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

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

SECOND REPORT AND ORDER

Adopted: March 4,2003 Released: April 10,2003

By the Commission: Commissioner Copps concurring and issuing a statement

I. INTRODUCTION

1. In this *Second Reporr &* Order, we establish new policies for licensing spectrum that the Commission has not reserved for the exclusive use of broadcast stations that provide or intend to provide noncommercial educational ("NCE') service. In developing our new policies and procedures, we are constrained by a number of court decisions, regulations, and statutory provisions that, taken together, limit our options. As explained in greater detail below, we have come to the following conclusions. First, those stations that a nonprofit educational organization shows will be used to advance an educational program are eligible to be licensed as NCE radio or television stations and thus are exempt from auction. Nonprofit educational organizations that do not make such a showing must compete at auction for licenses. Second, we will not hold applicants for NCE stations ineligible to apply for non-reserved channels, and instead will permit such applicants to continue to apply for this spectrum in filing windows. Any applications for NCE stations determined to be mutually exclusive with applications for commercial stations, however, will be dismissed, although applicants for services in which engineering solutions are possible will have a prior opportunity for settlement. Third, we reaffirm our existing relaxed reservation criteria, which enable would-be applicants for NCE stations in the full-power FM and TV services to add to the number of channels reserved for their use when they demonstrate that they are technically precluded from using an already-reserved channel, and they will provide needed NCE service in a given area. Interested parties may use these criteria to reserve channels in future allocation proceedings, as well as to reserve channels already in the Table of Allotments for which the Commission initiated an allocation proceeding prior to the August 7, 2000 effective date of the relaxed reservation standards, and for which the Commission has never accepted applications. Interested parties may not, however, use these criteria to reserve channels already in the Table for which the Commission initiated an allocation rulemaking after August 7, 2000, or channels for which the Commission has already accepted applications.

11. BACKGROUND

2. The Commission licenses NCE stations on channels reserved for their exclusive use and also on other broadcast spectrum.' In the FM service, the Commission has reserved twenty specific channels (channels 201 (88.1 **MHz)** to 220 (91.9 **MHz)),** out of a total of one hundred channels, exclusively for full-power **FM** and **FM** translator use by NCE stations.* In the television service, the Commission has reserved a similar proportion of channels, but using different channels in the Table of Allotments in different geographic areas across the country.' The Commission has not reserved any particular frequencies for exclusive use in the **AM** service, or secondary TV services, such as low power television (LPTV) and **TV** translators.[4]

3. The Commission initiated this proceeding in 1995 to revise the criteria it used to select among competing applicants for new NCE stations.' In the past, the Commission had used comparative criteria to resolve mutually exclusive applications in both the commercial and NCE services, although the criteria were different for reserved and non-reserved spectrum. NCE applicants competing against commercial applicants for a non-reserved channel were evaluated using the commercial criteria. Both comparative processes, however, were called into question in the 1990s, leading the Commission to revisit its comparative criteria for applicants for both commercial and NCE stations. The Commission has

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[1] **As** explained below, the Commission has reserved channels in the FM and TV services. The Commission first reserved FM channels in 1945. **see** In the Matter of Allocation of Frequencies to the Various Classes of Non-Governmental Services in the Radio Spectrum from 10 Kilocycles to 30,000,000 Kilocycles, 39 FCC 222, 226 (1945). and TV channels in 1952. **See** In the Matters of Amendment of Section 3.606 of the Commission's Rules and Regulations, *etc.*, **41** FCC 148, 159-164 (1952). When it reserved channels for the then-new television services, the Commission explained "that because educational institutions require more time to prepare for television than commercial interests, a reservation of channels is necessary to insure that such stations come into existence. . . ." *Id.* at 159.

[2] 47 C.F.R. §§ 73.201, 73.501. An FM translator is "[a] station in the broadcasting service operated for the purpose of retransmitting the signals of an FM radio broadcast station or another FM broadcast translator station without significantly altering any characteristics of the incoming signal other than its frequency and amplitude, in order to provide FM broadcast service to the public." ***Id.*** § 74.1201(a). **A** "noncommercial FM translator" is "[a]n FM broadcast translator station which rebroadcasts the signals of **a** noncommercial FM radio broadcast station.'' *Id.* § 74.1201(c). Full-power NCE FM stations and NCE FM translator stations may operate on channels 201-220, ***id.*** §§ 73.501, 74.1202(b)(2), which, **as** indicated above, the Commission has set aside for the exclusive use of NCE FM stations.

[3] *Id.* §§ 73.606 (analog TV channels), 73.622 (DTV channels).

[4] A ''television broadcast translator station" is "[a] station in the broadcast service for the purpose of retransmitting the programs and signals of a television broadcast station, without significantly altering the characteristic of the original signal ,other than its frequency and amplitude, for the purpose of providing television reception to the general public." ***id.*** § 74.701(a). A "low power television station" is "[a] station that is authorized under the provisions of this subpart that may retransmit the programs and signals of a TV broadcast station and that may originate programming in any amount greater than 30 seconds per hour andlor operates a subscription service." *Id.* §74.701(f). **As** discussed more fully below, the rules do not define an "NCE TV translator'' or an NCE LPTV station."

The Commission has not set aside frequencies for these secondary TV services, or for the AM service. Applications for these services are submitted on a demand basis, whereby uniquely engineered applications in terms of community of license and technical parameters proposed are determined by individual applicants. By contrast, applications for full-power FM channels in the non-reserved band and all full-power TV channels must specify a particular channel in the Table of Allotments, which is a list of all such channels designated for use in the country, with pre-determined communities of license and technical parameters.

[5] 10 FCC Rcd 2877 (1995).

adopted new selection criteria for NCE stations!

4. The Balanced Budget Act of 1997 ("1997 Budget Act")[7] amended certain provisions of the Communications Act ("Act") germane to the Commission's ongoing review of its licensing processes. Among other things, the 1997 Budget Act amended section 309(j) of the Act. As revised, section 309(j)(1) states: "If . . . mutually exclusive applications are accepted for any initial licenses or construction permits, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection." Section 309(j)(2) sets forth the limited exceptions to section 309(j)(1), including "licenses or construction permits issued by the Commission . . . (C) for stations described in section 397(6) of this Act." Section 397(6) of the Act provides the definition of NCE stations.

5. Given the different licensing mechanisms for NCE stations and all other stations, the Commission issued a ***Further Notice of Proposed Rulemaking*** in this docket and sought comment on how to resolve conflicts between commercial and NCE applicants for non-reserved spectrum.[8] The Commission also sought comment on whether section 309 of the Act prohibited it from using competitive bidding to resolve any mutually exclusive applications when they included at least one tiled by an applicant for an NCE station, or instead only when they involved competing applications for reserved channels.

6. In the ***Repon & Order,*** the Commission concluded that "the exemption of NCE applicants from our general mandatory auction authority does not prohibit us from auctioning non-reserved spectrum, even when NCE entities apply for those channels."' As a result, the Commission decided to require applicants for NCE stations to compete with applicants for commercial stations for non-reserved spectrum at auction. In order to minimize any hardship on applicants for NCE stations, the Commission also relaxed the criteria used to evaluate requests to reserve new channels.

7. The Association of Public Television Stations, the Corporation for Public Broadcasting, National Public Radio, and the State of Oregon challenged the Commission's decision in court. In ***NPR v. FCC,*** the U.S. Court of Appeals for the D.C. Circuit rejected the Commission's construction of section 309.[10] The court held that "nothing in the Act authorizes the Commission to hold auctions for licenses issued to NCEs to operate in the unreserved spectrum," because section 309(j)(2) denied the Commission the authority to use competitive bidding "based on the nature of the station that ultimately receives the license, and not on the part of the spectrum in which the station operates.""

8. In order to resolve the issues raised by the court's decision, we issued a ***Second Further Notice of Proposed Rulemaking***.[12] We asked for comment on the scope of the auction exemption, and offered three options, not necessarily mutually exclusive, on how to resolve the competing interests of applicants for commercial and NCE stations in the non-reserved spectrum. First, we proposed to hold

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[6] The newly adopted comparative standards to select among competing applicants for NCE broadcast stations have not yet been implemented because they have been challenged in court. **See** Reexamination of the Comparative Standards for Noncommercial Educational Applicants, 15 FCC Rcd 7386 (2000), *sub. nom., **Anierican Family Association, Inc. v. FCC,*** appeal docketed, Case No. **00-1310** (D.C. Cir. July 14, 2000).

[7] Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997).

[8] **13** FCC Rcd 21667 (1998) ("***Further Notice***").

[9] 15 FCC Rcd 7386,7429 (2000).

[10] 254 F.3d 226 (D.C.Cir. 2001).

[11] Id. at 229.

[12] **17** FCC Rcd 3833 (2002) ***("Second Further Norice").***

applicants for NCE stations ineligible for this spectrum, stating that such an approach "is consistent with the statutory language" and "has the advantage of clarity and simplicity."" Second, recognizing that, under our first proposal, spectrum might lie fallow if no commercial applicants applied to use it, we proposed to permit applicants for NCE stations to apply for non-reserved spectrum, subject to dismissal of their applications if they were mutually exclusive with those filed by commercial applicants.[14] We asked whether we should create opportunities for settlement prior to dismissal **for** applicants for services where engineering solutions are possible. Third, given that applicants for NCE stations may not legally participate in auctions, we also sought comment on whether we should further relax the criteria for would-be applicants for NCE stations to reserve additional channels in the future, and whether we should permit NCE applicants the opportunity to apply such criteria, or other criteria, to reserve existing or "vacant" allotments.'' We also welcomed comment on other options, inviting proposals that are "fully consistent with the governing legal standards and would otherwise serve the public interest," and stating that "[w]e wish to ensure that NCE entities have reasonable opportunities to obtain the spectrum they need."[16] We received thirty-three comments, and ten reply comments."

III. DISCUSSION

A. Scope of Exemption for NCE Stations from Competitive Bidding

1. Generally

9. Background. In the ***Second Further Notice,*** we sought comment on the breadth of section 309(j)(2)(C), which exempts NCE stations from competitive bidding.[18] As indicated above, that section exempts the licenses issued "for stations described in section 397(6) of this Act." Subsection (A) defines "noncommercial educational broadcast station" by incorporation of the Commission's eligibility rules for such stations in effect in 1978. As a general matter, subsection 397(6)(A) is limited to stations that a nonprofit educational organization shows will be used to use advance educational purposes. In the ***Second Further Norice,*** we asked whether the regulatory and statutory provisions together under subsection (A) mean that a nonprofit educational organization is exempt from auction whenever it applies for a broadcast construction permit or station license, or only upon showing that the station will be used to advance an educational program." Subsection **(B)** also defines as NCE stations those municipality-owned stations that transmit only noncommercial programs **for** educational purposes.

IO. As NPR stated in its reply, no commenter argued that a nonprofit educational organization, without more, is exempt from auction." Instead, commenters contended that a nonprofit educational organization is exempt from auction only upon showing that it intends to use a license to advance an educational program." **As** a result, commenters stated that such organizations that do not

[13] *Id.* at 3837.

[14] Id. at 3837-38.

[15] Id. at 3839-40.

[16] Id. at 3840.

[17] The parties that filed comments, **and** the abbreviations by which they are referred to in this document, are set forth in Appendix **A.**

[18] ***Second Further Notice,*** 17 FCC Rcd at 3836-37.

[19] *Id.*

[20] NPR Reply at 14-15.

[21] ***See, e.g.,*** APTS at ***5-6;*** NFCB at 4; NPR at 18-22; Trinity at **4-5;** UNI at 3-4.

make this showing may participate in auctions."

11. Discussion. We conclude that the auction exemption for NCE stations applies to two types of broadcast stations: (1) AM, full-power FM, FM translator, and full-power TV stations that a nonprofit educational organization shows will be used to advance an educational program, and are eligible to be licensed as NCE stations pursuant to the Commission's service-specific standards, in effect as of November 1978; and (2) stations that will be used by a municipality to transmit only noncommercial programs for educational purposes. Section 309(j)(2)(C) states that "[t]he competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission . . . (C) for stations described in section 397(6) of this Act."[23] Section 397(6), in turn, states that "[t]he 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 education purposes."[24] Defining stations within the scope of section 397(6)(A) must begin with the content of our eligibility rules as of November 2, 1978, because that is the date section 397(6) became effective.[25] The substance of the eligibility rules for NCE stations has not changed since that time. Section 73.503(a) of the rules sets forth the current eligibility rule for FM stations: "A noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon showing that the station will be used for the advancement of an educational program."[26] Section 73.621(a) of the rules sets forth the current eligibility rule for TV stations: "[N]oncommercial educational broadcast stations will be licensed only to nonprofit educational organizations upon showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service."" Weaving together these various regulatory and statutory provisions, in the manner the Act instructs, under section 397(6)(A), an NCE station is either an FM or TV station that is licensed to a nonprofit educational organization that shows that the station will be used to advance an educational program. A TV station must also show that the station will be used to furnish a nonprofit and noncommercial service that will serve the educational needs of its community. The Commission has also licensed AM stations that satisfy the FM station eligibilit rules, as well as FM translators that rebroadcast the signals of an NCE FM station, as NCE stations?' and has done so both

[22] See, *e.g.*, Trinity at 4-5. Commenters also explained that good public policy dictates that the Commission should not exclude nonprofit educational organizations that wish to participate in auctions from doing so, given that the Commission might hold them altogether ineligible for licenses using the non-reserved spectrum, and their presence in the auction enhances competition for the licenses. See. *e.g.*, SRG at 5-6.

[23] 47 U.S.C. § 309(j)(2)(C).

[24] Id. § 397(6).

[25] Pub. L. No. 95-567, Title IV. $401.92 Stat. 2422 (1978).

[26] 47 C.F.R. § 73.503(a).

[27] *Id.* 5 73.621(a).

[28] 47 C.F.R. § 74.1201(c) (defining "noncommercial FM translator" as "[a]n FM broadcast translator station which rebroadcasts the signals of a noncommercial FM radio broadcast station"). Although the Commission does not reserve frequencies for NCE use in the AM service, and thus has not expressly codified any distinct NCE eligibility rules for this service, the Commission has treated AM stations that satisfy the NCE FM eligibility rules as NCE AM stations, and other Commission rules identify and recognize AM NCE stations. See, *e.g.*, NPR Reply at 15-17. For example, the Commission's rules expressly regulate the conversion of an AM station from commercial to NCE status in the same way they regulate the similar conversion of FM and TV stations. See 47 C.F.R. § 73.1690(c)(9). As discussed below, the Commission does not treat LPTV stations or TV translator stations in the same manner.

before and since the November 1978 effective date of section 397(6).[29] In terms of subsection 397(6)(B), an NCE station is also any station that is owned and operated by a municipality and transmits only noncommercial programs for educational purposes, regardless of the Commission's eligibility rules. We conclude that applicants are exempt from auctions, pursuant to section 309(j)(2)(C), only when they file applications for broadcast stations expressly defined by sections 397(6)(A) and 397(6)(B).

12. This construction of the governing legal standards for NCE stations is consistent with our current practice." The Commission has long licensed nonprofit educational organizations, such as universities, to provide commercial service on non-reserved channels. For example, Window to the World Communications, Inc. is licensed to operate WFMT (FM) on channel 254B as a commercial station, but operates WTTW-TV as an NCE station." Likewise, the University of Missouri, a non-profit educational organization, operates KOMU-TV as a commercial NBC affiliate.[32] When licensed to operate commercial broadcast stations, these nonprofit educational organizations are subject to the requirements applicable to all commercial stations. For example, they must pay filing fees; by contrast, fees are not required with respect to any station that a nonprofit educational organization is licensed to operate as an NCE station."

2. LPTV and TV Translators

13. Backaround. We also sought comment on the applicability of the auction exemption in section 309(j)(2)(C) to LTPV and TV translator stations specifically. The Commission does not now issue, and has never issued, licenses for NCE stations in these services. As a result, we asked whether the auction exemption extends to applicants for LPTV and TV translator licenses that could qualify as applicants for NCE stations in other services. If the fact that we have not licensed LPTV and TV translator facilities as NCE stations in the past means that applicants must compete for these licenses at auction, we asked whether, and if so how, we should create an NCE LPTV and TV service. Even if we took such action, we sought comment on whether it would have any impact on the auctions exemption, given that section 397(6)(A) of the Act defines NCE stations in terms of our eligibility rules as they existed on November 2, 1978.[34]

14. APTS and Three Angels were the primary commenters that addressed these issues. APTS argued that the Act intended to treat TV translators licensed to NCE TV stations as NCE broadcast

[29] As one example, WNYC in New York City was an NCE AM station as of the effective date of section 397(6), and remains one to this day.

[30] NPR at 21-22; SRG at 5

[31] NPR at 21

[32] *id.* at 21-22.

[33] Given that the Commission's rules do not prohibit commercial stations from airing noncommercial educational programming, we agree with Kaleidoscope that a nonprofit educational organization could acquire a commercial broadcast station license through competitive bidding and use that license to provide noncommercial educational programs. See Kaleidoscope at 2. See also EMF at 6 (stating that once channels are auctioned, there should be no restriction on their use). As a result, a nonprofit educational organization that does not show in its application that it intends to use a particular license to advance an educational purpose – and thus does not establish its eligibility to be licensed as an NCE station – may, indeed must, compete at auction for the license at issue, but may still provide noncommercial educational programming using that license. Our rules also do not preclude a commercial station from changing its status to an NCE station upon a proper showing of eligibility, 47 C.F.R. § 73.1690(c)(9), and thereby gain the attendant benefits (*e.g.*, exemption from filing fees), *id.* §§ 1.1114(c), 1.1162(c), and incur the corresponding responsibilities (prohibition against airing commercials and provision of educational programming). Id. §§ 73.503(d), 73.621(e).

[34] *Second Further* Notice, 17 FCC Rcd at 3841-42

stations under section 397(6) of the Act,)' and that the Commission should establish a new category and process for managing applications for NCE **translators**.[36] Three Angels countered, however, that the Commission has never licensed LPTV and **TV** translators as NCE stations, and that we have no authority to establish such services now, at least for the purpose of excluding applications for such stations from auction."

15. Discussion. As explained more fully below, we agree with Three Angels that no licenses for LPTV and TV translator facilities fall within the scope of section 397(6)(A), and that adopting new NCE eligibility criteria for these services would not bring applicants for such services within the scope of the auction exemption. LPTV and TV translator facilities, however, qualify as NCE stations under section 397(6)(B) of the Act, if they are owned and operated by municipalities and transmit only NCE programs. This definition does not turn on our eligibility rules, and **so** applicants of the latter type are exempt from auction. Thus, except where a municipality satisfying the requirements of section 397(6)(B) files an application for an LPTV or TV translator station, all mutually exclusive applications for these services fall outside the scope of section 309(j)(2)(C) and must therefore be resolved by auction pursuant to section 309(j)(1).

16. As discussed above, section 397(6)(A) of the Act defines the NCE stations that are exempt from auction in terms of the Commission's eligibility rules in effect on November 2, 1978. We did not license LPTV and TV translator facilities as NCE stations **as** of that date. Indeed, the Commission did not create the LPTV service until 1982, and at that time expressly rejected the approach of licensing these facilities as NCE stations. With respect to the LPTV service, the Commission stated that

> the decision whether or not to air commercials, and in what amounts, should be left to the licensee's discretion. The Commission will not concern itself with this matter, nor with the corporate or organizational structure of an applicant. Whether a low power applicant or licensee is noncommercial or not-for-profit is a decision properly made by the licensee on the basis of applicable corporate and **tax** law, pertinent requirements of the Corporation for Public Broadcasting and perceived characteristics of the market in which it proposes to operate. Therefore, § 73.621 [the eligibility and programming rules regarding NCE TV stations] will not apply to lower power stations."

The same applies to TV translators.[39] Although we have exempted LPTV and TV translator licensees

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[35] APTS at 15-16.

[36] ***Id.*** at 17-22. See ***also*** NJ Public Broadcast Authority Reply at 4-5; UNC Reply at 3-4 (supporting APTS' proposal).

[37] Three Angels at **4-5,**7-8.

[38] An Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, 47 Fed. Reg. 21468,21486 (1982).

[39] LPTV and **TV** translators are virtually the same; the difference between the two is that LPTV licensees can originate more programming than **TV** translator licensees, but licensees can switch between the two through simple letter notification to the Commission. 47 C.F.R. § 74.701(a) (defining "television broadcast translator station" as "[a] station in the broadcast service for the purpose of retransmitting the programs and signals of a television broadcast station, without significantly altering any characteristic of the original signal other than its frequency and amplitude, for the purpose of providing television reception to the general public"); ***id.*** § 74.701(f) (defining "low power television station" as "[a] station authorized under the provisions of this subpart that may retransmit the programs and signals of a TV broadcast station and that may originate programming in any amount greater than **30** seconds per hour and/or operates a subscription service"); ***id.*** § 74.731(g) (indicating that an LPTV station may operate "[a}s a TV translator station" or "[f]or origination of programming and commercial matter as defined in § 74.701(f)"). Significantly, although the rules define FM and TV translators similarly, the FM rules also define a

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from administrative fees on certain conditions,[40] we do not license these facilities as NCE stations, with the result that the programming and service requirements for NCE stations do not apply. Given that we do not license LPTV and TV translator facilities as NCE stations, and did not do so as of the effective date of section 397(6), these stations (other than those defined in section 397(6)(B)) do not fall within the scope of section 309(j)(2)(C).

17. APTS' citation to section 615 of the Act to support the idea that Congress intended the definition of NCE station in section 397(6) to include translators is unpersuasive?' Section 615 is entitled "Carriage of Noncommercial Educational Television"; subsection 615(l) states: "For **purposes** *of this secrion* . . . [t]he term 'qualified noncommercial educational television station' . . . includes . . . the translator of any noncommercial educational television stations with five watts or higher power serving the franchise area. . . ."[42] Although section 615(l) thus defines certain NCE stations to include certain TV translators, it does so for purposes of the must-carry provisions of the statute. Moreover, section 615 was adopted after section 397(6), and thus cannot be read to inform prior Congressional intent in an unrelated section. If Congress had intended that our general auction authority set forth in section 309(j)(1) would not apply to licenses issued for a broader category of NCE stations, as described in section **615,** it could have incorporated both provisions in section 309(j)(2)(C), but it did not do so. Nothing in the language of the statute or the legislative history indicates Congressional intent to exempt from auction applicants for stations **not** described by section 397(6). The relevant legal standards, so construed, thus indicate that LPTV and TV translator stations are not eligible to be licensed by the Commission as NCE stations, and therefore do not fall within the section 397(6)(A) definitional parameters. This would not change by the adoption of APTS' proposals for creating and managing the licensing of NCE translators, which were supported by several commenters.[43]

18. As discussed above, however, section 397(6)(B) defines an NCE station as one that "is owned and operated by a municipality and which transmits only noncommercial programs for education purposes.'* This definition does not incorporate the Commission's eligibility rules for NCE stations. Thus, LPTV and TV translator stations that are owned and operated by municipalities and transmit only noncommercial programming for educational purposes are exempt from auction under section 309(j)(2)(C).

B. Licensing **of** Non-Reserved Spectrum

19. Background. In the ***Second*** **Further** Notice, we offered two different proposals for

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"noncommercial FM translator station," ***id.*** § 74.1201(c), but the TV rules do not define or otherwise reference a "noncommercial TV translator station."

[40] 47 **C.F.R.** § 1.1114(e)(2) (exempting LPTV and TV translator applicants that propose "noncommercial education service" upon showing, after grant, **that** they receive "funding for the construction of the station through the National Telecommunications and Information Administration (NTIA) or other showings as required by the Commission"); ***id.*** § 1.1162 (exempting LPTV and TV translator applicants from regulatory fees upon the same conditions). Significantly, the fee rules exclude "noncommercial educational broadcast stations in the **FM** or TV services, as well as AM applicants, permittees, or licensees who certify that the station will operate or **does** operate in accordance with § 73.503 of this chapter" (the Fh4 NCE eligibility rule) without additional information relating to funding. ***Id.*** § 1.1114 (c) (regarding application and filing charges). See ***also id.*** § 1.1162(e) (regarding regulatory fees).

[41] APTS at 15-16,

[42] 47 U.S.C. § 535(l) ***(emphasis added).***

[43] APTS at 18-22. See ***also*** NJ Public TV Broadcasting Reply at 4-5: **UNC** Reply at 3-4

[44] 47 U.S.C. § 397(6)(B).

licensing noncommercial educational applicants on non-reserved spectrum.[45] As one option, we proposed to hold applicants for NCE station licenses simply ineligible for non-reserved spectrum.[46] As an alternative, we proposed to accept applications for both commercial and NCE stations in the non-reserved spectrum, with the latter applications subject to dismissal if they were mutually exclusive with the former.[47] We also asked whether we should amend the anti-collusion rule to permit mutually exclusive commercial and NCE applicants for AM stations a prior opportunity to resolve their conflicts through settlements."

20. Commenters were sharply divided on this issue. Some commenters generally supported the approach of holding applicants for NCE stations ineligible for the non-reserved spectrum, claiming that the proposal avoids delay and the potential difficulties involved in comparing applicants:' and is otherwise fair to such applicants because they already have spectrum reserved for their use?' Others preferred the approach of permitting applicants for NCE stations to apply for non-reserved spectrum, and allowing them to amend their applications to propose commercial service if they filed mutually exclusive applications with commercial applicants," as well as permitting them to fashion settlements prior to dismissal.'* Others claimed that both options were the same substantively, because it would be a rare event that no commercial applicant would file for a non-reserved channel, and the Commission proposed to dismiss applicants for NCE stations under these circumstances?' Commenters that opposed our proposals to hold applicants for NCE stations ineligible for non-reserved spectrum, or to condition their eligibility on the lack of competing applications for commercial service, suggested that such action by the Commission is inconsistent with Congressional intent behind the auctions exemption, and otherwise unlawful.[54]

21. Discussion. We adopt our proposal to allow applicants for NCE stations to submit applications for non-reserved spectrum in a tiling window, subject to being returned as unacceptable for filing if there is any mutually exclusive application for a commercial station. We also will allow applicants for *Ah4* stations and secondary services a prior opportunity to resolve their mutually exclusive applications through settlements. We prefer this approach to that of holding applicants for NCE stations ineligible to apply for non-reserved spectrum. These policies are designed to preserve opportunities for applicants for NCE broadcast stations to use non-reserved spectrum, consistent with section 309(j), as amended, and in a manner that will not unduly delay the initiation of any broadcast service to the public. We recognize that these opportunities are limited to those situations in which commercial applicants do

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[45] *Second Further Notice,* 17 FCC Rcd at 3837-39. We also proposed a third alternative, reserving channels, but this process would take place during the preliminary allocations stage of the licensing process for services that use the Table of Allotments, *i.e.*, commercial FM and TV. We discuss this alternative separately below.

"Second Further Notice, 17 FCC Rcd at 3867.

[47] Id. at 3837-38.

[48] Id. at 3838-39.

[49] Eels at 3; NAB at 5.

[50] Birdsill at 1; Eels at 5-6. See also El Mundo at 2; Garter at 2: SSR at 1; Summit at 2 (generally supporting proposal to hold applicants for NCE station ineligible for non-reserved spectrum).

[51] Kaleidoscope at 2; EMF at *5-6.*

[52] Booth at 4; Bustos at 3-4; Ed Comm'n at 3-4; EMF at 5-6; Garter at 3; RMCPB at 3. See *also* Barrett at 6; Garter at 21; Kaleidoscope at 2; SSR at 1; WVRU at 4 (generally supporting proposal to allow applicants for NCE stations to apply for non-reserved spectrum. so long as their applications do not conflict with those for commercial service).

[53] Beacon at 5; GA PTC at 4-5; MO Curators at 5-6; Moody at 6; OR at 14; UNI at *5*

[54] APTS at 7-10; NFCB at 2-3; NPR at 5-11; Oregon *passim*

not file mutually exclusive applications for the spectrum, and to certain services in which the applicants reach a settlement, but these situations can and do happen. For example, approximately 4,700 applicants filed for LPTV and TV translators during our last filing window, but we have processed more than one third of these applications without conducting an auction because only one application was filed, or if mutually exclusive applications were filed, the applicants reached a settlement. We do not believe that allowing applicants for NCE stations to apply for non-reserved spectrum will create significant delay in licensing this spectrum or unfairness to commercial applicants, as suggested by commenters that preferred the more extreme approach of holding applicants for NCE stations ineligible for non-reserved spectrum.

22. As a practical matter, and as is currently our practice, we will begin the licensing process for non-reserved spectrum by opening an auctions filing window. Applicants for NCE stations may submit applications in the window in the same way as commercial applicants, using FCC Form 175, the "short-form" application to participate in an auction. Applicants that seek an NCE station license must identify themselves by checking the box labeled "noncommercial educational,"[55] which will serve as a preliminary showing that they intend to use the station to advance an educational program and that they meet all other Commission eligibility requirements for NCE stations. Applicants that do not check this box will be considered, as a matter of law, applicants for commercial broadcast stations. Because an applicant's self-identification as "noncommercial educational" affects its eligibility to hold an NCE station license and therefore its eligibility to participate in an auction, we will treat any applicant's attempt to change its self-identification as a major amendment, which is prohibited after the short-form application filing deadline.[56] As a result, we decline to adopt the suggestion that applicants for NCE stations can change their status once they learn they have filed an application that is mutually exclusive with a commercial applicant, as at least one commenter suggested;[57] instead, we limit this opportunity in a manner that is consistent with our current rules, which permit major amendments before the short-form filing deadline, but not after. Applications for NCE stations that are mutually exclusive only with one another will not proceed to auction and instead will be resolved by the same point system selection procedures that we have established for the reserved band.[58] Any application for an NCE station that is mutually exclusive with any application for a commercial broadcast station will, after any settlement opportunities expire, be returned as unacceptable for filing. As explained more fully below mixed groups of applications for AM and secondary services will have a prior opportunity to reach a settlement.[59]

23. We disagree with commenters that contend that our decision *is* tantamount to an outright prohibition on applications for NCE stations for non-reserved spectrum, which they claim is inconsistent with the Act and Congressional intent. As stated above, it is not uncommon for applications for certain services not to be mutually exclusive. In addition, applicants for certain services have settlement opportunities; applicants for secondary services already have an opportunity to try to settle their conflicts with one another and, as explained below, we create a similar opportunity for mixed groups of applicants

[55] The current version of Form 175 (revised Oct. 2000) includes a question about "applicant status," and one of the several possible responses is "noncommercial educational." The instructions to the form states: 'The definition of 'noncommercial educational' entity applies to broadcast applicants only and is contained in 41 U.S.C. 397(6) and 47 C.F.R. § 53.503(a) (for radio) and 47 C.F.R. § 73.621(a) (for television)."

[56] 47 C.F.R. § 1.2105(b)(2). This prohibition extends to applicants for all services, including those that are exempt from the anti-collusion rule and thus may pursue settlement opportunities and ultimately make certain amendments to their applications. Id. § 73.5002(c).

[57] Kaleidoscope at 2.

[58] 47 C.F.R. § 73.7000 *e/seq.* These rules are currently subject to challenge in court. *See supra,* note *6*

[59] We will determine which applications are mutually exclusive for these purposes in accordance with the Commission's current practices for the respective broadcast services. *See* In the Matter of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, 13 FCC Rcd 15920, 15978-80 (1998) *("Broadcast Aucrion First Report & Order").*

for AM stations. Applicants have successfully used these settlement opportunities, and then need not compete at auction. In addition, applicants for NCE stations that do not have settlement opportunities – applicants for full-power FM and TV stations – may reserve channels for their exclusive use, according to certain procedures, that we previously adopted and that we review and clarify below.

24. As NAB points out, the Commission has the authority to determine how much spectrum to make available for NCE use, and otherwise to create eligibility rules.[60] Indeed, both the concept and process of reserving channels for NCE use are creations of the Commission, and the Act in sections 4(i) and 303(r) gives us broad authority to adopt eligibility rules.[61] As NAB further points out, the 1997 Budget Act, which amended our auction authority, did not change our authority over determining the amount of spectrum for NCE use or creating eligibility rules, as neither the language of the statute nor the conference report addresses these issues.[62] Commenters do not point to any language that appears to limit our authority. Rather, they suggest that the Commission's decision to exclude or limit the eligibility of NCE applicants vis-a-vis non-reserved spectrum must necessarily be inconsistent with Congress' intent to exempt these applicants from competitive bidding. But this argument overlooks the fact that the Commission has set aside spectrum for the exclusive use of applicants for NCE stations, and awards this spectrum through the point system, and has relaxed its reservation policies to ensure an adequate level of NCE service. It also fails to recognize that the statute, amended in 1997 to require auctions as a general matter and interpreted in the NPR case to prohibit applicants for NCE stations from participating in such auctions, no longer allows the Commission as a practical matter to continue its established practice of simply processing applications for NCE stations on the non-reserved spectrum according to the same licensing standards for applications for commercial stations. Given the practical difficulties associated with this changed statutory scheme, we believe we have ensured adequate NCE service to the public consistent with evident congressional concern that the switch to auctions not unduly harm NCE stations. We have done so by relaxing our reservation policies, and where a channel is not reserved for NCE use, by allowing applicants for NCE stations to file an application for an NCE station on that channel. The application will be returned as unacceptable for filing under our revised application standards only if any mutually exclusive application for a commercial station remains on file after any applicable settlement period expires. Finally, as discussed below, in order to maximize the possibility of NCE stations being licensed to operate on the non-reserved spectrum, we have waived our anti-collusion rules and liberalized our settlement policies where technically and administratively feasible.

25. ***Anti-Collusion*** Rule. We adopt the approach outlined in the ***Second*** Further Notice to amend our anti-collusion rule to permit mutually exclusive applicants for ***AM*** stations to settle, when the applicants include at least one for an NCE station. The anti-collusion rule generally prohibits applicants that have filed mutually exclusive applications from "discussing or negotiating settlement agreements" among themselves after the short-form filing deadline.[63] The Commission adopted this rule to enhance "the competitiveness of the auction process and of the post-auction market structure,"[64] and it generally applies to broadcast services. The Commission, however, has carved out limited exceptions for certain applicant groups in the broadcast and Instructional Fixed Television (ITFS) services, namely those involving applications for major modifications that are mutually exclusive with one another or with applications for new stations, as well as those involving secondary services.[65] The Commission created

[60] NAB Reply at **2-3.** See also **Eels** at 4.

[61] 47 U.S.C. §§ 154(i), 303(r).

[62] NAB Reply at **4-5.**

[63] 47 C.F.R. § 1.2105(c)(1).

[64] In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, **9** FCC Rcd 2348,2387 (1994).

[65] **47** C.F.R. § 73.5002(d).

these exceptions based in part on the fact that it is possible for the applicants to devise engineering solutions to remove the technical conflicts between their applications.[66]

26. As a consequence of the exception for secondary services, applicants for NCE stations in the LPTV and translator services already have the opportunity to resolve their mutually exclusivity applications. Applicants for new *AM* stations also have the opportunity to settle when their applications are mutually exclusive with those for major modifications. We believe it will serve the public interest if we expand the settlement opportunity to applicants for new AM stations that are mutually exclusive with one another, when at least one of them is an applicant for an NCE station. Given the limited number of opportunities for any new stations using AM frequencies, this expansion to the groups that qualify for settlement is incremental. This is buttressed by the fact that we limit the groups of *AM* applicants eligible to enter into settlements to only those that include applicants for both commercial and NCE stations. Moreover, we do not believe that extending settlement opportunities to applicants for NCE stations is particularly likely to compromise the purpose of the anti-collusion rule, which is to enhance the competitiveness of the auction process, given that these applicants will never compete at auction for the licenses for which they have applied. As a result, mixed groups of applicants for AM stations will have the opportunity to design engineering solutions or reach other settlements, which must conform to all requirements in our settlement process for broadcast applicants.[67]

C. Allocating Spectrum

27. Background. In the *Repon & Order* in this proceeding, the Commission decided to allocate a channel as reserved if a proponent demonstrated: for radio, that it is technically precluded from using a reserved channel and would provide a first or second NCE radio service to 10% of the population within its 1mV/m contour, and for television, that there is no reserved channel available in the proponent's community and it would provide the first or second NCE television service to 2000 or more people who constitute 10% of the population within its noise limited contour.[68] The Commission adopted these standards for use at the allocation stage of the licensing process, and thus expressly declined io extend them to existing (vacant) allotments, pending applications, and services such as AM that do not use an allocations process. In the *Second* Further *Notice,* we asked whether we should further relax the reservation standards, and if so what the standard should be.[69] We also asked whether we should establish opportunities for interested parties to reserve existing allotments that we have not yet licensed (*i.e.*,

[66] *Broodcast Auction First Report & Order,* 13 FCC Rcd at 15927; *Memorandum Opinion & Order,* 14 FCC Rcd 8724,8757-59 (1999).

[67] 47 C.F.R. § 73.3525 (requiring, *inter alia,* an applicant to certify that it has not received any consideration in excess of its legitimate and prudent expenses). We will not extend a similar settlement opportunity to mixed groups, for other services, as some commenters suggested. *See, e.g.*, Garter at 3; Rocky Mountain Corp. for Public Broadcasting at 3. Applicants for full-power FM and TV stations use the Table of Allotments, and as a result, cannot resolve their conflicts using technical solutions. In addition, applicants could more easily abuse a settlement process for these services, given the ease of filing competing applications for the same allotment; by contrast, applicants for AM stations and secondary services must tile engineering proposals, which mean both that they must invest more in the application process and that it is more difficult for them to predict when their applications will conflict with others and thereby produce a settlement opportunity. Applicants for NCE stations in the full-power FM and TV services also have an opportunity to reserve channels at the allocation stage of the licensing process we use for those channels; this opportunity is not available to applicants for other services.

[68] *Report & Order,* 15 FCC Rcd at 7434. *See* also 47 C.F.R. § 73.202(a)(1)(ii) (FM); *id.* § 73.622(a)(DTV).

[69] *Second Further Notice.* 17 FCC Rcd at 3839-40.

"vacant" allotments), and if so what the standards should be.[70]

28. Commenters offered different views on these issues. NAB argued that we should not extend any further opportunities for applicants for NCE stations to reserve channels because the Commission has already set aside sufficient spectrum for their use, and that the lack of reserved channels in any area suggests that there is already adequate NCE service there.[71] **APTS** agreed that our existing reservation standards are adequate.[72] NPR, however, proposed a different standard (discussed below),[73] and argued that the Commission should allow applicants for NCE stations to apply these standards to vacant allotments, and suggested a process for doing so.[74] Others agreed that we should open closed allocation rulemakings, but suggested different standards.[75]

29. Discussion. We reaffirm the relaxed reservation standard that the Commission adopted in the ***Report &*** Order in this proceeding. We will, however, permit the use of these criteria to reserve channels not only in future allocation proceedings, but also in allocation proceedings that the Commission initiated prior to its adoption of the relaxed reservation standard. As explained below, **we** believe these policies best satisfy the public interest, and are the fairest to all parties concerned.

30. Future ***Allocations.*** As an alternative to our relaxed reservation standard, NPR proposed that we reserve a channel when a proponent for reservation demonstrates that it is "technically precluded from using a reserved channel or that there is no reserved spectrum available that would serve at least 50% of the area within the protected service contour of the subject allotment assuming full-class operation of a station at the allotment site – the "50 Percent Standard."[76] If the proponent could make this showing, it would also need to demonstrate that there is no other non-reserved channel available in order to reserve the allotment. If the proponent could not make this showing, *i.e.*, whenever there are other non-reserved channels that meet the "50 Percent Standard," the Commission should reserve one of the available non-reserved channels.[77]

31. We decline to adopt NPRs standard. As a preliminary matter, the Commission already has reserved twenty **(201-220)** out of a total of one hundred FM channels for the exclusive use of NCE stations, and will reserve any of the remaining eighty channels **(221-300)** for NCE stations if one of three tests is satisfied. The Commission's original purpose in reserving a band of channels was simply to ensure that NCE stations would develop; when establishing the FM and TV services, the Commission was concerned that commercial stations, due to their financial advantage, would make such immediate use of the spectrum for these services that none would remain available for NCE stations when they were prepared to make use of it.[78] In order to ensure that NCE stations could in fact make **use** of the reserved band of channels, the Commission adopted two tests for reserving channels outside this band; the Commission will allocate a new FM channel as reserved if a would-be applicant for an NCE station can show that it cannot use another reserved channel to provide its service without causing interference to

[70] Id. at 3840.

[71] NAB at 6-7.

[72] **APTS** at 11-12. See *also* Garter at **3-4** (stating same).

[73] NPR at 13-15. **See *infra*** ¶ 30 (discussing NPR's proposed standard).

[74] Id. at 12. See also SRG Reply at 2 (offering ideas on process Commission might use for vacant allotments).

[75] **See**, *e.g.*, NFCB at 2 (suggesting that existing standard be changed to include technical preclusion on reserved channel, and unavailability of non-reserved channel that would serve 50% of proposed service area).

[76] NPR at 13.

[77] *Id.*

[78] *See* ***supra*** n. 1

either a foreign station or a domestic TV station operating on channel 6.[79] Moreover, in order "to mitigate any potential hardship that the auction process might impose on noncommercial entities,"" the Commission adopted a third test for reserving channels outside 201-220 in the ***Reporf &*** Order in this proceeding. Under this third standard, the Commission will allocate a new FM channel as reserved if a would-be applicant for an NCE station can show that it is technically precluded from using a reserved channel, and that it will provide a first or second NCE service to 10% of the population within its proposed protected service contour. Since the Commission further relaxed the standard, several parties have asked the Commission to allocate a particular FM channel as resewed pursuant to the relaxed reservation standards, and we have done so.

32. As indicated by our third test, we believe that a necessary component of any reservation standard must take into account the distribution of commercial and NCE service in a given area. Under NPR's proposal, the Commission would reserve a channel for NCE use in a given area, even if the area had little or no commercial service, when a proponent for reservation could demonstrate that spectrum is not available that would enable the proponent to serve 50% of its proposed service area." Although such circumstances might be rare, we believe that a standard that takes into account *some* relative distribution of commercial and NCE service better serves the public interest. In addition, NPR has not demonstrated why our existing standards are insufficient. It has not explained, for example, how the application of our standards, as recently relaxed, results in too few channels for NCE stations, especially given that commercial stations can only operate on these same channels, because the Commission has not reserved any spectrum for the exclusive use of commercial stations.

33. In addition to requiring proponents of reservation to demonstrate that NCE service is in fact needed in their proposed service area (by showing that they will provide the first or second NCE service within some portion of their proposed service contour), our existing standards also require proponents to show that they are "technically precluded" from using a reserved channel. NCE service is not technically precluded if it is possible to specify a location at which same-class reserved band NCE facilities could be licensed to the proposed community in compliance with NCE technical rules." As explained in more detail below, a reservation proponent must satisfy two criteria: first, that class-maximum facilities at the allotment reference site would provide a new first or second NCE service to ten percent or more of the population in a station's service area; and second, that a same-class reserved band facility that would provide the requisite level of new NCE service is - to a reasonable degree of certitude - technically precluded.

34. In order to expedite new service and minimize burdens to prospective NCE applicants, we will use the following methodology to evaluate allotment reservation requests. A reservation showing must satisfy two distinct criteria. First, it must establish the relative need for a new NCE service by demonstrating that maximum class facilities at the proposed allotment site would provide a first or second NCE service to at least .ten percent of the population within the proposed station's service area and that such population is at least 2000 persons. The Commission will not reserve a particular allotment if this "first or second service" criterion is not satisfied at the allotment site's reference coordinates.

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[79] ***Id.*** § 73.202(a)(1)(i). An NCE station operating on one of the reserved FM channels might cause interference with a TV station operating on channel 6 because the twenty reserved FM channels (located at 88.1-91.9 **MHz)** sir immediately adjacent to TV channel 6 (located at 82-88 MHz). ***Id.*** §§ 73.201, 73.603(a).

[811] ***Report & Order,*** **15** FCC Rcd at 7433.

[81] NPR at 11-16. A few commenters suggested that the Commission should reserve channels simply when **a** reserved channel is unavailable. See, *e.g.*, Barrett at 6; Beacon at 6; SSR at 1. Because these proposals do not take into account the relative proportion of commercial and NCE service – we similarly reject them.

[82] ***See especially*** 47 C.F.R. Secs. 73.509, 73.5 15. and 73.525.

35. Secondly, a reservation request must include a technical preclusion showing. The following test is designed to provide a reliable and efficient proxy of technical preclusion. It is not a conclusive test, but one that the Commission will treat as establishing a rebuttable presumption of technical preclusion. The showing will be based on a circle, centered in the proposed community of license and drawn with a radius one kilometer less than the distance to the predicted 60 dBu strength signal of a maximum same-class facility. The reservation showing must establish that no rule-compliant facility can be authorized at maximum antenna height above average terrain ("HAAT") and with maximum effective radiated power ("ERP) on any reserved band channel at four equally-spaced locations on the circle, beginning with 0 (zero) degrees. In addition, the reservation showing must establish that no same-class rule-compliant facility can be authorized at minimum antenna HAAT and with minimum ERP on any reserved band channel at the city center coordinates for the community of license. If these two criteria are satisfied, the reservation proponent has presumptively established that the allotment should be reserved, *i.e.,* that a nonreseved band FM station licensed to the proposed community with the proposed class facilities is technically precluded from providing service on a reserved band channel.

36. In the event that an NCE station can be licensed on one or more channels at any of these five sites in compliance with the NCE technical rules, the reservation showing must undertake a "first or second service" analysis of the technically acceptable facilities at each acceptable site. If any analyzed facility would satisfy the "first or second service" criterion, the allotment will not be reserved. If none of the identified channel/site combinations satisfy the "first or second service" criterion, then the reservation proponent has presumptively established that the allotment should be reserved.

37. A reservation showing will be conclusively rebutted if a party that desires a non-reserved allotment can both identify a single location from which a facility with a class-permissible power/height combination can be authorized in compliance with the rules, and show, with respect to that location, that the specified facilities would satisfy the "first or second service" criterion. If no acceptable rebuttal showing is submitted, the allotment generally will be reserved. However, the staff may reject reservation showings if it determines that technically acceptable reserved band facilities can be licensed to the particular community, provided that such facilities meet the "first or second service" criterion.

38. We also clarify that a reservation request, accompanied with a complete technical preclusion showing, may be submitted as an original petition for rulemaking or as a timely counterproposal. If a reservation request is filed as a counterproposal and specifies the same community as the initial petition, the station class and allotment coordinates set forth in the initial petition would be used to determine technical preclusion. Conflicts between mutually exclusive allotments for different communities when a party has made the two-part reservation showing with respect to one community will be resolved under established Section 307(b) precedent. Reserved allotments will be conditioned on the construction and licensing of an NCE station that provides the requisite level of first and second NCE service. In the event that all applications for a reserved band allotment fail to propose such service, the allotment will become unreserved by operation of law and subject to the Commission's competitive bidding licensing procedures.

39. Vacant *Allotments.*[83] We will authorize entities to use the relaxed reservation standards that we reaffirm today not only for future allocations, but also for FM channels for which we initiated an allocation proceeding (as determined by the release of a Notice of Proposed *Rulemaking)* before the effective date of these standards, August 7, 2000, and for which we never opened a filing window to

[83] The issue of whether to allow would-be applicants for NCE stations to attempt to reserve channels already in the Table of Allotments is generally irrelevant for TV, because there are no vacant NTSC allotments, and the only vacant DTV allotments are those already reserved for NCE use.

accept applications.[84] There are approximately 450 such FM channels, including approximately 350 that were previously scheduled for auction.'' In determining whether to reevaluate the status of an FM channel that already has been the subject of an allocation rulemaking proceeding, we believe that the public interest requires us to weigh the delay in the introduction of new FM service to the public that would be associated with such a review, against the public interest benefits of additional review, and fairness to all interested parties. For FM channels for which Commission initiated an allocation proceeding before August 7, 2000, and for which it has no applications on file, we believe that the balance of these concerns favors further review. On the one hand is delay, as some commenters indicate,[86] as well as unfairness to the proponents of these channels, each of which petitioned the Commission to allocate the channel, and has affirmatively expressed an interest in filing an application and competing for the channel at auction. On the other hand, proponents of channels have no "finder's preference" for them, and entities that wish to use these FM channels to operate NCE stations have not had meaningful opportunities to acquire the licenses for them. This is because these entities never had opportunities to reserve these channels using our relaxed reservation standards, and although we will still permit them to apply for these channels, their applications will be returned as soon as they become mutually exclusive with those for commercial stations.[87] Allowing entities that wish to use these FM channels to operate NCE stations an opportunity to reserve them also ensures that we will allocate them as reserved or non-reserved according to whether there is a greater need for commercial or NCE service, as determined by our relaxed reservation standards, such that the delay of service occasioned by our further review of the nature of the channel is offset by the public interest benefit of more diverse service. Thus, on balance, we believe that the public interest is best served by allowing interested parties an opportunity to reserve FM channels using the standards that were not previously available to them. As a result, we will direct the staff to open a short window in the near future, during which interested parties may attempt to reserve any FM channel for which we initiated an allocation rulemaking before August 7, 2000, using the standards that became effective that day and that we reaffirm and clarify here. Interested parties objecting to any proferred reservation showing we receive may of course file opposing pleadings. We will release a Public Notice containing the details of our procedures for reserving vacant allotments in advance of the window.

40. We will not, however, allow interested parties to use the relaxed reservation standards for any FM channel for which we initiated an allocation rulemaking after August 7, 2000. We believe the cost-benefit analysis associated with opening these rulemakings is different. The relaxed reservation standards were available to reserve any of these channels, as some commenters point out." Indeed, several parties have reserved allotments using the Commission's new standards. We do not believe it would serve the public interest to introduce additional delay to offer would-be applicants for NCE stations yet another opportunity to attempt to reserve these channels using the criteria that have already been available for them.

41. Pending Applications. Consistent with our conclusion not to open these newer vacant allotments to reconsider reserving the channels, we also reaffirm the decision in the Report & Order in

[84] The Commission published the *Reporr* & Order in which it adopted these standards in the Federal Register on June 8, 2000. See 65 Fed. Reg. *36,375* (2000). The effective date of these standards **was** sixty days thereafter, or August 7,2000.

[85] See, *e.g.*, Public Notice, "Auction Notice and Filing Requirements for FM Broadcast Construction Permits," *16* FCC **928,961-968** (2001) (listing FM channels included in Auction No. 37).

[86] Garter at 4; NAB at *7*

[87] Mutually exclusive mixed group applicants for stations that are licensed using the Table of Allotments do not have the opportunity to settle. **See** supra note *61*.

[88] Barrett at 6 Eels at **8:** NAB Reply at 10.

this proceeding not to permit applicants for NCE stations in pending mixed groups a further opportunity to reserve the channels for which they have applied. At the time of the ***Second Further Notice,*** a total of forty mixed groups were pending.[89] We offered these groups an opportunity to settle,[90] and many took advantage of that opportunity, with the result that approximately twenty mixed groups remain. The channels at issue here are altogether different from the allotments discussed above because they have advanced to a farther point in our licensing process: the Commission opened a filing window for some of these channels nearly ten years ago, already has long-form applications on file for them, and in fact had originally scheduled to award the licenses by auction in 1999.[91] As a result, when compared to the allotments for which we never opened a filing window, further review of the channels associated with pending applications would cause even greater delay in our licensing process and the introduction of broadcast service, and also would cause greater unfairness to applicants for commercial stations, because all interested parties have spent the time and money necessary to complete all of the engineering and legal components of a long-form application. Particularly given that we have already offered settlement opportunities to all applicants in these pending cases, we are not persuaded that the equities favoring the applicants for NCE stations in these pending proceedings outweigh the delay in initiating new broadcast service to the public as well as the unfairness to applicants for commercial stations. As a result. we believe that it will serve the public interest best to return as unacceptable for filing the pending applications for NCE stations, and move the process forward by subjecting any remaining mutually exclusive applications to auction. This auction will be closed. We will not open a new filing window; therefore, only the pending applicants for commercial stations may compete for the licenses at issue. Prior to auction, we will not review these applicants' long form applications already on file, nor will we accept amendments to these forms, including any amendments to change **an** applicant's status from NCE to commercial. If only one commercial application remains after the return of all mutually exclusive NCE applications. we will process that applicant's pending long-form application in accordance with our applicable rules. This approach will end the administrative delay in processing these applications, and will result in licensing new broadcast facilities to serve the public more quickly.

42. ***Other Allocation Issues.*** NPR, with the support of a few other commenters, asked us to reallocate TV channel 6 for NCE radio use, claiming that such an action would, among other things, alleviate interference complaints, permit additional NCE service, and pose little hardship to existing licensees because they have been given a different DTV channel.[92] A number of NCE TV licensees objected, however, stating that this issue is outside the scope of this proceeding.[93] We agree, and decline to adopt NPR's proposal. We also conclude that Amherst Alliance's request that we expand the reserved band for FM from 88-92 **MHz** to 88-94 **MHz,** and limit eligibility to the expanded reserved band to particular types of NCE stations? is likewise outside the scope of this proceeding. The nature of our inquiry here has been to evaluate how to resolve competing interests for individualized non-reserved channels and frequencies, not to reconfigure the reserved band.

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[89] Second ***Further*** Notice, 17 FCC Rcd at 3839 n.40.

[90] Public Notice, "Window Opened to Permit Settlements for Closed Groups of Mutually Exclusive Broadcast Applications," 16 FCC Rcd 17091 **(2001).** The Commission extended the settlement period through February 15, 2002. **See** Public Notice, "Extended Settlement Period for Closed Groups of Mutually Exclusive Broadcast Applications Announced," 16 FCC Rcd 22047 (2001).

[91] Originally, the Commission expected to resolve mutually exclusive applications for these licenses in Auction No. ***25,*** which the Commission conducted in late 1999.

[92] NPR at 16-18: NPR Reply at 12-13, ***See*** also NFCB at ***5.***

[93] Channel 6 PTV Licensees **at** 3. **See** *also* APTS Reply at ***5-6***

[94] Amherst Alliance at **3-4.**

IV. CONCLUSION

43. This proceeding has required us to undertake the difficult task of deciding how to resolve the competing interests of applicants for commercial and NCE stations for non-reserved spectrum. We have attempted to create and maintain opportunities for applicants for NCE stations insofar as possible, consistent with the applicable legal standards, and fairness toward applicants for commercial stations. Our resolution of these issues will now enable the Commission to move forward quickly with licensing non-reserved spectrum, so that the ultimate licensees may provide service to the public.

V. ADMINISTRATIVE MATTERS

44. This document is available to persons with disabilities requiring accessible formats (electronic ASCII text, Braille, large print, and audiocassette) by contacting Brian Millin at (202) 418-7426 (voice), (202) 418-7365 (TTY), or by sending anemail to access@fcc.gov.

45. ***Final Paperwork Reduction Act Analysis.*** This ***Second Report & Order*** contains no new or modified information collections subject to the Paperwork Reduction Act of 1995.

46. ***Final Regulatory Flexibility Act Analysis.*** The Final Regulatory Flexibility Analysis for this ***Second Report & Order*** is set forth in Appendix B.

47. ***Additional Infarmtion.*** For additional information, please contact Eric J. Bash, Media Bureau, Policy Division, (202) 418-1188, or ebash@fcc.gov, or Peter Corea, Media Bureau, Policy Division, (202) 418-7931, or pcorea@fcc.gov.

VI. ORDERING CLAUSES

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

49. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this ***Second Report & Order,*** including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

50. IT IS FURTHER ORDERED that this proceeding is TERMINATED

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

COMMENTS

Amherst Alliance *et al.*
Association of Public Television Stations
Barrett, David
Beacon Broadcasting Corp. *et al.*
Birdsill, Michael R.
Bustos, Amador
Curators of the University of Missouri
Educational Communications of Colorado Springs, Inc. *er al.*
Eels, Thomas M.
El Mundo Broadcasting Corp.
Gartner, Jack
Georgia Public Telecommunications Commission
KNME-TV
Kaleidoscope Foundation, Inc.
Minority Media & Telecommunications Council
Moody Bible Institute of Chicago *et al.*
National Association *of* Broadcasters
National Federation of Community Broadcasters
National Public Radio
Oregon, State *of*
Rocky Mountain Corp. for Public Broadcasting
Rosner Communications Network, Inc.
Satellite Beach Community Broadcasters
Short, Robert
SSR Communications, Inc.
Staples, Stephen W. d/b/a Regional Broadcasting Co.
Station Resource Group
Summit Media Broadcasting, LLC
Three Angels Broadcasting Network, Inc.
Three States Broadcasting Co., Inc.
Trinity Broadcasting Network
University of Northern Iowa
WVRU-FM, Radford Univ.

REPLY COMMENTS

Association *of* Public Television Stations
Birdsill, Michael R.
Channel 6 Public Television Stations
Educational Media Foundation
Iowa Public Broadcasting Board
National Association of Broadcasters
National Public Radio
New Jersey Public Broadcasting Authority
Station Resource Group
University of North Carolina Center for Public Television

APPENDIX B

FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[95] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the ***Second Further Notice of Proposed Rulemaking ("Second Further Notice")*** in this docket.% The Commission sought written public comment on the proposals in the ***Second Further Notice,*** including comment on the IRFA. No comments addressed the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA') conforms to the RFA.[97]

Need for, and Objectives of, the *Second Report & Order*

The Commission adopts the ***Second Report & Order*** to establish new policies for licensing spectrum that the Commission has not specifically reserved **for** the exclusive use of noncommercial educational ("NCE) broadcast stations. In the ***Report & Order*** in this docket, the Commission decided to resolve competing applications for commercial and NCE stations in this "non-reserved' spectrum via competitive bidding, but the U.S. Court of Appeals **for** the D.C. Circuit overturned that result.[98] In the ***Second Further Notice*** in this docket, the Commission sought comment on how to allocate and license this spectrum, consistent with the court's opinion and the Communications Act. The ***Second Report & Order*** resolves the issues we raised in the ***Second Further Norice.***

Summary of Significant Issues Raised hy the Public in Responses to the IRFA

No comments addressed the IRFA, **or** otherwise discussed issues that may impact small entities

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

The RFA directs the Commission to provide a description of, and, where feasible, an estimate of the number of small entities that will be affected by the rules.[99] The RFA defines the term "small entity" as having the same meaning as "small business," "small organization," and "small governmental jurisdiction."[100] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act."' A "small business concern" is one that: (1) is independently owned and operated: (2) is not dominant in its field of operation; and **(3)** satisfies any additional criteria established by the SBA.[102] A **"small** organization" is generally defined as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. . . ."[103] A "small governmental jurisdiction" is generally defined as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand. . . ."[104]

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[95] ***See*** 5 U.S.C. § 603. The RFA, **see** 5 U.S.C. § 601 *et* ***seq.***, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (SBREFA).

[96] 17 FCC Rcd 3833,3844-3846(2002).

"See 5 U.S.C. § 604.

[98] ***National Public Radio*** v. FCC, 254 F.3d 226 (D.C. Cir. 2001).

[99] **5** U.S.C. § 604(a)(3).

[100] ***Id.*** § 601(6).

[101] *Id.* § 601(3).

[102] *Id.* § 632.

[103] Id. § 601(4).

[104] 5 U.S.C. § 601(5).

Report to Congress

The Commission will send a copy of the ***Second Reporr & Order,*** including this FRFA, in a report to he sent to Congress pursuant to the Congressional Review Act.[113] In addition, the Commission will send a copy of the ***Second Repon & Order,*** including this **FRFA,** to the Chief Counsel for Advocacy of the Small Business Administration. **A** copy of the ***Second Report & Order*** and this FRFA (or summaries thereof) will also he published in the Federal Register.[114]

[113] ***Id.*** § 801(a)(1)(A).

[114] ***Id.*** § 604(b).

Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements
The Commission anticipates that none of the rules adopted in the ***Second Report & Order*** will result in an increase in the existing reporting and recordkeeping requirements of potential applicants.

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered
The RFA requires an agency to describe any significant alternatives that it has considered in adopting its rules, which may include the following four alternatives (among others): (I) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and **(4)** an exemption from coverage of the rule, or any part thereof, for small entities.[112]

The ***Second Reporf & Order*** establishes new policies for licensing non-reserved spectrum, in a manner consistent with the court's decision in the ***NPR*** case, and the applicable provisions of the statute. As explained in detail in the ***Second Report & Order,*** section 309(j)(1) of the Act generally requires the Commission to resolve mutually exclusive applications for licenses to use spectrum via competitive bidding, but section 309(j)(2)(C) exempts the licenses for NCE stations from this process. In the ***Repon & Order*** in this docket, the Commission concluded that the auction exemption applied only to licenses for NCE stations to use the channels that Commission has reserved for their exclusive use, and that applicants for licenses for NCE stations to use non-reserved spectrum must compete for them via competitive bidding; in the ***NPR*** case, the D.C. Circuit decided that the auction exemption extended to licenses for NCE stations to use non-reserved spectrum. As a result, the Commission's new policies and rules must distinguish between commercial station and NCE stations in terms of how it allocates and licenses this spectrum. Thus, the Commission cannot distinguish between "small" and "non-small" entities in applying the relevant statutory standards.

Although it is not necessarily true that more applicants for NCE stations would qualify as "small entities" than applicants for commercial stations, the Commission has attempted, within the applicable legal constraints, to maximize the opportunities for applicants for NCE stations to obtain licenses to use non-reserved spectrum, consistent with the mandate in section 604(a)(5) of the RFA that an agency consider alternatives to minimize significant economic impact on small entities. For example, in the Second ***Further Notice,*** the Commission proposed two alternatives for licensing non-reserved spectrum: hold applicants for NCE stations ineligible for the spectrum, or permit them to apply for this spectrum, subject to the Commission returning their applications as unacceptable for filing if any mutually exclusive applications for commercial stations remained after the expiration of any settlement period. In the ***Second Report & Order,*** the Commission has adopted the second of these alternatives, which permits NCE stations to obtain licenses for non-reserved spectrum, while the first one did not. This alternative is equally beneficial to both large and small entities, because it permits all entities the opportunity to acquire licenses for non-reserved spectrum. Moreover, the Commission has also reaffirmed its process that permits would-he applicants for NCE stations, both large and small, to reserve more FM and TV channels for their exclusive use upon showing that an already-reserved channel is not available for use, and there is a need for NCE service in a given area. The Commission will allow interested parties an opportunity to apply these criteria to future allocation proceedings, and to channels already in the Table of Allotments for which the Commission initiated an allocation proceeding before the effective date of the criteria, and for which it never accepted applications.

[112] ***5*** **U.S.C.§** 603(c)(1)-(c)(4)

Section 73.3572 is amended by revising paragraph (e) as follows:

§ 73.3572 Processing of TV broadcast, Class A TV broadcast, low power TV, TV translators, and TV booster applications.

(e) The FCC will specify by Public Notice a period for filing applications for a new non-reserved television, low power TV and TV translator stations or for major modifications in the facilities of such authorized stations, whether **for** commercial broadcast stations or noncommercial educational broadcast stations, as described in 47 U.S.C. § 397(6), and major modifications in the facilities of Class **A** TV stations.

* * * * *

Section 73.3573 is amended by revising paragraph (f) to read as follows:

$73.3573 Processing of FM broadcast station applications.

* * * * *

(f) ***Processing non-reserved channel FM broadcast station applications***

* * * * *

(2)(i) The FCC will specify by Public Notice, pursuant to § 73.5002(a), a period for filing non-reserved hand FM applications for a new station or for major modifications in the facilities of an authorized station. FM applications for new facilities or for major modifications, whether for commercial broadcast stations **or** noncommercial educational broadcast stations, as described in 47 **U.S.C.** $ 397(6), 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) Subsequently, the FCC will release Public Notices: (i) identifying the short-form applications received during the window filing period which are found to he mutually exclusive, including any applications for noncommercial educational broadcast stations, as described in 47 U.S.C. § 397(6), as well as the procedures the FCC will use to resolve the mutually exclusive applications;

* * * * *

(4) If, after the close of the appropriate window filing period, a non-reserved FM allotment remains vacant, the window remains closed until the FCC, by Public Notice, specifies a subsequent period for filing non-reserved band FM applications for a new station or for major modifications in the facilities of an authorized station pursuant to paragraph (f)(2)(i) of this section. After the close **of** the filing window, the FCC will also release a Public Notice identifying the short-form applications which are found to be non-mutually exclusive, including any applications **for** noncommercial educational broadcast stations, as described in 47 U.S.C. $ 397(6). These non-mutually exclusive applicants will be required to submit the appropriate long-form application within 30 days of the Public Notice and, for applicants for commercial broadcast stations, pursuant to the provisions of § 73.5005(d). Non-mutually exclusive applications for commercial broadcast stations will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584. Non-mutually exclusive applications for noncommercial educational broadcast stations, as described in 47 U.S.C. §397(6), will be processed and the FCC will periodically release a Public Notice

APPENDIX C

RULE CHANGES

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended as follows:

PART 73 – RADIO BROADCAST SERVICES

Subpart H – Rules Applicable to All Broadcast Stations

Section 73.3571 is amended by revising paragraph (h) to read as follows:

§ 73.3571 Processing of AM broadcast station applications.

* * * * *

(h) ***Processing new and major AM broadcast station applications.*** (1)(i) The FCC will specify by Public Notice, pursuant to § 73.5002, a period for filing AM applications for a new station or for major modifications in the facilities of an authorized station. AM applications for new facilities or for major modifications, whether for commercial broadcast stations or noncommercial educational broadcast stations, as described in 47 U.S.C. § 397(6), will be accepted only during these specified periods. Applications submitted prior to the appropriate filing period or "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.

* * * * *

(2) Subsequently, the FCC will release Public Notices:

(i) identifying the short-form applications received during the window filing period which are found to be mutually exclusive, including any applications for noncommercial educational broadcast stations, as described in 47 U.S.C. § 397(6), as well as the procedures the FCC will use to resolve the mutually exclusive applications;

* * * * *

(3) After the close of the filing window, the FCC will also release a Public Notice identifying any short-form applications received which are found to be non-mutually exclusive, including any applications for noncommercial educational broadcast stations, as described in 47 U.S.C. § 397(6). All non-mutually exclusive applicants will be required to submit an appropriate long form application within 30 days of the Public Notice and, for applicants for commercial broadcast stations, pursuant to the provisions of § 73.5005(d). Non-mutually exclusive applications for commercial broadcast stations will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584. Non-mutually exclusive applications for noncommercial educational broadcast stations, as described in 47 U.S.C. § 397(6), will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.7004 and 73.3584. 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 non-mutually exclusive long form application, the same will be granted.

* * * * *

of mutual exclusivity for auction purposes can be made, applicants for non-table broadcast services or for **ITFS** must also submit the engineering data contained in the appropriate FCC form (FCC Form 301, FCC Form 346, FCC Form 349 or FCC Form 330). Beginning January I, 1999, all short-form applications must be filed electronically. If any application for a noncommercial educational broadcast station, as described in 47 U.S.C. § 397(6), is mutually exclusive with applications for commercial broadcast stations, and the applicants that have the opportunity to resolve the mutually exclusivity pursuant to subsection ***(c)*** and (d) of this section fail to do so, the application for noncommercial educational broadcast station, as described in 47 U.S.C. § 397(6), will be returned as unacceptable for filing, and the remaining applications for commercial broadcast stations will be processed in accordance with competitive bidding procedures.

(c) Applicants in all broadcast service or ITFS auctions, and applicants for noncommercial educational stations, as described in 47 U.S.C. § 397(6), on non-reserved channels will be subject to the provisions of § 1.2105(b) of this chapter regarding the modification and dismissal of their short-form applications. Notwithstanding the general applicability of § 1.2105(b) of this chapter to broadcast and ITFS auctions, and applicants for noncommercial educational stations, as described in 47 U.S.C. § 397(6), on non-reserved channels, the following applicants will be permitted to resolve their mutual exclusivities by making amendments to their engineering submissions following the filing of their short-form applications:

* * * * *

(4) applicants for the AM broadcast service who file applications that are mutually exclusive with at least one application for a noncommercial educational station, as defined in 47 U.S.C. § 397(6).

(d) * * * * *

(4) applicants for the **AM** broadcast service who file applications that are mutually exclusive with at least one application for a noncommercial educational station, as defined in 47 U.S.C. § 397(6).

* * * * *

Section 73.5005 is amended **by** revising paragraph (d) as follows:

$73.5005 Filing of long-form applications.

(d) An applicant whose short-form application, submitted pursuant to 47 CFR 73.5002(b), was not mutually exclusive with any other short-form application in the same service, or whose short-form application was mutually exclusive only with one or more short-form applications for a noncommercial educational broadcast station, as described in 47 U.S.C. § 397(6), shall submit an appropriate long-form application within thirty (30) days following release of a public notice identifying any such non-mutually exclusive applicants. The long-form application should be submitted pursuant to the rules governing the relevant service and according to any procedures for filing such applications set out by public notice. The long-form application filed by a non-mutually exclusive applicant need not contain the additional exhibits, identified in § 73.5005(a), required to be submitted with the long-form applications filed by winning bidders. When electronic procedures become available, the Commission may require any non-mutually exclusive applicants to file their long-form applications electronically.

Section 73.5006 is amended by revising paragraph (a) as follows:

§ 73.5006 Filing of petitions to deny against long-form applications.

listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.7004 and 73.3584. 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 non-mutually exclusive long-form application, it will be granted.

Subpart I – Procedures for Competitive Bidding and for Applications for Noncommercial Educational Broadcast Stations on Non-Reserved Channels

Section 73.5000 is amended by revising paragraph (b) as follows:

§ 73.5000 Services subject to competitive bidding.

(b) Mutually exclusive applications for broadcast channels in the reserved portion of the FM band (Channels **200-220)** and for television broadcast channels reserved for noncommercial educational use are not subject to competitive bidding procedures. Applications for noncommercial educational broadcast stations, as described in 47 U.S.C. § 397(6), on non-reserved channels also *are* not subject to competitive bidding procedures.

* * * * *

Section 73.5002 is amended by revising paragraphs (a), (c) and (d) to read as follows:

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

* * * * *

(a) Prior to any broadcast service or ITFS auction, the Commission will issue a public notice announcing the upcoming auction and specifying the period during which all applicants seeking to participate in an auction, and all applicants for noncommercial educational broadcast stations, as described in 47 U.S.C. § 397(6), on non-reserved channels, must file their applications for new broadcast or ITFS facilities or for major changes to existing facilities. Broadcast service or ITFS applications for new facilities or for major modifications will be accepted only during these specified periods. This initial and other public notices will contain information about the completion and submission **of** applications to participate in the broadcast or I T S auction, and applications for noncommercial educational broadcast stations, as described in 47 U.S.C. § 397(6), on non-reserved channels, as well **as** any materials that must accompany the applications, and any filing fee that must accompany the applications or any upfront payments that will need to be submitted. Such public notices will also, in the event mutually exclusive applications are filed for broadcast construction permits or ITFS licenses that must **be.** resolved through competitive bidding, contain information about the method of competitive bidding to be used and more detailed instructions on submitting bids and otherwise participating in the auction. In the event applications are submitted that are not mutually exclusive with any other application in the same service, or in the event that any applications that are su'bmitted that had been mutually exclusive with other applications in the same service are resolved as a result of the dismissal or modification of any applications, the non-mutually exclusive applications will be identified by public notice and will not be subject to auction.

(b) To participate in broadcast service or ITFS auctions, or to apply for a noncommercial educational station, as described in 47 U.S.C. § 397(6), on a non-reserved channel, all applicants must timely submit short-form applications (FCC Form 175), along with all required certifications, information and exhibits, pursuant to the provisions of 47 CFR 1.2105(a) and any Commission public notices. So determinations

(3) Subsequently, the **FCC** will release Public Notices:

(i) Identifying the short-form applications received during the appropriate filing period or "window" which are found to be mutually exclusive, including any applications for noncommercial educational broadcast stations, as defined in **47 U.S.C.**§ 397(6), as well as the procedures the **FCC** will use to resolve the mutually exclusive applications;

* * * * *

(4) After the close of the tiling window, **the FCC** will also release a Public Notice identifying any short-form applications which are found to be non-mutually exclusive, including any applications for noncommercial educational broadcast stations, as described in **47** U.S.C. § 397(6). These non-mutually exclusive applicants will be required to submit the appropriate long form application within **30** days of the Public Notice and, for applicants for commercial broadcast stations, pursuant to the provisions of § **73.5005.** Non-mutually exclusive applications for commercial broadcast stations will be processed and the **FCC** will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and **73.3584.** Non-mutually exclusive applications for noncommercial educational broadcast stations, as described by **47 U.S.C.**§ 397(6), will be processed and the **FCC** will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.7004 and **73.3584. If** the applicants are duly qualified, and upon examination, the **FCC** finds that the public interest, convenience and necessity will be served by the granting of the non-mutually exclusive long-form application, the same will be granted.

(a) As set forth in 47 CFR 1.2108, petitions to deny may be filed against the long-form applications filed by winning bidders in broadcast service or ITFS auctions and against the long-form applications filed by applicants whose short-form applications were not mutually exclusive with any other applicant, or whose short-form applications were mutually exclusive only with one or more short-form applications for a noncommercial educational broadcast station, as described in 47 U.S.C. § 397(6).

Subpart K – Application and Selection Procedures for Reserved Noncommercial Educational Channels, and for Certain Applications for Noncommercial Educational Stations on Non-Reserved Channels

Section 73.7001 is amended by revising paragraph § 73.7001 as follows:

§ 73.7001 Services subject to evaluation by point system.

* * * * *

(b) 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 non-reserved channels, only when all of the mutually exclusive applications are for noncommercial educational broadcast stations. as described in 47 U.S.C. § 397(6)(A) or 47 U.S.C. § 397(6)(B).

(c) A point system will be used to evaluate mutually exclusive applications for new television translator and low power television facilities, and for major changes to existing facilities, only when all of the mutually exclusive applications are for noncommercial educational broadcast stations, as described in 47 U.S.C. § 397(6)(B).

* * * * *

PART 74 – EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

Subpart L – FM Broadcast Translator Stations and FM Broadcast Booster Stations

Section 74.1233 is amended by revising paragraph (d) to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

* * * * *

(d) Processing non-reserved band FM translator applications.

* * * * *

(2)(i) The FCC will specify by Public Notice, pursuant to § 73.5002(a), a period for filing non-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, whether for commercial broadcast stations or noncommercial educational broadcast stations, as described in 47 U.S.C. § 397(6), 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.

* * * * *

for competing against commercial broadcasters in auctions for licenses of public spectrum. I hope our decision today will not be used to circumvent Congress' directive against auctions for NCE stations. If such a result comes to pass, the Commission may need to revisit its decision today. Indeed, I will urge it to do so.

CONCURRING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Reexamination of the Comparative Standard for Noncommercial Educational Applicants

Today's decision has much to recommend it. I am pleased the Commission has reached a decision on the difficult issue of the eligibility of noncommercial educational applicants to use non-reserved spectrum. I agree with the decision to allow applicants for an NCE station to continue to apply for the use of non-reserved spectrum, subject to dismissal if there is a competing commercial application. Such an approach is preferable to holding all such applications ineligible even where there is not a mutually exclusive application for the spectrum's use. NCE stations – traditional public broadcasting, as well as other stations licensed to universities, churches, and municipalities – have been fulfilling their educational mission to their communities for decades.

It further seems reasonable to allow nonprofit educational organizations not wishing to provide NCE services to utilize non-reserved spectrum. Applicants who do not choose to make an NCE showing ought to have the opportunity to obtain licenses for the use of non-reserved spectrum. Indeed, as the Order points out, some non-profit entities today operate both commercial and non-commercial stations.

In addition, under current rules that are not at issue here, a commercial station is not precluded from changing its status to an NCE station. This also seems reasonable. After all, why preclude a commercial broadcaster from deciding it would be better to provide educational programming and receive the attendant benefits and obligations of being an NCE station?

I must note, however, that this is not a perfect resolution of all the issues. Probably there is no perfect solution. Nevertheless, I do see opportunities for abuse that could develop out of today's Order. For example, a non-profit educational organization that seeks an additional license outside the reserved bands could claim it is seeking a commercial station, participate in an auction, and then immediately upon receiving the license change its status to an NCE station. The Order assumes that the benefits of getting more educational programming on the air outweigh the risk of abuse. And indeed, allowing NCE applicants to avoid the auctions exemption in this manner is a way to get more NCE broadcast stations on the air. Yet, my concern remains.

More generally, I am concerned about further blurring the distinctions between commercial and non-commercial licensees. It was not so long ago that this Commission went down the road toward commercialization of public television by determining that the prohibition on advertising does not apply to advertisements carried on the non-broadcast portion of the bitstream - the spectrum used for subscription or data services.

I do not want to encourage further travel down this road. Some nonprofit educational broadcasters could feel pressure to seek additional revenue streams to purchase licenses. We may soon be dealing with revenue-raising schemes that will detract from and endanger the integrity of noncommercial broadcasting. Worse yet, at some point, public funds could he used to purchase licenses to use the public's airwaves. I fervently hope that public broadcasters will not resort to this, because in so doing, they could be playing fast and loose with not only the proud heritage of their service, but also with its very credibility and long-term survivability.

Congress did not establish noncommercial broadcasting to be the same as commercial broadcasting. In establishing the Corporation for Public Broadcasting, Congress reported that public broadcasters "will not be in economic competition with commercial broadcasters. [They] will be filling the gaps that commercial broadcasters do not fill." Because NCE stations are different, they should be able to use the money they collect for the development of new and innovative programming, rather than