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FCC Proposes Revision of Radio Allotment and Application Policies

The FCC has issued a *Notice of Proposed Rulemaking* to explore rule and policy changes that are intended to advance several policy goals for radio – to distribute broadcast licenses to smaller communities and tribal areas, to make more applications eligible for auction, to discourage the filing of technically-deficient applications, and to deter speculation. The most far-reaching proposals involve modifying the traditional allotment priorities and creating a new preference for tribal groups serving tribal lands.

The most significant specific proposals are as follows:

Revision of Section 307(b) Priorities – The FCC’s allotment priorities are intended to implement §307(b) of the Communications Act, which mandates distribution of broadcast facilities among the States and communities. The current priorities have been in place since 1982, and apply to both FM (in allotting new channels) and AM (in comparing mutually exclusive applications). Priorities 1, 2 and 3 favor elimination of white (completely unserved) and gray (receiving only one service) areas and provision of a first station licensed to each significant community to serve its local needs. Priority 4 occasionally favors “underserved” areas (receiving fewer than 5 services) but largely compares total populations to be served. The Commission believes that since the higher priorities are rarely invoked nowadays, the fourth relies too heavily on proposed service populations and therefore skews determinations toward urban areas at the expense of smaller communities and rural areas that need local service. The Commission further contends that when service is proposed over significant portions of urbanized areas, applicants have little incentive to provide meaningful local service to their nominal and far less populous cities of license.

In lieu of “Tuck” showings (designed to ensure that a proposed city of license is indeed independent from a nearby urbanized area), the Commission proposes to deny a priority 3 local service preference to an applicant (a) that would place a daytime principal community signal over 50% or more of an Urbanized Area, or (b) that could be modified to provide such coverage based on existing spectrum availability or rule-compliant power or pattern modifications from a site covering the same proposed community of license. The Commission invites comment on factors that could be used to rebut a resulting presumption that service is intended to the Urbanized Area rather than to the less attractive specified community of license.

The Commission is particularly concerned over applying §307(b) to AM applications. While it will consider eliminating priority 4 altogether for AM, it also proposes to deny a priority 4 preference where more than 75% of a proposed principal community (5 mV/m) contour receives five or more aural services. Applicants that qualify under this threshold test would then be compared according to differentials in their “Service Value Indexes,” calculated by dividing the population within each “pocket” by the number of aural services they receive. (Thus, a pocket of 1,000 people receiving 20 aural services would generate an SVI of 50.) Only differentials of 50% or more between applicants’ total SVIs would be decisional. In addition, the Commission would award a priority to applicants proposing to serve a “substantial number” of underserved listeners, and proposes limiting this priority to service to at least 15, 25, 35 or 50% of total proposed service population.

New 307(b) Priority for Native American and Alaska Native Tribal Groups Serving Tribal Lands – To redress the dearth of stations serving the unique needs of tribal populations, the Commission proposes creating a new priority that would take precedence over all but priority 1 (eliminating white area). Eligible applicants

would have to be either a federally-recognized Tribe or tribal consortium, a member of a Tribe, or have more than 70% ownership or control by members of Tribes. In addition, they would have to propose to place at least 50% of their daytime principal community contour over tribal lands, and the proposed community of license would have to be located on tribal lands and have no current station licensed to it. An immediate challenge arises in applying this preference in an FM context, in which channel allotments are made long before any specific application can be filed. The Commission speculates whether this type of priority can survive strict judicial scrutiny as a racial classification.

Limiting Migration of Existing Stations Away From Smaller Communities – Concerned over the trend for stations to move toward urbanized areas, the Commission proposes to bar any move that creates white or gray area, and to deny a priority 3 preference to any application for an unserved community that will place a daytime principal community signal over 50% or more of an Urbanized Area. The Commission further proposes to bar or at least heavily disfavor any move that would create a “significant population” of underserved area losing service.

Initial Examination of AM Applications For Technical Eligibility – After years of complaint by competing applicants, the Commission has acknowledged a severe problem with its policy of examining basic qualification criteria only after an applicant receives a dispositive preference or wins an auction – other applicants found themselves outbid by, or lose on 307(b) grounds to, a competitor that could not possibly have built its proposed facility, only to have the competitor amend to cure its previously fatal problem. Now, the Commission proposes to require AM applicants to meet basic qualification criteria at the time of filing and to prohibit disqualified applicants from amending or participating in auctions or 307(b) decisions. A further benefit of prompt dismissal of such patently defective applications would be to end the protection that others would need to provide to ineligible pending facilities.

Other proposed rules would:

- cap the number of AM applications that could be filed in any given window, so as to stem the filing of large numbers of speculative applications by parties hoping that one or more will prove to be singletons (that is, not mutually-exclusive with any others and thus spared the need for a 307(b) comparison or an auction);
- require any application granted as a result of a 307(b) preference to render the proposed service for a period such as four years before any downgrade would be permitted, so as to discourage “gaming” the process with theoretically superior but impractical technical proposals.
- codify the current staff practice of enabling certain mutually-exclusive application groups to submit settlements or technical amendments that would result in the grant of least one application;
- authorize the staff to extend the usual 30-day period to file a “long form” construction permit application after the close of an auction;
- prohibit FM translator applicants from avoiding the current freeze on reserved band applications by “band hopping” (that is, filing for and obtaining a permit for a non-reserved channel and then filing a minor change to relocate to an adjacent or IF channel in the reserved band);
- affirm the current staff practice of determining mutual exclusivity among AM window applications by considering interference caused to or received from other window-filed applications as well as existing stations;
- clarify that “new entrant” bidding credit eligibility (for which a party having an attributable interest can have no other interest in the “same area” that the new application proposes to serve) is to be defined by the maximum class facilities at the allotment site rather than preferred coordinates (although one-step

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upgrades to a new site following an auction win would be permitted and would not require reimbursement of the credit);

- require that the unjust enrichment rules be triggered by not just “long form” but pro-forma assignments and transfers of control to entities that no longer qualify for a bidding credit;
- highlight the existing policy that bidding credit eligibility is to be frozen as of the filing deadline and that all subsequent changes through the date of grant of a construction permit can only result in diminution of the credit;
- codify in §73.313(e) of the Commission’s rules the circumstances in which applicants may use alternate methods of FM contour prediction; and
- prohibit the use of alternate contour prediction methods in the reserved band.

Comments are to be due 60 days after publication of the *Notice* in the *Federal Register*. A copy of the complete *Notice of Proposed Rulemaking* (FCC 09-30; MB Docket No. 09-52; RM-11528) may be downloaded from the FCC’s website at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-30A1.pdf.

If you would like to discuss any of these proposals, or their possible effect upon your operations or plans, please contact [Peter Gutmann](#) or any member of the firm’s [Communications Law Group](#).

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