, even if one or more of the applicants would be eligible to and intends to operate in a noncommercial educational manner. Mutually exclusive applications for nonreserved broadcast channels will be resolved by the competitive bidding procedures in Subpart I regardless of the noncommercial or commercial nature of the applicants.

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

(a) If timely filed applications for full service stations on reserved FM channels are determined to be mutually exclusive, and will serve different communities, the Commission will first determine, as a threshold issue, whether grant of a particular application would substantially further the fair distribution of service goals enunciated in Section 307(b) of the Communications Act, 47 U.S.C. § 307(b).

(b) An applicant for a full service FM radio station that will provide the first or second noncommercial educational (NCE) aural signal to at least 10% of the population within the 60 dBu (1mV/m) service contours of a noncommercial educational FM station substantially furthers fair service goals and will be considered superior to mutually exclusive applicants not proposing that level of service, provided that such service to fewer than 2,000 people will be considered insignificant. First service to 2,000 or more people will be considered superior to second service to a population of any size. If only one applicant will provide such first or second service, that applicant will be selected as a threshold matter. If more than one applicant will provide an equivalent level (first or second) of NCE aural service, the size of the population to receive such service from the mutually exclusive applicants will be compared. The applicant providing the most people with the highest level of new service will be awarded a construction permit, if it will provide such service to 5,000 or more people than the next best applicant. Otherwise, the mutually exclusive applications will proceed to examination under a point system.

(c) For a period of four years of on-air operations, an applicant receiving a decisive preference pursuant to this section is required to construct and operate technical facilities substantially as proposed and shall not downgrade service to the area on which the preference was based.

§ 73.7003 Point system selection procedures.

(a) If timely filed applications for reserved FM channels or reserved TV channels are determined to be mutually exclusive, applications will be processed and assessed points to determine the tentative selectee for the particular channels. The tentative selectee will be the applicant with the highest point total under the procedure set forth in this section, and will be awarded the requested permit if the Commission determines that an award will serve the public interest, convenience, and necessity.

(b) Based on information provided in each application, each applicant will be awarded a predetermined number of points under the criteria listed:

(1) Established Local Applicant. Three points for local applicants as defined in Section 73.7000 who have been local continuously for no fewer than the two years (24 months) immediately prior to application, if the applicant's own governing documents (e.g. by-laws, constitution, or their equivalent) require that such localism be maintained.

(2) Local Diversity of Ownership. Two points for applicants with no attributable interests as defined in Section 73.7000, in any other broadcast station or authorized construction permit (comparing radio to radio and television to television) whose principal community

(city grade) contour overlaps that of the proposed station, if the applicant's own governing documents (e.g. by-laws, constitution, or their equivalent) require that such diversity be maintained. The principal community (city grade) contour is the 5 mV/m for AM stations, the 3.16 mV/m for FM stations calculated in accordance with Section 73.313(c), and the contour identified in 73.685(a) for TV.

- (3) State-Wide Network. Two points for an applicant that does not qualify for the credit for local diversity of ownership, if it is:
- (a) an entity, public or private, with authority over a minimum of 50 accredited full-time elementary and/or secondary schools within a single state, encompassed by the combined primary service contours of the proposed station and its existing station(s), if the existing station(s) are regularly providing programming to the schools in furtherance of the school curriculum and the proposed station will increase the number of schools it will regularly serve; or
  - (b) an accredited public or private institution of higher learning with a minimum of five full time campuses within a single state encompassed by the combined primary service contours of the proposed station and its existing station(s), if the existing station(s) are regularly providing programming to campuses in furtherance of their curriculum and the proposed station will increase the number of campuses it will regularly serve; or
  - (c) an organization, public or private, with or without direct authority over schools, that will regularly provide programming for and in coordination with an entity described in (a) or (b) above for use in the school curriculum.

No entity may claim both the diversity credit and the state-wide network credit in any particular application.

- (4) Technical Parameters. One point to the applicant covering the largest geographic area and population with its relevant contour (60 dBu for FM and Grade B for TV), provided that the applicant covers both a ten percent greater area and a ten percent greater population than the applicant with the next best technical proposal. The top applicant will receive two points instead of one point if its technical proposal covers both a 25 percent greater area and 25 percent greater population than the next best technical proposal. )

(c) If the best qualified (highest scoring) two or more applicants have the same point accumulation, the tentative selectee will be determined by a tie-breaker mechanism as follows:

(1) Each applicant's number of attributable existing authorizations (licenses and construction permits, commercial and noncommercial) in the same service (radio or television) nationally, as of the time of application shall be compared, and the applicant with the fewest authorizations will be chosen as tentative selectee;

(2) If a tie remains after the tie breaker in Section c(1), the tentative selectee will be the remaining applicant with the fewest pending new and major change applications in the same

service at the time of filing;

(3) If a tie remains after the tie breaker in Section c(2), each of the remaining applicants will be identified as a tentative selectee, with the time divided equally among them.

(d) Settlements. At any time during this process, the applicants may advise the Commission that they are negotiating or have reached settlement, and the Commission will withhold further comparative processing for a reasonable period upon such notification. Settlement may include an agreement to share time on the channel voluntarily or other arrangement in compliance with Commission rules. Parties to a settlement shall comply with Section 73.3525, limiting any monetary payment to the applicant's reasonable and prudent expenses.

#### § 73.7004 Petitions to Deny Tentative Selectee(s)

- (a) For mutually exclusive applicants subject to the selection procedures in Subpart J, Petitions to Deny will be accepted only against the tentative selectee(s).
- (b) Within thirty (30) days following the issuance of a public notice announcing the tentative selection of an applicant through fair distribution (section 73.7002) or point system (section 73.7003) procedures, petitions to deny that application may be filed. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.
- (c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The time for filing such oppositions shall be 10 days from the filing date for petitions to deny, and the time for filing replies shall be 5 days from the filing date for oppositions.
- (d) If the Commission denies or dismisses all petitions to deny, if any are filed, and is otherwise satisfied that an applicant is qualified, the application will be granted. If the Commission determines that the points originally claimed were higher than permitted, but that there is no substantial and material question of fact of applicant qualifications, it will compare the revised point tally of the tentative selectee to the other mutually exclusive applicants and, either grant the original application or announce a new tentative selectee, as appropriate. If an applicant is found unqualified, the application shall be denied, and the applicant(s) with the next highest point tally named as the new tentative selectee.

#### § 73.7005 Holding period.

(a) **Assignments/Transfers.** NCE stations awarded by use of the point system in Section 73.7003 shall be subject to a holding period. From the grant of the construction permit and continuing until the facility has achieved four years of on-air operations, an applicant proposing to assign or transfer the construction permit/license to another party will be required to demonstrate (1) that the proposed buyer would qualify for the same number of or greater points as the assignor or transferor originally received; and (2) that consideration received and/or promised does not exceed the assignor's or transferor's legitimate and prudent expenses. For purposes of this section, legitimate

and prudent expenses are those expenses reasonably incurred by the assignor or transferor in obtaining and constructing the station (e.g. expenses in preparing an application, in obtaining and installing broadcast equipment to be assigned or transferred, etc.). Costs incurred in operating the station are not recoverable (e.g. rent, salaries, utilities, music licensing fees, etc.). Any successive applicants proposing to assign or transfer the construction permit/license prior to the end of the aforementioned holding period will be required to make the same demonstrations.

(b) **Technical.** In accordance with the provisions of Section 73.7002, an NCE applicant receiving a decisive preference for fair distribution of service is required to construct and operate technical facilities substantially as proposed, and can not downgrade service to the area on which the preference is based for a period of four years of on-air operations.

(c) The holding period in this section does not apply to construction permits that are awarded on a non-comparative basis, such as those awarded to non-mutually exclusive applicants or through settlement.

#### PART 74 - EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTION SERVICES

1. The authority citation for part 74 continues to read:  
Authority: 47 U.S.C. 154, 303, 307, and 554.

2. Section 74.1233 is amended by revising paragraphs (b), (c), and (e) to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

\* \* \* \* \*

(b) \*\*\*

(3) Applications for reserved band FM translator stations will be processed using filing window procedures. The FCC will specify by Public Notice, a period for filing reserved band FM translator applications for a new station or for major modifications in the facilities of an authorized station. FM translator applications for new facilities or for major modifications will be accepted only during these specified periods. Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

(4) Timely filed applications for new facilities or for major modifications for reserved band FM Translators will be processed pursuant to the procedures set forth in Subpart K (Section 73.7000 et seq.) Subsequently, the FCC will release Public Notices identifying: mutually exclusive groups of applications; applications received during the window filing period which are found to be non-mutually exclusive; tentative selectees determined pursuant to the point system procedures set forth in Section 73.7003; and acceptable applications. The Public Notices will also announce: additional procedures to be followed for certain groups of applications; deadlines for filing additional information; and dates by which petitions to deny must be filed in accordance with the provisions of Section 73.7004 of this chapter. If the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by

the granting of the application, it will be granted. If an application is found not to be acceptable for filing, the application will be returned, and subject to the amendment requirements of Section 73.3522.

(c) \* \* \*

(1) There is not pending a mutually exclusive application.

\* \* \* \* \*

(e) \* \* \*

(3) Where there are no available frequencies to substitute for a mutually exclusive application, the FCC will apply the same point system identified for full service reserved band FM stations in Section 73.7003(b). In the event of a tie, the FCC will consider:

(i) Each applicant's number of existing FM translator authorizations (licenses and construction permits) of the same type (fill-in or non fill-in as defined in paragraphs 1 and 2 above) as of the time of application shall be compared, and the applicant with the fewest authorizations will be chosen as tentative selectee;

(ii) If a tie remains, after the tie breaker in section (i), the remaining applicant with the fewest pending new and major change applications for FM translators of the same type (fill-in or non fill-in) will be chosen as tentative selectee;

(iii) Where the procedures in paragraphs e(1), e(2) and e(3)(i) and (ii) of this section fail to resolve the mutual exclusivity, the applications will be processed on a first-come-first-served basis.