

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

In the Matter of	)	
	)	
Policies to Promote Rural Radio Service and to	)	MB Docket No. 09-52
Streamline Allotment and	)	RM-11528
Assignment Procedures	)	

**THIRD REPORT AND ORDER**

**Adopted: December 28, 2011**

**Released: December 29, 2011**

By the Commission: Commissioner Copps issuing a statement.

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**I. INTRODUCTION**

1. In this *Third Report and Order* (“*Third R&O*”), we continue our efforts to enhance the ability of federally recognized Native American Tribes and Alaska Native Villages (collectively “Tribes”)<sup>1</sup> not only to receive radio service tailored to their specific needs and cultures, but to increase ownership of such radio stations by Tribes and Tribal-owned entities. Specifically, we adopt our proposal to limit eligibility for authorizations associated with allotments added to the FM Table of Allotments using the recently established Tribal Priority<sup>2</sup> to the Tribes whom the Tribal Priority was intended to

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<sup>1</sup> As we did in the earlier stages of this proceeding, and in the interest of avoiding confusion, we will continue to employ the terms “Tribes” and “Tribal Lands” when referring to Native Nations, their governments, and their lands. See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556, 2557 n.1 (2011) (“*Second R&O*” and “*Second FNPRM*,” as appropriate). See also 47 C.F.R. § 73.7000.

<sup>2</sup> *Second FNPRM*, 26 FCC Rcd at 2587.

benefit. We established the Tribal Priority in this proceeding to promote the sovereign rights of Tribes by enabling them to provide vital radio services to their communities and set their own communications priorities and goals. The Tribal Priority also advances the policies and purposes of the Communications Act favoring the diversity of media voices and a fair and equitable distribution of radio service.<sup>3</sup> We believe that the threshold qualifications procedure we adopt accommodates both the needs of Tribes desiring to provide commercial FM broadcast service to Tribal citizens and our long-standing policies designed to facilitate and expedite new radio service to the public.

## II. BACKGROUND

2. On April 20, 2009, the Commission released a *Notice of Proposed Rule Making* (“*Rural NPRM*”) in this proceeding.<sup>4</sup> In the *Rural NPRM* the Commission proposed, among other things, a new Section 307(b) priority that would apply only to Tribes, and entities owned or controlled by Tribes proposing new radio services that primarily would serve Tribal Lands (the “Tribal Priority”). The *Rural NPRM* also included proposed changes to the Commission’s allotment and assignment procedures, including how we award preferences to applicants under the provisions of Section 307(b), which directs us to provide a fair, efficient, and equitable distribution of radio service among the States and communities.

3. On January 28, 2010, in the *First Report and Order* (“*First R&O*”) in this proceeding, we adopted the Tribal Priority proposal, with modifications. The *First R&O* also included a *Further Notice of Proposed Rulemaking*, in which we sought comment, among other things, on whether and how to implement an auction Tribal bidding credit.<sup>5</sup> In our subsequent discussion of the proposed Tribal bidding credit in the *Second Further Notice of Proposed Rule Making* (“*Second FNPRM*”), we recognized the useful input provided by joint commenters Native Public Media and the National Congress of American Indians (“NPM/NCAI”). We expressed concern, however, that the record remained inconclusive as to the efficacy of such a bidding credit.<sup>6</sup> We observed that, in the AM and noncommercial educational (“NCE”) FM services, the Tribal Priority effectively served as a guarantee that an authorization would be awarded to the Tribe or Tribes invoking the priority.<sup>7</sup> By way of contrast, in the commercial FM context, the Tribal Priority is applied at the allotment stage of the licensing process, when the FM channel is allotted at a community, but the Tribe proposing the allotment can still be outbid by a non-Tribal applicant in the subsequent auction of that allotment.<sup>8</sup> This outcome would frustrate the purpose of the Tribal Priority.<sup>9</sup> Instead of a Tribal bidding credit, we proposed to require, as a threshold qualification to apply for a

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<sup>3</sup> *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order and Further Notice of Proposed Rule Making, 25 FCC Rcd 1583, 1588-89, 1596-97 (2010) (“*First R&O*”).

<sup>4</sup> *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Notice of Proposed Rule Making, 24 FCC Rcd 5239 (2009) (“*Rural NPRM*”).

<sup>5</sup> *First R&O*, 25 FCC Rcd at 1615-16.

<sup>6</sup> *Second R&O*, 26 FCC Rcd at 2588.

<sup>7</sup> *Id.* at 2589.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

commercial FM channel allocated pursuant to the Tribal Priority,<sup>10</sup> that an applicant demonstrate that it would qualify for the Tribal Priority for that channel.<sup>11</sup> We also observed that in other contexts, such as procedures used when applying for a non-reserved band FM allotment reserved for NCE use, we require applicants to demonstrate their qualifications for the reserved allotment at the application stage, just as the channel reservation proponent did at the allocations stage.<sup>12</sup>

4. In proposing this threshold qualifications procedure, we also sought comment on certain ancillary issues. For example, we asked whether, in the event that two or more applicants meeting threshold qualifications sought a particular allotment, the Commission should adopt an exception to the general prohibition of certain communications between auction applicants,<sup>13</sup> so that the applicants would have an opportunity to resolve any mutual exclusivities through engineering solutions or settlement.<sup>14</sup> We also sought comment on whether, in the event no applicant meets the threshold qualifications for the Tribal allotment in a filing window, we should include those allotments in subsequent auction filing windows, and on whether and when we should permit non-Tribal applicants to seek construction permits through the auctions process for allotments for which potential Tribal applicants have not expressed an interest.<sup>15</sup> Finally, we asked for comment on issues surrounding Tribal participation in the commercial FM auction process, including the particular bidding disadvantages that Tribes may face vis-à-vis non-Tribal bidders for broadcast radio licenses, as well as the capital requirements of Tribes and Tribal-owned entities to provide commercial FM service to Tribal lands.<sup>16</sup>

5. We received two comments and one reply comment on these issues: NPM and NCAI again filed joint comments, and Gila River Telecommunications, Inc. (“GRTI”) filed comments and reply comments. All commenters support the threshold qualifications approach as proposed in the *Second FNPRM*. GRTI opines that while the Tribal Priority is an “important tool” for Tribes and Tribal entities during the commercial FM allotment stage, it “provides no assistance” to such applicants during the auction stage.<sup>17</sup> NPM/NCAI again state that Tribal bidding credits have not been successfully employed in other telecommunications services, and agree that using threshold qualifications “makes logical sense

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<sup>10</sup> See 47 U.S.C. § 309(j)(6)(E) (“Nothing in this subsection, or in the use of competitive bidding, shall . . . be construed to relieve the Commission of the obligation in the public interest to continue to use . . . threshold qualifications . . . in order to avoid mutual exclusivity in application and licensing proceedings.”).

<sup>11</sup> *Second R&O*, 26 FCC Rcd at 2588, citing *First R&O*, 25 FCC Rcd at 1596 (“[W]e conclude that the Tribal Priority should extend only to (1) Tribes; (2) Tribal consortia; or (3) entities that are 51 percent or more owned or controlled by a Tribe or Tribes... [Q]ualifying Tribes or tribal entities must be those at least a portion of whose tribal lands lie within the proposed station's principal community contour.”). The other applicable requirements that we established in the *First R&O* also would have to be satisfied in order to meet threshold requirements.

<sup>12</sup> *Second R&O*, 26 FCC Rcd at 2588.

<sup>13</sup> See 47 C.F.R. §§ 1.2105(c), 73.5002(d).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 2590.

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

<sup>17</sup> GRTI Comments at 5.

and furthers the goals of the [Tribal] Priority.”<sup>18</sup> GRTI and NPM/NCAI further agree that settlements among qualifying mutually exclusive Tribal applicants should be encouraged.<sup>19</sup>

6. GRTI and NPM/NCAI also concur that an FM allotment added by a qualified Tribe or Tribal-owned entity using the Tribal Priority (“Tribal Allotment”) should be initially awarded only to a Tribe or Tribal entity, and should remain reserved for such an entity even if no Tribal applicants meeting such threshold qualifications express interest in a Tribal Allotment when initially offered.<sup>20</sup> NPM/NCAI in particular believe that it would frustrate the purpose of the Tribal Priority to open, then abruptly close, a Tribal filing window, only to offer the Tribal Allotment to non-Tribal applicants.<sup>21</sup> There are, according to NPM/NCAI, many obstacles that some Tribes face when seeking to initiate new radio service, including lack of capital or federal program support; short construction seasons in many Tribal areas; complications with regard to tower siting, due to factors such as preservation of sacred sites and Bureau of Indian Affairs land use policies; and lack of easy access to materials and engineering expertise.<sup>22</sup> GRTI adds that there are some Tribes that are “prepared, and indeed eager” to begin station construction, but that such desires can be thwarted by what it perceives as Commission delays.<sup>23</sup> GRTI thus suggests we implement an “expedited processing” system for Tribes meeting threshold qualifications and proposing new AM, full-power FM, and low-power FM facilities.<sup>24</sup> Finally, all commenters reiterate their support for a Tribal bidding credit of up to 60 percent in the event we do not adopt threshold qualifications procedures.<sup>25</sup>

### III. DISCUSSION

7. Based on our examination of the record in this proceeding, we adopt the proposed threshold qualifications approach to commercial FM application processing as set forth below, including measures to address situations in which Tribes and Tribal entities require additional time to apply for a license. We are, as always, committed to assisting Tribes in establishing radio service meeting the needs of their communities and citizens. At the same time, we are also mindful of our fundamental interest in expediting new radio service to communities and preventing the so-called “warehousing” of scarce spectrum.<sup>26</sup> The latter concern militates against procedures that would unreasonably delay authorizing

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<sup>18</sup> NPM/NCAI Second FNPRM Comments at 3.

<sup>19</sup> NPM/NCAI Second FNPRM Comments at 4-5; GRTI Reply Comments at 3.

<sup>20</sup> *Id.* at 3-4; NPM/NCAI Second FNPRM Comments at 5-8.

<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Id.* at 6-7.

<sup>23</sup> GRTI Reply Comments at 4-6.

<sup>24</sup> *Id.* at 6-7.

<sup>25</sup> *Id.* at 2-3; NPM/NCAI Second FNPRM Comments at 9.

<sup>26</sup> *See, e.g., 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23093 (1998) (noting that Section 319 of the Act and the Commission’s rules governing construction permits are designed to strike a balance between our fundamental interests in expediting new service to the public and preventing the warehousing of scarce spectrum, on the one hand, and the Commission’s recognition that there are legitimate obstacles that may prevent the rapid construction of broadcast facilities, on the other).

new stations, or tie up spectrum for indefinite periods of time. We also note that, to some extent, a Tribe may time the award of a new FM commercial facility by petitioning for a new Tribal Allotment only when it is ready to commence construction (although we are aware that, in certain areas where spectrum is more scarce, Tribes could reasonably conclude that the risks of deferring application filing are too great). Moreover, while we are sensitive to the financial obstacles to initiating new broadcast service, we reiterate that the procedures proposed in the *Second FNPRM* apply only to commercial FM facilities, which by their nature are intended to be financially self-sustaining.<sup>27</sup> Finally, as GRTI points out in its comments, there exist Tribes that are ready, willing, and able to commence construction immediately, and that would be disserved by any process that includes built-in delays. The procedures we adopt herein are intended to balance these concerns by accommodating both those Tribes and Tribal entities that wish to initiate commercial FM service quickly and those that might need additional time to muster the resources needed to apply for a new station and complete construction.

8. Under the threshold qualifications procedure that we adopt herein, once a Tribal Allotment is allocated, as set forth in the *First R&O*, within a reasonable period of time after publication of the new allotment in the *Federal Register*, we will announce by Public Notice a Threshold Qualifications Window (“TQ Window”). During the TQ Window, any Tribe or Tribal entity that could qualify to add that particular Tribal Allotment, including the original proponent of the allotment, may file FCC Form 301 for the Tribal Allotment.<sup>28</sup> Such an applicant must demonstrate that it meets all of the following eligibility criteria for grant of a Tribal Priority at the allotment stage:

- (A) The applicant is either a federally recognized Tribe or Tribal consortium, or an entity 51 percent or more of which is owned or controlled by a Tribe or Tribes. Qualifying Tribes or Tribal entities must be those at least a portion of whose Tribal Lands lie within the principal community contour of the proposed facility. Although the 51 or greater percent Tribal control threshold need not consist of a single Tribe, the qualifying entity must be 51 percent or more owned or controlled by Tribes at least a portion of whose Tribal Lands lie within the proposed facility’s principal community contour;
- (B) (1) At least 50 percent of the area within the proposed principal community contour is over that Tribe’s Tribal Lands, or (2) the proposed principal community contour (a) encompasses 50 percent or more of that Tribe’s Tribal Lands, (b) serves at least 2,000 people living on Tribal Lands, and (c) the total population on Tribal Lands residing within the proposed station’s service contour constitutes at least 50 percent of the total covered population<sup>29</sup> (and, in the case of either (B)(1) or (B)(2), the proposed station’s

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<sup>27</sup> While NPM/NCAI state that the National Telecommunications and Information Administration’s recently suspended Public Telecommunications Facilities Program (“PTFP”) was among the funding sources for tribal radio (NPM/NCAI Second FNPRM Comments at 7 and n.15), we note that PTFP funds were available only to NCE stations, and would not have been available in any event to proposed commercial FM facilities.

<sup>28</sup> The original Tribal Allotment proponent will, in fact, already have filed FCC Form 301 simultaneously with its Petition for Rule Making proposing the new allotment. See *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212, 14224-25 (2006), recon. pending (“*Community of License R&O*”). See also 47 C.F.R. § 1.401(d). Thus, the original Tribal Allotment proponent need only submit a notice stating that it wishes its pending Form 301 application to be processed immediately, or it may file an amendment to its pending Form 301 application during the TQ Window, as appropriate.

<sup>29</sup> For purposes of qualifying for the Tribal Priority at the FM allotment stage, the service contour is the class reference contour as set forth in 47 C.F.R. § 73.211(b). This is the 1 mV/m (60 dBμ) contour.

- principal community contour does not cover more than 50 percent of the Tribal Lands of a Tribe that is not a party to the application),<sup>30</sup>
- (C) The proposed community of license must be located on Tribal Lands; and
  - (D) The proposed service must constitute first or second aural (reception) service, or first local Tribal-owned commercial transmission service at the proposed community of license.<sup>31</sup>

We find that these criteria will further the primary goals of the Tribal Priority: promoting the provision of radio service by a Tribe or majority Tribal-owned entity to communities and populations residing on the applicant's Tribal Lands or the equivalent.<sup>32</sup>

9. If only one acceptable application is filed during the TQ Window, whether by the original Tribal Allotment proponent submitting notification to process its application immediately or by another qualified applicant,<sup>33</sup> that application will be processed promptly, and the Tribal Allotment will not be auctioned. In the event that two or more acceptable applications are filed during the TQ Window, we will announce a limited period, after the close of the TQ Window but before the next FM auction, in which the parties may negotiate a settlement (including a time-sharing agreement) or *bona fide* merger, as a way of resolving the mutual exclusivity between their applications. This process is similar to the settlement windows afforded certain mutually exclusive applicants for new AM stations.<sup>34</sup> Any such settlement or merger will be subject to the same limits and conditions as other agreements for resolving application conflicts.<sup>35</sup> However, we will not allow technical solutions by way of settlement. Unlike the case of competing new AM applications, in which each mutually exclusive applicant has submitted a discrete tech box engineering proposal in its application, which may be amended, a Tribal Allotment will have been added to the Table of Allotments only after it has undergone the allocations rulemaking process.<sup>36</sup> That process involves not only a complete engineering review of the proposed allotment, but also consideration of comments and, often, competing allotment proposals. Allowing a post-allocation

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<sup>30</sup> To the extent that a Tribe lacks Tribal Lands, the applicant may demonstrate eligibility for waiver of the above-listed tribal land coverage provisions, by demonstrating a geographic area identified with the Tribe. See *Second R&O*, 26 FCC Rcd at 2561-63. Likewise, we will consider requests for waiver of the other requirements where appropriate.

<sup>31</sup> See *First R&O*, 25 FCC Rcd at 1596-97; *Second R&O*, 26 FCC Rcd at 2561-63, 2586-87.

<sup>32</sup> *Id.* See also, e.g., *First R&O*, 25 FCC Rcd at 1588 (“We conclude that the establishment of an allocation priority for the provision of radio service to tribal lands by Indian tribal government-owned stations will advance our Section 307(b) goals and serve the public interest by enabling Indian tribal governments to provide radio service tailored to the needs and interests of their local communities that they are uniquely capable of providing.”).

<sup>33</sup> See *supra* note 28. Absent an affirmative submission by the original Tribal Allotment proponent during the TQ Window notifying us that it wishes its Form 301 application to be processed immediately, we will not consider the allotment proponent's already-filed Form 301 application to be an “acceptable application” at this stage of the threshold qualifications proceeding.

<sup>34</sup> See, e.g., *AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction; Settlement Period Announced for Certain Mutually Exclusive Application Groups; September 16, 2005, Deadline Established for Section 307(b) Submissions*, Public Notice, 20 FCC Rcd 10563 (MB/WTB 2005) (“*Auction 84 Settlement Public Notice*”).

<sup>35</sup> See 47 C.F.R. § 73.3525.

<sup>36</sup> *Id.* § 73.202.

technical solution that would result in grant of more than one FM allotment would effectively circumvent the FM allocations rulemaking process, and the right of parties to file comments and counter-proposals that is inherent in that process. If there are other fully spaced channels that could accommodate another Tribal Allotment, one of the competing applicants could simply petition to add such an allotment through the normal allocations rulemaking process. If, on the other hand, there are no channels available, we decline GRTI's suggestion that we relax our spacing or other rules designed to prevent interference among stations.<sup>37</sup> A settlement that establishes technically deficient Tribal stations does not, in our view, constitute an effective means to achieve the goal of establishing viable radio service to Tribal Lands.

10. If a settlement or merger is reached, the parties shall so notify the Commission as set forth in the Public Notice announcing the TQ Window.<sup>38</sup> The staff will promptly begin processing the surviving application pursuant to the settlement or merger. If a settlement or merger cannot be reached among the mutually exclusive applicants, the Tribal Allotment will be auctioned during the next scheduled FM auction. However, at that time only the applicants whose applications were accepted for filing during the TQ Window, as well as the original Tribal Allotment proponent, will be permitted to bid on that particular Tribal Allotment, i.e., bidding on that allotment will be closed to all other potential applicants. The closed group of mutually exclusive TQ Window applicants must comply with generally applicable auction procedures (e.g., by correctly completing Form 175 and timely making an upfront payment).<sup>39</sup> In the event that only one Tribal applicant qualifies to bid in the first auction of a Tribal Allotment, it must submit an upfront payment and enter a bid during the auction in order to obtain the construction permit.<sup>40</sup> The winning bidder for the Tribal Allotment must comply with all auction rules for winning bidders in order to be awarded the construction permit; that is, it must timely make any required down and final payments, and must timely file FCC Form 301 (or, in the case of the original proponent of the Tribal Allotment, amend its pending Form 301 or advise the staff that its pending Form 301 application may be processed).<sup>41</sup>

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<sup>37</sup> GRTI Comments at 7.

<sup>38</sup> We anticipate that the procedure will be similar to that used for AM auction filing window applicants, i.e., the settling/merging parties will file an original and two copies of a joint request for approval of the settlement agreement with the Office of the Secretary. See, e.g., *AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction*, Public Notice, 20 FCC Rcd 10563, 10566 (MB/WTB 2005). We delegate to the Media Bureau authority to release Public Notices announcing the opening of, and procedures relating to, TQ Windows.

<sup>39</sup> See 47 C.F.R. §§ 1.2105-1.2106, 73.5002.

<sup>40</sup> See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15974, 15979-80 (1998) (“*Broadcast First Report and Order*”) (applications specifying the same vacant FM allotment are mutually exclusive; mutually exclusive applicants identified by public notice are required to submit the full amount of their upfront payment to the Commission’s lock-box bank by the date specified in the public notice, in accordance with 47 C.F.R. § 1.2106), *on recon.*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), *on further recon.*, Memorandum Opinion and Order, 14 FCC Rcd 14521 (1999). See also, e.g., *Auction of FM Broadcast Construction Permits Rescheduled for April 27, 2011; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 91*, Public Notice, 25 FCC Rcd 16787, 16790 (MB/WTB 2010) (once mutual exclusivity exists for auction purposes, even if only one applicant for a particular construction permit submits an upfront payment, that applicant is required to submit a bid in order to obtain the construction permit).

<sup>41</sup> See *id.* §§ 1.2107, 1.2109, 1.2112, 73.5003, 73.5005.

11. We note that in the NCE FM context, the Commission's rules impose a holding period on authorizations granted pursuant to a Tribal Priority, for a period beginning from the award of a construction permit through four years of on-air operations, prohibiting community of license changes and/or technical changes that would result in the modified facility no longer qualifying for a Tribal Priority.<sup>42</sup> The Commission's rationale was to discourage trafficking in authorizations granted pursuant to the Tribal Priority, which could frustrate the goals of the priority and potentially harm the communities that the Tribal Priority is intended to benefit.<sup>43</sup> We believe that the rationale for imposing a holding period on authorizations granted pursuant to the Tribal Priority in the NCE FM context applies equally in the commercial FM context with regard to authorizations awarded (1) to a singleton TQ Window applicant, (2) after a settlement among TQ Window applicants, and (3) after an auction among a closed group of bidders composed only of threshold qualified tribal applicants. Accordingly, we will further prohibit the permittee or licensee of an authorization awarded to a TQ Window singleton, after a post-TQ window settlement, or after an auction to a closed group of threshold qualified tribal applicants, from assigning or transferring the authorization, except to another party that qualifies for the Tribal Priority under which the Tribal Allotment was awarded in all respects, for a period beginning from the award of a construction permit through four years of on-air operations.<sup>44</sup>

12. In the event that no qualifying party applies during the TQ Window, and the Tribal Allotment proponent requests that its pending FCC Form 301 application not be immediately processed,<sup>45</sup> the Tribal Allotment will be placed in a queue to be auctioned in the normal course for vacant FM allotments.<sup>46</sup> When the Tribal Allotment is offered at auction for the first time, only applicants meeting the threshold qualifications (those who would have qualified to add the Tribal Allotment, including the original proponent of the allotment, as detailed in paragraph 8, above) may specify that particular Tribal Allotment on FCC Form 175, Application to Participate in an FCC Auction. Any applicant not meeting threshold qualifications that selects the Tribal Allotment in its Form 175 application will be prohibited from entering a bid for the Tribal Allotment. Qualifying Tribal applicants must, as noted above, otherwise qualify to bid at auction, and must comply with all Commission rules relating to the conduct of auctions and award of construction permits to winning bidders, as discussed above.<sup>47</sup>

13. Should no qualifying party apply to bid on a Tribal Allotment in the first auction in which it is offered, or should no such party qualify to bid in the first auction in which a Tribal Allotment is offered, then the Tribal Allotment will be offered in a subsequent auction or auctions, and any applicant, whether or not a Tribe or Tribal entity, may apply for the Tribal Allotment. We thus decline to adopt the commenters' suggestion that a Tribal Allotment only be offered for initial licensing to a qualifying Tribe or Tribal entity in perpetuity. Such a prohibition would frustrate our aforementioned policies favoring expeditious initiation of radio service, and disfavoring the practice of allowing spectrum to lie fallow for

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<sup>42</sup> See *First R&O*, 25 FCC Rcd at 1586, 1593, 1596-97.

<sup>43</sup> *Id.* at 1593.

<sup>44</sup> Cf. 47 C.F.R. § 73.7002(c). See *supra* paragraph 8 regarding qualifications for the Tribal Priority.

<sup>45</sup> The original Tribal Allotment proponent may make such a request by sending a letter to the staff of the Audio Division, Media Bureau, during the TQ Window.

<sup>46</sup> The time between adding a vacant allotment and its auction will vary based on the number of allotments awaiting auction, but this time period is likely to be no more than two years.

<sup>47</sup> See *supra* notes 39-41.

indefinite periods.<sup>48</sup> Again, we anticipate and expect that Tribes or Tribal entities wishing to establish commercial FM service will seek allotments based on the Tribal Priority only after carefully evaluating the economic viability of such service, and only when ready to commence construction and operation.<sup>49</sup>

14. Because we adopt the threshold qualifications approach, we do not adopt our original proposal of a Tribal bidding credit. We continue to believe that a bidding credit, of whatever magnitude, is insufficient to ensure that Tribal Allotments will end up in the hands of qualifying Tribal applicants.<sup>50</sup> We expect that, under the procedures we adopt today, the majority of FM commercial Tribal Allotments will be awarded through the TQ Window approach. Moreover, to the extent that multiple qualifying Tribes or Tribal entities would bid on a Tribal Allotment at auction, all would likely qualify for the same Tribal or new entrant bidding credits. Adding a bidding credit to the procedures we adopt here would therefore serve no purpose.

15. We believe the procedures we adopt today will both accommodate those Tribes and Tribal entities seeking to establish new commercial FM services quickly, and provide a means for those Tribes needing more time to marshal their resources. These procedures also align with Congress's direction that we use threshold qualifications to avoid mutual exclusivity in application and licensing proceedings when it is in the public interest to do so.<sup>51</sup> Most importantly, we believe these procedures provide the best means of assuring that FM commercial allotments pursuant to the Tribal Priority will be awarded to qualifying Tribes or Tribal entities, thus achieving the goals of the Tribal Priority.

16. We realize that any process leading to deployment of communications services on Tribal lands and removing barriers to entry must recognize Tribal sovereignty and self-determination, the unique needs and priorities of Native Nations and Tribal communities, and the importance of consultation and coordination with Tribal government and Native community leaders. We further acknowledge "the rights of Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership."<sup>52</sup> To that end, we direct the Office of Native Affairs and Policy ("ONAP") and the Audio Division ("AD") of the Media Bureau to coordinate in establishing informational materials and training opportunities for Tribes and Tribal entities, in order to help them better understand the complexities of the threshold qualification and licensing processes established herein. Additionally, we direct ONAP and AD, as appropriate, to remain available to consult with Tribal applicants on any questions that they may

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<sup>48</sup> See *supra* note 26. See also 47 U.S.C. §§ 309(j)(3) ("[I]n designing the [competitive bidding] methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 1 of this Act and . . . the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays. . ."), 319(b).

<sup>49</sup> We also reject NPM/NCAI's suggestion that any offering of a Tribal Allotment to non-Tribal applicants would engender "gaming" of the system, by encouraging Tribes to refrain from applying for Tribal Allotments during a TQ Window or auction in exchange for payment by outside parties. NPM/NCAI Second FNPRM Comments at 8. To the extent we identify any such abuses of the Commission's processes, we will address them on a case-by-case basis. We are confident, however, that the vast majority of Tribes will use these procedures in the manner intended, namely, to assist in their missions of self-government and promulgation of Tribal languages and cultures.

<sup>50</sup> *Second R&O*, 26 FCC Rcd at 2588-89.

<sup>51</sup> 47 U.S.C. § 309(j)(6)(E).

<sup>52</sup> *Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080-81 (2000).

have at any stage of our radio application and licensing processes, especially as they relate to our Tribal licensing priorities.<sup>53</sup>

#### IV. ADMINISTRATIVE MATTERS

##### 1. Final Regulatory Flexibility Analysis.

17. As required by the Regulatory Flexibility Act of 1980 (“RFA”),<sup>54</sup> the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to this *Third R&O*. The FRFA is set forth in Appendix B.

##### 2. Final Paperwork Reduction Act of 1995 Analysis.

18. This *Third R&O* adopts new or revised information collection requirements, subject to the Paperwork Reduction Act of 1995 (“PRA”).<sup>55</sup> These information collection requirements will be submitted to the Office of Management and Budget (“OMB”) for review under Section 3507(d) of the PRA. The Commission will publish a separate notice in the Federal Register inviting comment on the new or revised information collection requirement(s) adopted in this document. The requirement(s) will not go into effect until OMB has approved it and the Commission has published a notice announcing the effective date of the information collection requirement(s). In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”<sup>56</sup>

19. *Further Information.* For additional information concerning the information collection requirements contained in this *Third Report and Order*, contact Cathy Williams at 202-418-2918, or via the Internet to [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov).

##### 3. Congressional Review Act.

20. The Commission will send a copy of this *Third R&O* in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.<sup>57</sup>

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<sup>53</sup> *Id.* at 4082. (“The Commission will assist Indian Tribes in complying with Federal communications statutes and regulations.”)

<sup>54</sup> See 5 U.S.C. § 604. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

<sup>55</sup> The Paperwork Reduction Act of 1995 (“PRA”), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in 44 U.S.C. §§ 3501-3520).

<sup>56</sup> *Rural NPRM*, 24 FCC Rcd at 5261; 74 Fed. Reg. 22498, 22505 (May 13, 2009).

<sup>57</sup> See 5 U.S.C. § 801(a)(1)(A).

**VI. ORDERING CLAUSES**

21. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 303, 307, and 309(j), that this *Third Report and Order* IS ADOPTED.

22. IT IS FURTHER ORDERED that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 548, the Commission's Rules ARE HEREBY AMENDED as set forth in Appendix C.

23. IT IS FURTHER ORDERED that the rules adopted herein contain new or modified information collection requirements that require approval by the Office of Management and Budget ("OMB") under the Paperwork Reduction Act (PRA), and which WILL BECOME EFFECTIVE after the Commission publishes a notice in the *Federal Register* announcing such approval and the relevant effective date.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”)<sup>1</sup> an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Second Further Notice of Proposed Rule Making* (“*Second FNPRM*”) to this proceeding.<sup>2</sup> The Commission sought written public comment on the proposals in the *Second FNPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.<sup>3</sup>

**A. Need for, and Objectives of, the Third Report and Order**

2. In the *Third Report and Order* (“*Third R&O*”) in this proceeding, the Commission adopts new procedures under which commercial FM allotments added using the Commission’s Tribal Priority may be awarded to tribal applicants meeting the threshold qualifications for adding such an allotment. The new procedures were adopted in order to provide a significant opportunity for the award of such tribal allotments to tribal applicants, in keeping with the goals underlying the Commission’s Tribal Priority.

3. The further rulemaking proceeding leading to the *Third R&O* was initiated to obtain further comments concerning an alternative proposal to assist Native American Tribes and Alaska Native Villages (“Tribes”) seeking to establish new commercial FM service to Tribal communities. In the *Further Notice of Proposed Rulemaking*, the Commission proposed an auction bidding credit to Tribes and entities owned by Tribes. The Commission received only one proposal for a potential tribal bidding credit: to grant Tribes a 35 percent Tribal Bidding Credit (“TBC”), to be added to any new entrant bidding credit for which they may qualify, to a maximum of 60 percent. The Commission believed this record was inconclusive to adopt a TBC, and further believed it was unclear whether and how a TBC could be crafted to advance the dual goals of increasing Tribal ownership of radio facilities and maximizing the value of spectrum through competitive bidding, as mandated by Section 309(j) of the Communications Act.<sup>4</sup> On further consideration, the Commission determined that an alternative approach would more effectively achieve the policy goals underlying the Tribal Priority adopted in the *First Report and Order* (“*First R&O*”) in this proceeding,<sup>5</sup> and be more consistent with its statutory mandate.<sup>6</sup>

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

<sup>2</sup> 26 FCC Rcd 2556, 2587 (2011).

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> 47 U.S.C. § 309(j).

<sup>5</sup> 25 FCC Rcd 1583, 1596-97 (2010).

<sup>6</sup> See 47 U.S.C. § 309(j)(6)(E) (“Nothing in this subsection, or in the use of competitive bidding, shall . . . be construed to relieve the Commission of the obligation in the public interest to continue to use . . . threshold qualifications . . . in order to avoid mutual exclusivity in application and licensing proceedings.”).

4. Specifically, in the *Second FNPRM* the Commission sought comment on whether to require, as a threshold qualification to apply for a commercial FM channel allotted pursuant to the Tribal Priority, that applicants qualify for a Tribal Priority for that channel. Such an approach is consistent with other procedures used by the Commission, such as those used to reserve vacant FM allotments for noncommercial educational (“NCE”) use. Additionally, while the Tribal Priority operates as a dispositive preference in the AM commercial and FM NCE application contexts, as currently formulated the priority is not dispositive for FM commercial stations, because a Tribe that adds an FM allotment using the Tribal Priority may still be outbid at auction by a non-Tribal applicant. The alternative approach proposed by the Commission would correct this asymmetry, and would also more effectively ensure that FM allotments added using the Tribal Priority are ultimately licensed to Tribes, who would use such FM channels for their intended purposes of promoting Tribal language, culture, and self-government. The Commission therefore sought comment on this alternative approach and its potential ramifications, including whether non-Tribal applicants should be allowed to apply for FM allotments added using the Tribal Priority, but for which no Tribe expresses interest. The Commission also sought additional input from commenters on the TBC, and on other ways in which the Commission could promote commercial Tribal radio service, including comment on potential barriers that may discourage Tribal participation in the broadcast auction and licensing processes.

5. Commenters on these issues favored the adoption of the threshold qualifications procedure, as the best means of ensuring that Tribal-added FM allotments would ultimately be licensed to those whom the Tribal Priority was meant to benefit. Native Public Media and the National Congress of American Indians (“NPM/NCAI”), filing joint comments, expressed concern that expedited procedures would force Tribes to receive construction permits before they were financially and technically able to construct facilities. Another commenter, Gila River Telecommunications, Inc. (“GRTI”), agreed, but at the same time argued that there should be expedited threshold qualifications procedures for those Tribal applicants who are ready and able to begin station construction. All commenters agreed that Tribal allotments should not be made available to non-Tribal applicants at any time. Commenters also agreed that, if the threshold qualifications procedure were not adopted, a TBC of up to 60 percent should be afforded to Tribal applicants for FM allotments added using the Tribal Priority.

6. In the *Third R&O* in this proceeding, the Commission adopted the threshold qualifications procedure proposed in the *Second FNPRM*. Under the threshold qualifications procedure, once a commercial FM allotment is allocated using the Tribal Priority (“Tribal Allotment”), within a reasonable time thereafter the Commission staff will announce by Public Notice a Threshold Qualifications Window (“TQ Window”). During the TQ Window, any Tribe or Tribal entity that could qualify to add that particular Tribal Allotment may file FCC Form 301 for the Tribal Allotment. The original Tribal Allotment proponent, which will already have filed Form 301 at the time it proposed the allotment, must submit to the staff a notice stating that it wishes its already-filed Form 301 application to be processed immediately, or make that statement in an amendment to its Form 301. An applicant in the TQ Window must demonstrate that it meets all of the eligibility criteria for grant of a Tribal Priority at the allotment stage.<sup>7</sup>

7. If only one acceptable application is filed during the TQ Window, whether by the original Tribal Allotment proponent submitting notification to process its application immediately or by another qualified applicant, that application will be processed promptly, and the Tribal Allotment will not be auctioned. In the event that two or more acceptable applications are filed during the TQ Window, we will announce a limited period, after the close of the TQ Window but before the next FM auction, in which the parties may negotiate a settlement (including a time-sharing agreement) or *bona fide* merger, as a way of

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<sup>7</sup> On eligibility criteria generally, see *Third R&O*, paragraph 8.

resolving the mutual exclusivity between their applications. There is precedent for such settlements or mergers in the AM auction context, involving certain mutually exclusive applicants for new and modified AM stations.<sup>8</sup> If a settlement or merger is reached, the parties shall so notify the Commission as set forth in the Public Notice announcing the TQ Window. The staff will promptly begin processing the surviving application pursuant to the settlement or merger. If a settlement or merger cannot be reached among the mutually exclusive applicants, the Tribal Allotment will be auctioned during the next scheduled FM auction. However, at that time only the applicants whose applications were accepted for filing during the TQ Window, as well as the original Tribal Allotment proponent, will be permitted to bid on that particular Tribal Allotment, i.e., bidding on that allotment will be closed to all other potential applicants. The closed group of mutually exclusive TQ Window applicants must comply with generally applicable auction procedures. The winning bidder for the Tribal Allotment must comply with all auction rules for winning bidders in order to be awarded the construction permit; that is, it must timely make any required down and final payments, and must timely file FCC Form 301 (or, in the case of the original proponent of the Tribal Allotment, amend its pending Form 301 or advise the staff that its pending Form 301 application may be processed).

8. In the event that no qualifying party applies during the TQ Window, and the original Tribal Allotment proponent requests that its pending FCC Form 301 application not be immediately processed, the Tribal Allotment will be placed in a queue to be auctioned in the normal course for vacant FM allotments. When the Tribal Allotment is offered at auction for the first time, only applicants meeting the threshold qualifications (those who would have qualified to add the Tribal Allotment, including the original proponent of the allotment) may specify that particular Tribal Allotment on FCC Form 175, Application to Participate in an FCC Auction. Any applicant not meeting threshold qualifications that selects the Tribal Allotment in its Form 175 application will be prohibited from entering a bid for the Tribal Allotment. Qualifying Tribal applicants must, as noted above, otherwise qualify to bid at auction, and must comply with all Commission rules relating to the conduct of auctions and award of construction permits to winning bidders. Should no qualifying party apply to bid on a Tribal Allotment in the first auction in which it is offered, or should no such party qualify to bid in the first auction in which a Tribal Allotment is offered, then the Tribal Allotment will be offered in a subsequent auction or auctions, and any applicant, whether or not a Tribe or Tribal entity, may apply for the Tribal Allotment. A Tribal Allotment won in an open auction (that is, one open to non-threshold qualified applicants) will not be subject to the four-year prohibition on assignment or transfer (but will still be subject to a four-year prohibition on community of license or technical changes). Because of the similarity of the new threshold qualifications procedures to the procedures for awarding NCE construction permits based on the Tribal Priority (namely, to discourage trafficking in such permits so that they will be used to further the goals of the Tribal Priority by enabling Tribes or tribal entities to broadcast to Tribal Lands), the Commission will impose the same holding period prohibition on commercial FM permits awarded using the threshold qualifications procedures. The Commission will therefore prohibit the permittee or licensee of an authorization awarded to a TQ Window singleton, after a post-TQ window settlement, or after an auction to a closed group of threshold qualified tribal applicants, from assigning or transferring the authorization, except to another party that qualifies for the Tribal Priority under which the Tribal Allotment was awarded in all respects, for a period beginning from the award of a construction permit through four years of on-air operations.

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<sup>8</sup> See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15927 (1998), *on recon.*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), *on further recon.*, Memorandum Opinion and Order, 14 FCC Rcd 14521 (1999).

## B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

9. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

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

10. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.<sup>9</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small government jurisdiction.”<sup>10</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>11</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>12</sup>

11. The rules and policies adopted in the *Third R&O* will primarily apply to Tribes, consortia of Tribes, and entities 51 or more percent owned by Tribes or consortia, that apply for commercial FM radio stations, but potentially will apply to all AM and FM radio broadcasting licensees and potential licensees, to the extent that they may ultimately be allowed to apply for Tribal Allotments in the event that qualified Tribal applicants do not do so. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.<sup>13</sup> Included in this industry are commercial, religious, educational, and other radio stations.<sup>14</sup> Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.<sup>15</sup> However, radio stations that are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number.<sup>16</sup> The SBA has established a small business size standard for this category, which is: firms having \$7 million or less in annual receipts.<sup>17</sup> According to BIA/Kelsey, MEDIA Access Pro Database on November 1, 2011, 10,785 (97%) of 11,127 commercial radio stations have revenue of \$7 million or less. Therefore, the majority of such entities are small entities. We note, however, that many radio stations are affiliated with much larger corporations having much higher revenue. Our estimate, therefore, likely overstates the number of small entities that might be affected by any ultimate changes to the rules and forms.

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<sup>9</sup> 5 U.S.C. § 603(b)(3).

<sup>10</sup> *Id.* § 601(6).

<sup>11</sup> *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>12</sup> 15 U.S.C. § 632.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

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

<sup>17</sup> 13 C.F.R. § 121.201, NAICS code 515112 (updated for inflation in 2008).

#### **D. Description of Projected Reporting, Record Keeping and other Compliance Requirements**

12. As described, certain rules and procedures will change, although the changes will not result in substantial increases in burdens on most applicants. The new procedures will only apply to Tribes and entities majority owned by Tribes, which do not constitute the majority of commercial FM applicants. Moreover, because of the geographic limits of commercial FM allotments, and the qualifying criteria for the Tribal Priority, the number of threshold qualified applicants for a given allotment will likely be small. Questions will be modified in FCC Form 301 to indicate whether the applicant is applying for a Tribal Allotment, and certifying that it qualifies for the Tribal Priority for that particular Tribal Allotment. These are largely self-identification questions reflecting the applicant's status, although in the case of eligibility for the Tribal Priority some geographic analysis may be required, and/or a showing may be needed to establish eligibility for the Tribal Priority in the absence of tribal lands as defined in the *First R&O*. Additionally, questions will have to be added to FCC Form 175, in the case of Tribal Allotments that proceed to competitive bidding, in order to establish the applicant's eligibility to apply for a Tribal Allotment in the first instance. However, these burdens should be moderate to minimal, as it is anticipated that a substantial number of commercial tribal FM allotments will be awarded before the auction stage, and many threshold qualified tribal applicants will have established their qualifications before auction, either at the allocations stage or during a TQ window. In any event, such burdens are needed in order to achieve the Commission's statutory mandate of fair, efficient, and equitable distribution of radio service (and, in the case of Tribal Priority claimants, are necessary in order to open up the Tribal Priority to greater numbers of Tribes seeking to establish new radio service). Certain notifications may also be required of some applicants, for example, notification that a Tribal Allotment proponent wishes its already-filed FCC Form 301 application to be considered in the TQ Window, or a request for approval of a merger or settlement agreement among TQ Window applicants. The remaining procedural changes in the *Third R&O* are changes in Commission procedures, requiring no input from applicants. For example, under the new threshold qualifications procedure, the Commission will have to generate Public Notices setting forth procedures for TQ Windows, or modify auction Public Notices to set forth special procedures for Tribal Allotments being auctioned.

#### **E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered**

13. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>18</sup>

14. With regard to the proposals in the *Second FNPRM*, NPM/NCAI expressed concern about the ability of some Tribes to act quickly to construct and license new commercial FM stations. There is, according to NPM/NCAI, a significant and adverse economic impact that some Tribes face when seeking to initiate new radio service. Factors causing such an adverse economic impact include lack of capital or federal program support; short construction seasons in many Tribal areas; complications with regard to tower siting, due to factors such as preservation of sacred sites and Bureau of Indian Affairs land use policies; and lack of easy access to materials and engineering expertise. While not disagreeing with NPM/NCAI on this issue, GRTI pointed to what it perceives as Commission delays in

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<sup>18</sup> 5 U.S.C. § 603(c)(1)-(c)(4).

allocating new FM allotments and making them available for auction, delaying the initiation of new service by Tribes ready and able to begin construction immediately. In order to accommodate these dual concerns, the Commission adopted a threshold qualifications approach to Tribal commercial FM allotments that provides an early opportunity for application for Tribes that are ready to commence construction, as well as a later opportunity (up to, but likely no more than, two years) for those Tribes that may lack the resources to commence construction soon after a channel is allotted using the Tribal Priority. In this way, the Commission's adopted procedure is designed to reduce the burdens on these groups of potential applicants, based on the concerns expressed in their comments. Although the Commission could have adopted strictly an expedited threshold qualifications procedure – awarding a construction permit for a Tribal Allotment through a TQ Window opened shortly after allocation of the Tribal Allotment – this would have forced those Tribes lacking the resources to commence construction immediately either to delay proposing an allotment or to risk expiration of the construction permit before construction could be completed. Accordingly, by adopting the TQ Window process over the proposed alternative of an expedited threshold qualifications procedure, the Commission has chosen the alternative that imposes a substantially less significant economic impact.

#### **F. Report to Congress**

15. The Commission will send a copy of the *Third R&O*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>19</sup> In addition, the Commission will send a copy of the *Third R&O*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Third R&O* and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>20</sup>

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<sup>19</sup> See *id.* § 801(a)(1)(A).

<sup>20</sup> See *id.* § 604(b).

**APPENDIX B**

**Comments and Reply Comments Filed in Response to Second FNPRM**

**Comments**

Native Public Media / National Congress of American Indians  
Gila River Telecommunications, Inc.

**Reply Comments**

Gila River Telecommunications, Inc.

## APPENDIX C

## Final Rules

**Part 73 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:**

Section 73.3573 is amended by adding new paragraph (f)(6) and adding new Note 5, to read as follows:

§ 73.3573 Processing FM broadcast station applications.

\* \* \* \* \*

(f) \* \* \*

(6)(i) When a non-reserved channel FM allotment is added to the Table of FM Allotments using the Tribal Priority described in Note 5 to this section, the FCC will specify by Public Notice a window filing period during which only those applicants that satisfy all of the eligibility criteria listed in Note 5 to this section with regard to the specific Tribal Priority FM allotment(s) listed in the Public Notice may file a long-form application for the Tribal Priority FM allotment. Only applications from applicants meeting the “threshold qualifications” listed in Note 5 will be accepted during this window filing period.

(ii) If only one application for the Tribal Priority FM allotment is accepted for filing during the threshold qualifications window, the long-form application will be processed. If two or more applications for the Tribal Priority FM allotment are accepted for filing during the threshold qualifications window, the FCC will specify by Public Notice a period of time, after the close of the threshold qualifications window but before the next FM auction, during which the parties may negotiate a settlement or *bona fide* merger, as a way of resolving the conflict between their applications. Parties to a settlement must comply with § 73.3525 of the Commission’s rules. If a settlement or *bona fide* merger is reached, the surviving application will be processed. If no settlement or *bona fide* merger is reached among the threshold qualifications window applicants, the Tribal Priority FM allotment will be offered at auction as described in paragraphs (f)(2) through (f)(5) of this section, except that only those applicants whose applications were accepted for filing pursuant to paragraph (f)(6)(i) of this section may participate in the initial auction of the Tribal Priority FM allotment.

(iii) If no application is accepted for filing during the threshold qualifications window, and the party that initially proposed the Tribal Priority FM allotment requests by letter to the Audio Division, Media Bureau, that its pending long-form application not be immediately processed, the Tribal Priority FM allotment will be auctioned as described in paragraphs (f)(2) through (f)(5) of this section in the normal course for vacant FM allotments. When a Tribal Priority FM allotment is offered at auction for the first time, only those applicants meeting the threshold qualifications for that specific Tribal Priority FM allotment, as described in Note 5 to this section, may participate in the auction of that allotment.

(iv) Should no applicant meeting threshold qualifications, as described in Note 5 to this section, apply to bid on a Tribal Priority FM allotment in the first auction in which it is offered, or should no applicant meeting threshold qualifications qualify to bid in the first auction in which a Tribal Priority FM allotment is offered, then the Tribal Priority FM allotment will be offered in a subsequent auction. Any such subsequent auction of a Tribal Priority FM allotment shall proceed as described in paragraphs (f)(2) through (f)(5) of this section, and any qualified applicant may participate in the auction of the Tribal Priority FM allotment in such subsequent auction, regardless of whether it meets the threshold qualifications with regard to that specific Tribal Priority FM allotment.

\* \* \* \* \*

Note 5 to § 73.3573. The “Tribal Priority” is that established by the Commission in Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, MB Docket 09-52. See First Report and Order and Further Notice of Proposed Rule Making, MB Docket 09-52, FCC 10-24, 75 FR 9797, 75 FR 9856, 75 FR 73976; Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, MB Docket 09-52, FCC 11-28, 76 FR 14362, 76 FR 18942; Third Report and Order, MB Docket 09-52, FCC 11-190. To qualify for the Tribal Priority, and thus meet “threshold qualifications” for a particular allotment, an applicant must demonstrate that it meets all of the following eligibility criteria: (a) the applicant is either a federally recognized Tribe or Tribal consortium, or an entity 51 percent or more of which is owned or controlled by a Tribe or Tribes. Qualifying Tribes or Tribal entities must be those at least a portion of whose Tribal Lands lie within the principal community contour of the proposed facility. Although the 51 or greater percent Tribal control threshold need not consist of a single Tribe, the qualifying entity must be 51 percent or more owned or controlled by Tribes at least a portion of whose Tribal Lands lie within the facility’s principal community contour; (b) (1) at least 50 percent of the area within the proposed principal community contour is over that Tribe’s Tribal Lands, or (2) the proposed principal community contour (i) encompasses 50 percent or more of that Tribe’s Tribal Lands, (ii) serves at least 2,000 people living on Tribal Lands, and (iii) the total population on Tribal Lands residing within the proposed service contour constitutes at least 50 percent of the total covered population (and, in the case of either (b)(1) or (b)(2) the proposed principal community contour does not cover more than 50 percent of the Tribal Lands of a Tribe that is not a party to the application); (c) the proposed community of license must be located on Tribal Lands; and (d) the proposed service must constitute first or second aural (reception) service, or first local Tribal-owned commercial transmission service at the proposed community of license. For purposes of this section, the definition of “Tribal Lands” is the same as that set forth at footnote 15 of the First Report and Order and Further Notice of Proposed Rule Making, FCC 10-24, and as further set forth at paragraphs 8-10 and 59 of the Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, FCC 11-28.

**STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*Re: Policies to Promote Rural Radio Services and to Streamline Allotment and Assignment Procedures (MB Docket No. 09-52)*

I am happy to support this item today in the continued effort to bring new voices and media outlets to Tribal Lands. The Tribal Qualification we adopt in this Report and Order will, I believe, lead to licensing significantly more Tribal entities to serve Native American Tribes and Alaska Native Villages. This is a down-payment on the FCC's commitment to enhance the ownership of Tribal entities by establishing certain criteria which will prioritize ownership for qualified Tribes or Tribal entities. I commend the Chairman for moving quickly on this item. It is my hope and expectation that the Commission will continue this important work in the months and years ahead. During my time at the Commission I have endeavored to make bringing modern telecommunications to Indian Country a priority. Today's action is a wonderful step in that direction.