

(g) Disputes between the Executive agency and GSA arising out of the ancillary repair and alteration work will, to the maximum extent practicable, be resolved informally at the working level. In the event a dispute cannot be resolved informally, the matter shall be referred to GSA's Public Buildings Service. The Executive agency agrees that, in the event GSA's Public Buildings Service and the Executive agency fail to resolve the dispute, they shall refer it for resolution to the Administrator of General Services, whose decision shall be binding.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 95-31; FCC 08-219]

Reexamination of the Comparative Standards for Noncommercial Educational Applicants

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission addresses eight petitions for reconsideration of the *Second Report & Order*, in the closed "mixed groups" proceeding. The "mixed groups" proceeding sought to establish rules for resolving the situation when an application for an NCE broadcast station is mutually exclusive with an application for a commercial broadcast station. The *Second Report & Order* decided to accept applications for NCE stations on non-reserved channels in "closed, mixed groups," but to dismiss those applications if they are mutually exclusive with applications for commercial stations. This document now affords a discrete group of pending applicants for NCE stations on non-reserved channels in closed, mixed groups that have been pending since the date of the *Second Report & Order*, a one-time opportunity to amend their applications to apply for a commercial broadcast station in order to avoid dismissal of their applications. This document reaffirms the other decisions in the *Second Report & Order*.

DATES: Effective April 23, 2009.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Room TW-A325, Washington, DC 20554. For additional information, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Evan Baranoff, of the Media Bureau, Policy Division at Evan.Baranoff@fcc.gov, 418-7142.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Memorandum Opinion and Third Order on Reconsideration*, MM Docket No. 95-31, FCC 08-219, adopted on September 24, 2008 and released on December 2, 2008. The full text of this document is available on the Internet at the Commission's Web site: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-219A1.doc. It is also available for inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. The complete text may be purchased from the Commission's copy and duplicating contractor, Best Copy & Printing, Inc. (BCPI), 445 12th Street, SW., Room CY-B402, Washington, DC 20554. BCPI can be contacted at 202-488-5300 (phone), 202-488-5563 (facsimile), or <http://www.BCPIWEB.com>. Please be prepared to provide the appropriate FCC document number (FCC 08-219). To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Summary of the Memorandum Opinion & Third Order on Reconsideration

I. Introduction

1. In this *Memorandum Opinion & Third Order on Reconsideration*, we resolve eight petitions for reconsideration of the *Second Report & Order*, 68 FR 26220, May 15, 2003. The *Second Report & Order*, among other things, established "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." These new policies included the decision to permit applicants for NCE stations to apply for non-reserved channels, but to dismiss such applications should they conflict with applications for commercial stations. One petitioner seeks reconsideration of this decision, which was codified in § 73.5002(b) of the Commission's rules. For the reasons discussed below, we decline to reconsider establishment of this rule and affirm our decision to dismiss

applicants for NCE stations for non-reserved channels that conflict with applications for commercial stations. Several other petitioners seek reconsideration of our decision not to accept any amendments to a discrete group of long-pending NCE applications, including amendments to change an applicant's status from NCE to commercial, and request that we not dismiss this specific group of applicants. For the reasons discussed below, we will reconsider the immediate dismissal of this discrete group of applicants for NCE stations, and will afford them a one-time opportunity to amend their long-pending applications to apply for commercial stations to avoid dismissal. Accordingly, we grant reconsideration of our decision not to accept any amendments to the discrete group of long-pending applications for NCE stations, but otherwise deny the petitions and reaffirm our earlier conclusions.

II. Background

2. The *Second Report & Order* established standards to resolve the situation when an application for an NCE broadcast station is mutually exclusive with an application for a commercial broadcast station (*i.e.*, "mixed groups"). NCE stations can operate both on (1) channels reserved by the Commission specifically for NCE service and (2) non-reserved channels, which are also available to applicants for commercial stations. The Commission has long used different standards to resolve application conflicts for reserved channels, on the one hand, and non-reserved channels, on the other.

3. The Commission initiated this proceeding in 1995 to revise the criteria it used to select among competing applicants for new NCE stations. Subsequently, the Balanced Budget Act of 1997, Public Law 105-33, 111 Stat. 251 (1997) amended section 309(j) of the Communications Act of 1934 (the Act), to require the Commission to use competitive bidding to resolve application conflicts, but exempted NCE stations from this process, see 47 U.S.C. 309(j) (exempting stations described in Section 397(6) of the Act). As a result, the Commission in the *Report & Order*, 65 FR 36375, June 8, 2000, decided to use a non-auction, point system to resolve application conflicts for reserved channels, and use competitive bidding to resolve conflicts for non-reserved channels. In *National Public Radio, Inc. v. FCC*, 254 F.3d 226, 229 (D.C. Cir. 2001), parties challenged the procedures for non-reserved channels,

and the court concluded that the Act did not authorize the Commission to require applicants for NCE stations to compete at auction for non-reserved channels.

4. After notice and comment on the impact of the court decision, the Commission announced, in the *Second Report & Order*, new procedures for resolving conflicts between NCE and commercial applications for non-reserved channels and frequencies. In that order, the Commission held that although it will accept applications for NCE stations on non-reserved channels and frequencies, those that are mutually exclusive with applications for commercial stations will be dismissed. Applicants for AM and secondary service construction permits, however, will have a prior opportunity for settlement.

5. The Commission also reaffirmed that it will reserve a channel in the Table of Allotments (used for full-power FM and TV broadcast stations) for the exclusive use of NCE stations if a proponent for reservation demonstrates that an NCE station is technically precluded from using already-reserved channels, and that it will provide needed NCE service in a given area, according to certain defined standards. The Commission indicated that it would entertain requests for reservation using these criteria not only in future allocation proceedings, but also for allotments for which the Commission had adopted a Notice of Proposed Rulemaking before August 7, 2000, and for which it had not yet opened a filing window prior to the release of the *Second Report & Order*. As to channels or frequencies for which the Commission had already accepted long-form applications for construction permits, the Commission concluded that it would best promote the public interest to dismiss the long-pending competing applications for NCE stations so that the applications for commercial stations could proceed to auction. The Commission held that applicants for NCE stations in these pending, closed mixed groups would not have further opportunity to reserve the channels they had applied for, nor to amend their previously filed applications to propose commercial service in order to avoid dismissal.

III. Discussion

A. Licensing of Non-Reserved Spectrum

6. Under procedures adopted in the *Second Report & Order*, applicants for NCE stations may submit applications for non-reserved spectrum in auction filing windows. These applications are

subject to dismissal if there is any mutually exclusive application for a commercial station. These procedures are codified in § 73.5002(b) of the Commission's rules. University of Missouri asks us to reconsider this decision, contending that it is tantamount to a ban on NCE stations' use of the non-reserved spectrum. University of Missouri argues that applications for NCE stations are highly likely to be mutually exclusive with those for commercial stations, and so will almost always be dismissed. In addition, University of Missouri states that the opportunities we afford NCE stations to reserve FM and TV channels and to settle application conflicts in the AM and translator services are unlikely to be helpful.

7. In the *Second Report & Order*, the Commission fully considered and rejected University of Missouri's claim that this decision is tantamount to a ban on NCE stations' use of the non-reserved spectrum. University of Missouri offers no new evidence or changed circumstances in its petition to cause us to reconsider our decision. Moreover, University of Missouri suggests no lawfully permissible alternative to our decision. We thus reaffirm our decision, and reject University of Missouri's petition for reconsideration.

8. As explained at the outset of the *Second Report & Order*, "we are constrained by a number of court decisions, regulations, and statutory provisions that, taken together, limit our options." Again, the entirety of section 309(j)(1), 47 U.S.C. 309(j)(1), states: "If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding * * *." Paragraph 2 sets forth the relevant exemptions: "The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission * * * for stations described in section 397(6) of this Act," i.e., NCE stations.

9. Taken together, the statutory provisions sharply limit the Commission's authority in this area. In the past, the Commission allowed applicants for NCE stations to compete for non-reserved spectrum under the standards that applied to applicants for commercial stations. The Commission attempted to continue that longstanding policy after the 1997 Balanced Budget Act by allowing NCE stations to compete at auction for non-reserved

channels and frequencies. As recognized by the *NPR* case, the statute mandates that we resolve mutually exclusive applications for commercial stations by competitive bidding, prohibits us from using that same system to resolve applications for NCE stations, but does not require us to follow any particular alternative procedure for applications for NCE stations. Accordingly, in the *Second Further Notice*, 67 FR 9945, March 5, 2002, the Commission outlined two possible courses of action: (1) Prohibit applications for NCE stations on non-reserved channels or frequencies, just as the Commission prohibits applications for commercial stations on reserved channels or frequencies, or (2) continue to allow the filing of applications for NCE stations, which would be subject to dismissal if any conflict with applications for commercial stations could not be resolved. In the *Second Report & Order*, the Commission opted for the latter course of action. No commenting party suggested a workable alternative. The Commission believed that these two options were the most straightforward solutions to the problem and chose the one that was least harsh to applicants for NCE stations.

10. The reservation and settlement opportunities are not as limited as University of Missouri suggests, and thus our rule is not tantamount to a ban on NCE stations' use of non-reserved spectrum. As the Commission noted in the *Second Report & Order*, "several parties have asked the Commission to allocate particular FM channels as reserved pursuant to the relaxed reservation standards [adopted in the *Report & Order* in the proceeding], and we have done so." Since the Commission released the *Second Report & Order*, the Media Bureau opened a window accepting reservation showings for nearly 500 additional FM channels. In response, 129 petitioners sought to reserve 91 vacant FM allotments. University of Missouri was one of the petitioners that took advantage of this opportunity. To date, 56 vacant FM allotments have been successfully reserved for NCE use. With respect to the effectiveness of settlement opportunities, as the Commission explained in the *Second Report & Order*, the Commission received approximately 4,700 applications for LPTV and TV translator stations during an auction filing window, but processed more than one third of them prior to auction because either only one application was filed, or the applicants reached a settlement. We fully recognize that the opportunities for reservation

and settlement are limited, and may not be as plentiful as University of Missouri prefers. We continue to believe, however, that the Commission's decision, given the statutory constraints, best serves the public interest, and again note that University of Missouri has failed to suggest any alternative approach that would comport with the legal restrictions on our authority in this area. Consequently, we decline to reconsider the decisions to accept applications for NCE stations on non-reserved channels and frequencies and to dismiss such applications if they remain mutually exclusive with applications for commercial stations after the expiration of any applicable opportunity for settlement.

B. Pending Applications

11. As discussed in the *Second Report & Order*, there remain pending closed groups of non-reserved channel mutually exclusive construction permit applications for NCE and commercial stations (*i.e.*, "mixed groups"). Applications in these mixed groups were identified in Attachment A to "Window Opened to Permit Settlements for Closed Groups of Mutually Exclusive Broadcast Applications," Public Notice, 16 FCC Rcd 17091 (2001). In the *Second Report & Order*, the Commission decided to dismiss the long-pending applications for NCE stations in mixed groups without providing these applicants an opportunity to avoid dismissal by amending their applications to change their status from NCE to commercial. Approximately 19 mixed groups of mutually exclusive applications for non-reserved channels remain pending; these include 13 FM mixed groups, two FM translator mixed groups, and four TV mixed groups. For the reasons discussed below, we will now reconsider the Commission's decision in the *Second Report and Order* and afford each of these applicants for NCE stations in the pending, closed mixed groups a one-time opportunity to amend their applications to apply for a commercial broadcast station in order to avoid dismissal.

12. Four petitioners ask us to reconsider the Commission's decision to dismiss these long-pending applications for NCE stations. Several petitioners contend that the decision is arbitrary and capricious. Black Hawk also claims that the decision is impermissibly retroactive. Marist College contends that the decision is inconsistent with the 1997 Balanced Budget Act. In addition, Fatima Response argues that the decision is not in the public interest. As alternatives, Black Hawk suggests that

we give applicants with pending applications for NCE stations an opportunity to use the reservation procedures we established for future applicants; likewise, Fatima Response and Renaissance Community suggest that we permit applicants with pending applications for NCE stations in mixed groups to amend their applications to apply for commercial broadcast stations. Jack Garter opposes Black Hawk's petition, and argues that the *Second Report & Order* is not arbitrary and capricious or impermissibly retroactive and did not violate any processing "rights."

13. The Commission's primary rationale for previously opting to dismiss the pending applications for NCE stations in mixed groups was that some of these applications had been filed a decade ago, and that the Commission had provided numerous settlement opportunities to these mixed group applicants. In the *Second Report & Order*, the Commission was "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."

14. We now are persuaded that the unfairness of immediate dismissal to this discrete group of long-pending applications for NCE stations outweighs any delay to those applicants for commercial stations that are mutually exclusive with these applicants. Unlike prospective applicants for NCE stations, these applicants for NCE stations in the mixed groups sought to be licensed as NCE stations before adoption of the *Second Report & Order* and thus without knowledge of the consequences of this decision. Moreover, we believe that we can expeditiously afford mixed group applicants for NCE stations a one-time opportunity to amend their pending applications to apply for a commercial station, while avoiding unnecessary delay to the pending commercial applicants, which initially dissuaded the Commission from providing such an opportunity.

15. Shortly after release of this Order, the Media Bureau will announce an amendment window to permit all applicants in the approximately 19 pending, closed mixed groups (1) that had filed applications for NCE stations as of the date of the *Second Report & Order* and that remain pending, and (2) that were mutually exclusive with those for commercial stations as of the date of the *Second Report & Order*, to amend their pending applications for the sole purpose of applying for a commercial station. After the close of this window,

any application for an NCE station that remains mutually exclusive with any application for a commercial station will be dismissed with prejudice. There will be no additional opportunity for applicants in these pending, closed mixed groups to further amend their long-form applications. We believe that this processing policy will provide fairer treatment to pending applicants and better serve the public interest. It will give applicants for NCE stations one opportunity to reevaluate their long-pending plans in the context of full and complete information about how the licensing process will work and, as designed, it should not appreciably delay the introduction of new service. This approach will avoid the harsh result of dismissing applicants based on subsequently adopted processing rules in a manner that is consistent with the Act and with our commercial and NCE licensing schemes.

C. Vacant Allotments

16. Bible Broadcasting states that it agrees with the Commission's decision to accept reservation showings for certain vacant FM allotments and requests that we award three points to the successful reservation proponent in the subsequent application of the point system for that FM allotment. In essence, Bible Broadcasting asks us to award a "finder's preference" to the successful proponent of a reservation showing. Bible Broadcasting explains that many applicants for NCE stations have limited resources, and will be unwilling to undertake the expense of preparing a reservation showing without receiving such a preference at the licensing stage.

17. We deny Bible Broadcasting's petition. As a preliminary matter, the Commission does not award a finder's preference to successful proponents of allocations for commercial stations. Moreover, in adopting the current point system for NCE stations on reserved channels, the Commission explicitly declined to give any kind of finder's preference to the first entity or individual to file an application for a given frequency. We recognize that such a preference would create an incentive for any entity or individual to pursue a new allocation or to reserve it for NCE use. We believe, however, the existing factors in our current point system best serve the public interest in selecting a licensee. As the Commission said when it selected the point system over other methodologies to resolve application conflicts, favoring those who file first is not "the optimal way to select applicants who will provide 'diversity and excellence' in educational

broadcasting to the public.”

Accordingly, we decline to award points to the successful proponent of a reservation showing.

D. Miscellaneous Issues

18. *MMTC Pleadings Withdrawn*. On June 16, 2003, MMTC filed a petition for reconsideration of the *Second Report & Order*, seeking changes in the eligibility requirements for the new entrant bidding credit used in broadcast auctions. In its petition, MMTC specifically requested that applicants in FM Auction No. 37 “immediately” report changes that cause a loss of, or reduction in, eligibility for a new entrant bidding credit. The Commission subsequently established such a requirement in FM Auction No. 37, and, as a result, MMTC withdrew its petition for reconsideration by a letter dated October 19, 2004. Accordingly, this matter is no longer before the Commission in this proceeding.

19. *Licenses Formerly Held by Michael Rice-Controlled Entities*. By Public Notice, 16 FCC Rcd 12832, released July 3, 2001, the Media Bureau and the Wireless Telecommunications Bureau collectively gave notice of filing procedures for applications for interim and permanent authority to operate the two AM (Rice AM Stations) and five FM stations (*Rice FM Stations*) (collectively, the Rice Stations) formerly licensed to entities controlled by Michael Rice. Because the filing window for AM Auction No. 32 had been completed, the *Rice Public Notice* announced a supplemental AM Auction No. 32 filing window for the Rice AM Stations. Seven entities timely filed applications for the AM facility at 640 KHz, Terre Haute, IN; six entities timely filed applications for the AM facility at 1230 KHz, Terre Haute, IN. One of the entities applying for both of the Rice AM stations, Word Power, Inc., indicated that it was applying for NCE stations. The *Rice Public Notice* also announced that the now-vacant allotments for the Rice FM Stations would be included in FM Auction No. 37 and interested parties could file Form 175 applications in the then-upcoming auction filing window. The allotments for the five Rice FM Stations were also included in the *Public Notice*, described *supra*, listing 500 vacant FM allotments for which NCE reservation showings could be filed. Four of the five Rice FM Station allotments received reservation showings.

20. University of Missouri now expresses concern about the impact of the *Second Report & Order* on the licenses for the Rice Stations and, in particular, the Channel 252C2 allotment

in Columbia, Missouri—formerly licensed as KFMZ-FM. University of Missouri asks us to clarify whether the policies and rules established in the *Second Report & Order* apply to interim licensing for this channel. University of Missouri also contends that it should have an opportunity to reserve this channel for exclusive NCE use according to the criteria discussed in the *Second Report & Order*. Ultimately, University of Missouri suggests, the Commission should adopt unique procedures to license KFMZ-FM to avoid the litigation that it anticipates will result from the allotment’s auction.

21. As previously discussed, the Media Bureau opened a window to permit interested parties an opportunity to reserve any of approximately 500 vacant FM allotments. Channel 252C2 in Columbia, Missouri was among these FM allotments, as were the four other FM channels previously used by Mr. Rice. University of Missouri, in fact, filed a reservation showing for the FM channel it seeks. Thus, insofar as it seeks this opportunity in its petition, the issue is now moot. To the extent University of Missouri seeks a non-auction mechanism to award a license for the channel on a permanent basis, we see no grounds for doing so. We find unpersuasive University of Missouri’s argument that ineligible parties may attempt to acquire the license, and that such efforts will result in time-consuming litigation. This possibility applies to all broadcast auctions. A petitioner may raise such arguments post-auction when a prevailing applicant’s long-form application is filed. Thus, this concern is insufficient to overcome the clear imperative of section 309(j) of the Act.

22. Applications filed in the supplemental AM Auction No. 32 filing window for the two Rice AM Stations also predated the release of the *Second Report & Order*. As a result of the *Second Report & Order*, any of the applications for NCE stations filed during this window that are mutually exclusive with applications for commercial stations are to be dismissed. The application of Word Power, Inc. was the only application for an NCE station. We, therefore, offer Word Power, Inc. the same relief offered to the applicants for NCE stations in mixed groups, discussed above, and will afford it the same time-limited opportunity to amend its application(s) to apply for commercial stations, in accordance with the procedures set forth above. After this limited amendment opportunity, all remaining mutually exclusive applications for commercial stations for

the Rice AM Stations will proceed to auction.

IV. Conclusion

23. In this *Memorandum Opinion & Third Order on Reconsideration*, we reaffirm all decisions in the *Second Report & Order*, except that we will now permit parties with applications for NCE stations on non-reserved channels in closed mixed groups that have been pending since the date of the *Second Report & Order*, and were then mutually exclusive with applications for commercial stations, a one-time opportunity to amend their applications. We believe that reaffirmation of our earlier conclusions, subject to this change, best serves the public interest.

V. Procedural Matters

24. *Accessibility Information*. To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the FCC’s Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: <http://www.fcc.gov>.

25. *Final Paperwork Reduction Act Analysis*. This *Memorandum Opinion & Third Order on Reconsideration* contains no new or modified information collections subject to the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995) (codified in Chapter 35 of Title 44 U.S.C.). In addition, therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, 116 Stat. 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); see 44 U.S.C. 3506(c)(4).

26. *Supplemental Final Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 603, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, 110 Stat. 847 (1996), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Second Further Notice*. The Commission sought written public comment on the proposals in the *Second Further Notice*, including comment on the IRFA. No comments addressed the IRFA. A Final Regulatory Flexibility Analysis (FRFA) was published in the *Second Report & Order*. This present Supplemental FRFA, which conforms to the RFA, supplements that FRFA. We note that

the Supplemental FRFA addresses only the matters considered on reconsideration in the *Memorandum Opinion & Third Order on Reconsideration*. Therefore, this Supplemental FRFA addresses only the one decision reversed from the *Second Report & Order*.

A. Need for, and Objectives of, the Memorandum Opinion & Third Order on Reconsideration

27. The Commission adopts this *Memorandum Opinion & Third Order on Reconsideration* to reaffirm its earlier conclusions in the *Second Report & Order*, except for one decision. In the *Second Report & Order*, the Commission decided to dismiss a discrete group of applicants for NCE stations for non-reserved channels that were mutually exclusive with applications for commercial stations without providing these applicants an opportunity to avoid dismissal by amending their applications to change their status from NCE to commercial. This discrete group of long-pending applications for NCE stations consists of approximately 19 mixed groups of mutually exclusive applications for non-reserved channels filed between 1994 and 1997; these include 13 FM mixed groups, two FM translator mixed groups, and four TV mixed groups. On reconsideration, the Commission will now afford each of these applicants a one-time opportunity to amend their applications to apply for a commercial broadcast station before dismissing these applications. The Commission is persuaded that the unfairness of immediate dismissal to this discrete group of long-pending applications for NCE stations outweighs any delay to those applicants for commercial stations that are mutually exclusive with these applicants. Unlike prospective applicants for NCE stations, these applicants for NCE stations in the mixed groups sought to be licensed as NCE stations before adoption of the *Second Report & Order* and thus without knowledge of the consequences of this decision. Moreover, the Commission finds that it can expeditiously afford mixed group applicants for NCE stations a one-time opportunity to amend their pending applications to apply for a commercial station, while avoiding unnecessary delay to the pending commercial applicants, which initially dissuaded the Commission from providing such an opportunity.

B. Summary of Significant Issues Raised by the Public in Responses to the IRFA

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

C. Description and Estimate of the Number of Small Entities To Which the Rules Will Apply

29. 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. The RFA defines the term “small entity” as having the same meaning as “small business,” “small organization,” and “small governmental jurisdiction.” 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.

30. The decision adopted in this *Memorandum Opinion & Third Order on Reconsideration* will affect only (1) the discrete group of applicants for NCE stations for non-reserved channels and (2) those applicants for commercial stations that are mutually exclusive with these NCE applicants. These groups may include small businesses, and were included in the description and estimate of small entities in the FRFA to the *Second Report & Order*.

31. *Radio*. The applicants affected by this new decision may include existing radio stations. SBA defines as a small business those radio broadcasting stations that have no more than \$7.0 million in annual receipts. The Commission has estimated the number of licensed radio stations to be 13,837, of which 4,754 are AM stations, 6,266 are commercial FM stations, and 2,817 are NCE FM stations. According to Commission staff review of the BIA Financial Network, MAPro Television Database (BIA) of March 30, 2007, about 10,420 commercial radio stations (or about 95 percent) of an estimated 11,000 commercial radio stations have revenue of \$7.0 million or less. Many commercial radio stations, however, are affiliated with larger corporations with higher revenue, with the result that the estimated number of commercial radio stations overstates the number that qualify as small entities. The 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.

32. *Television*. The applicants affected by this new decision may also include TV stations. The SBA defines a television broadcast station as a small business if such station has no more than \$14.0 million in annual receipts. Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.” The Commission has estimated the number of licensed commercial television stations to be 1,376. According to Commission staff review of the BIA Financial Network, MAPro Television Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations (or about 72 percent) have revenues of \$14.0 million or less and thus qualify as small entities under the SBA definition. The Commission has estimated the number of licensed NCE television stations to be 380. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The 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.

33. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

34. The decision adopted in this *Memorandum Opinion & Third Order on Reconsideration* will not result in a change in the existing compliance, reporting and recordkeeping

requirements, except with respect to the discrete group of applicants for NCE stations that were previously dismissed in the *Second Report & Order* because they were mutually exclusive with applications for commercial stations. As a result of this Order, the discrete group of applicants for NCE stations is being permitted a one-time opportunity to file an amendment to their applications to change their status from NCE to commercial, and thereby avoid dismissal of their applications.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

35. 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): (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.

36. On reconsideration, the Commission determined it has two choices: (1) Reaffirm its decision in the *Second Report & Order* to immediately dismiss this discrete group of applicants for NCE stations or (2) give these applicants an opportunity to amend their applications to change their status from NCE to commercial, and thus avoid dismissal. In the *Second Report & Order*, we were not persuaded that the equities favoring the applicants for NCE stations outweighed the delay in initiating new broadcast service to the public as well as the unfairness to applicants for commercial stations. But we now believe that the unfairness of immediate dismissal to this discrete group of applicants for NCE stations outweighs any delay or unfairness to those applicants for commercial stations that are mutually exclusive with these

applicants. Unlike future applicants for NCE stations, these applicants for NCE stations in the mixed groups sought to be licensed as an NCE station before adoption of the *Second Report & Order* and thus without full knowledge of the consequences of this decision. Moreover, we now believe that we can expeditiously afford applicants with pending applications a one-time opportunity to amend their applications to apply for a commercial station yet will avoid the delay and unfairness to applicants for commercial stations that initially dissuaded us from providing such an opportunity. After this filing opportunity, any application for an NCE station that remains mutually exclusive with any application for a commercial station will be dismissed with prejudice, in accordance with § 73.5002(b) of the rules. There will be no additional opportunity for applicants in these pending, closed mixed groups to further amend their long-form applications. We believe that this processing policy will provide fairer treatment to pending applicants and better serve the public interest. It will give applicants for NCE stations one opportunity to reevaluate their long-pending plans in the context of full and complete information about how the licensing process will work and, as designed, it should not appreciably delay the introduction of new service. This approach will avoid the extremely harsh result of dismissing applicants based on subsequently adopted processing rules in a manner that is consistent with our statutory commercial and NCE licensing schemes.

37. Furthermore, our new decision will benefit the applicants for NCE stations that are small businesses by allowing them a chance to compete for licenses. While some of the applicants for commercial stations that are small businesses may be harmed by facing increased competition for licenses, the harm to these entities would not be as great as that to those small businesses applicants for NCE stations that would face dismissal of their applications. In addition, the public is better served by this enhanced competition.

F. Report to Congress

38. The Commission will send a copy of this *Memorandum Opinion & Third Order on Reconsideration*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of this *Memorandum Opinion & Third Order on Reconsideration*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *Memorandum Opinion & Third Order on Reconsideration* and this FRFA (or summaries thereof) will also be published in the **Federal Register**.

39. *Additional Information.* For additional information, please contact Evan Baranoff, Media Bureau, Policy Division, (202) 418–2120, or Evan.Baranoff@fcc.gov.

VI. Ordering Clauses

40. Accordingly, *it is ordered* that, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309 and 405(a) of the Communications Act, as amended, 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309 and 405(a), and § 1.429 of the Commission's rules, 47 CFR 1.429, that the petitions for reconsideration filed by the parties listed in Appendix A *are granted in part and denied in part* as indicated above, and that this *Memorandum Opinion & Third Order on Reconsideration* is adopted.

41. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Memorandum Opinion & Third Order on Reconsideration*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

42. *It is further ordered* that this proceeding is *terminated*.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

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