COLORADO—PM–10

Designated area	Designation		Classification	
	Date	Type	Date	Type
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Pitkin County:				
Aspen/Pitkin County Area—The area encompassed by the following Parcel ID numbers, as defined by the Pitkin County Planning Department: 2337–29, 2737–28, 2737–21, 2737–20, 2737–19, 2737–18, 2737–17, 2737–08, 2737–07, 2737–06, 2735–22, 2735–15, 2735–14, 2735–13, 2735–12, 2735–11, 2735–10, 2735–03, 2735–02, 2735–01, 2641–31, 2643–36, 2643–35, 2643–34, 2643–27, 2643–26.	7/14/03	Attainment.		
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[FR Doc. 03–12026 Filed 5–14–03; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 74

[MM Docket No. 95–31; FCC 03–44]

RIN 3060–AH96

Reexamination of the Comparative Standard for Noncommercial Educational Applicants; Association of America's Public Television Stations' Motion for Stay of Low Power Television Auction (No. 81)

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document the Commission modifies its rules and procedures for allocating and licensing ''non-reserved'' broadcast spectrum where conflicting uses are proposed by commercial and noncommercial educational broadcast stations. The Commission received several comments in how to resolve solutions. These methods were established to select among competing noncommercial and commercial applicants.

DATES: Effective June 16, 2003.

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SUPPLEMENTARY INFORMATION: This is a summary of the Media Bureau's *Second Report and Order (''2R&O'')* in MM Docket No. 95–31; FCC 03–44, adopted March 4, 2003, and released on April 10, 2003. The full text of this *2R&O* is available for inspection and copying during regular business hours in the FCC Reference Center, 445 Twelfth Street, SW., Room CY–-A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, Qualex International, Room CY—B402, telephone (202) 863–2893, or via e-mail *qualexint@aol.com.* This document is also available to persons with disabilities requiring accessible formats (electronic ASCII text, Braille, large print, and audiocassette) by contacting Brian Millin at (202) 418–7426 (voice), (202) 418–7365 (TTY), or by sending an e-mail to *access@fcc.gov.*

Synopsis of Second Report and Order

I. Introduction

1. In this *2R&O,* we establish new policies for licensing spectrum that the Commission has not reserved for the exclusive use of broadcast stations that provide or intend to provide noncommercial educational (''NCE'') service. In developing our new policies and procedures, we are constrained by a number of court decisions, regulations, and statutory provisions that, taken together, limit our options. We have come to the following conclusions. First, those stations that a nonprofit educational organization shows will be used to advance an educational program are eligible to be licensed as NCE radio or television stations and thus are exempt from auction. Nonprofit educational organizations that do not make such a showing must compete at auction for licenses. Second, we will not hold applicants for NCE stations ineligible to apply for non-reserved channels, and instead will permit such applicants to continue to apply for this spectrum in filing windows. Any applications for NCE stations determined to be mutually exclusive with applications for commercial stations will be dismissed, although applicants for services in which engineering solutions are possible will have a prior opportunity for settlement. Third, we reaffirm our existing relaxed reservation criteria, which enable would-be applicants for NCE stations in the full-power FM and TV services to add to the number of channels reserved for their use when they demonstrate that they are technically precluded from using an already-reserved channel, and they will provide needed NCE service in a given area. Interested parties may use these criteria to reserve channels in future allocation proceedings, as well as to reserve channels already in the Table of Allotments for which the Commission initiated an allocation proceeding prior to the August 7, 2000 effective date of the relaxed reservation standards, and for which the Commission has never accepted applications. Interested parties may not use these criteria to reserve channels already in the Table for which the Commission initiated an allocation rulemaking after August 7, 2000, or channels for which the Commission has already accepted applications.

II. Background

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

3. The Commission initiated this proceeding in 1995 to revise the criteria it used to select among competing applicants for new NCE stations. In the past, the Commission had used

comparative criteria to resolve mutually exclusive applications in both the commercial and NCE services, although the criteria were different for reserved and non-reserved spectrum. NCE applicants competing against commercial applicants for a non-reserved channel were evaluated using the commercial criteria. Both comparative processes, however, were called into question in the 1990s, leading the Commission to revisit its comparative criteria for applicants for both commercial and NCE stations. The Commission has adopted new selection criteria for NCE stations.

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

5. Given the different licensing mechanisms for NCE stations and all other stations, the Commission issued a *Further Notice of Proposed Rulemaking (''FNPRM''),* 63 FR 58358, October 30, 1998, in this docket and sought comment on how to resolve conflicts between commercial and NCE applicants for non-reserved spectrum. The Commission also sought comment on whether section 309 of the Act prohibited it from using competitive bidding to resolve any mutually exclusive applications when they included at least one filed by an applicant for an NCE station, or instead only when they involved competing applications for reserved channels.

6. In the *Report and Order (''R&O''),* 65 FR 36375, June 8, 2000, the Commission concluded that ''the exemption of NCE applicants from our general mandatory auction authority does not prohibit us from auctioning non-reserved spectrum, even when NCE entities apply for those channels.'' The Commission decided to require applicants for NCE stations to compete with applicants for commercial stations for non-reserved spectrum at auction. In order to minimize any hardship on applicants for NCE stations, the Commission also relaxed the criteria used to evaluate requests to reserve new channels.

7. The Association of Public Television Stations, the Corporation for Public Broadcasting, National Public Radio, and the State of Oregon challenged the Commission's decision in court. In *NPR* v. *FCC,* 254 F.3d 226 (DC Cir. 2001), the U.S. Court of Appeals for the D.C. Circuit rejected the Commission's construction of section 309. The court held that ''nothing in the Act authorizes the Commission to hold auctions for licenses issued to NCEs to operate in the unreserved spectrum,'' because section 309(j)(2) denied the Commission the authority to use competitive bidding ''based on the nature of the station that ultimately receives the license, and not on the part of the spectrum in which the station operates.'' 254 F.3d at 229.

8. In order to resolve the issues raised by the court's decision, we issued a *Second Further Notice of Proposed Rulemaking (2FNPRM),* 67 FR 9945, March 5, 2002. We asked for comment on the scope of the auction exemption, and offered three options, not necessarily mutually exclusive, on how to resolve the competing interests of applicants for commercial and NCE stations in the non-reserved spectrum. First, we proposed to hold applicants for NCE stations ineligible for this spectrum, stating that such an approach ''is consistent with the statutory language'' and ''has the advantage of clarity and simplicity.'' Second, recognizing that, under our first proposal, spectrum might lie fallow if no commercial applicants applied to use it, we proposed to permit applicants for NCE stations to apply for non-reserved spectrum, subject to dismissal of their applications if they were mutually exclusive with those filed by commercial applicants. Third, given that applicants for NCE stations may not legally participate in auctions, we also sought comment on whether we should further relax the criteria for would-be applicants for NCE stations to reserve additional channels in the future, and whether we should permit NCE applicants the opportunity to apply such criteria, or other criteria, to reserve existing or ''vacant'' allotments. We also welcomed comment on other options.

III. Discussion

A. Scope of Exemption for NCE Stations From Competitive Bidding

1. Generally

9. *Background.* In the *2FNPRM,* we sought comment on the breadth of section 309(j)(2)(C), which exempts NCE stations from competitive bidding. As indicated, that section exempts the licenses issued ''for stations described in section 397(6) of this Act.'' Subsection (A) defines ''noncommercial educational broadcast station'' by incorporation of the Commission's eligibility rules for such stations in effect in 1978. Subsection (B) defines as NCE stations those that are municipality-owned and transmit only noncommercial programs for educational purposes.

10. *Discussion.* We conclude that the auction exemption for NCE stations applies to two types of broadcast stations: (1) AM, full-power FM, FM translator, and full-power TV stations that a nonprofit educational organization shows will be used to advance an educational program, and are eligible to be licensed as NCE stations pursuant to the Commission's service-specific standards, in effect as of November 1978; and (2) stations that will be used by a municipality to transmit only noncommercial programs for educational purposes. Section 309(j)(2)(C) states that ''(t)he competitive bidding authority granted by this paragraph shall not apply to licenses or construction permits issued by the Commission * * * (C) for stations described in section 397(6) of this Act.'' Section 397(6), in turn, states that ''(t)he terms 'noncommercial educational broadcast station' and 'public broadcast station' mean a television or radio broadcast station which (A) under the rules and regulations of the Commission in effect on the effective date of this paragraph, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes.'' Defining stations within the scope of section 397(6)(A) must begin with the content of our eligibility rules as of November 2, 1978, because that is the date section 397(6) became effective. The substance of the eligibility rules for NCE stations has not changed since that time. Section 73.503(a) of the

Commission rules set forth the current eligibility rule for FM stations: ''A noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon showing that the station will be used for the advancement of an educational program.'' Section 73.621(a) of the rules sets forth the current eligibility rule for TV stations: ''(N)oncommercial educational broadcast stations will be licensed only to nonprofit educational organizations upon showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service.'' Weaving together these various regulatory and statutory provisions, in the manner the Act instructs, under section 397(6)(A), an NCE station is either an FM or TV station that is licensed to a nonprofit educational organization that shows that the station will be used to advance an educational program. A TV station must also show that the station will be used to furnish a nonprofit and noncommercial service that will serve the educational needs of its community. The Commission has also licensed AM stations that satisfy the FM station eligibility rules, as well as FM translators that rebroadcast the signals of an NCE FM station, as NCE stations, and has done so both before and since the November 1978 effective date of section 397(6). In terms of paragraph 397(6)(B), an NCE station is also any station that is owned and operated by a municipality and transmits only noncommercial programs for educational purposes, regardless of the Commission's eligibility rules. We conclude that applicants are exempt from auctions, pursuant to section 309(j)(2)(C), only when they file applications for broadcast stations expressly defined by sections 397(6)(A) and 397(6)(B).

11. This construction of the governing legal standards for NCE stations is consistent with our current practice. The Commission has long licensed nonprofit educational organizations, such as universities, to provide commercial service on non-reserved channels. When licensed to operate commercial broadcast stations, these nonprofit educational organizations are subject to the requirements applicable to all commercial stations. For example, they must pay filing fees; by contrast, fees are not required with respect to any station that a nonprofit educational organization is licensed to operate as an NCE station.

2. LPTV and TV Translators

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

Discussion. We conclude that no licenses for LPTV and TV translator facilities fall within the scope of section 397(6)(A), and that adopting new NCE eligibility criteria for these services would not bring applicants for such services within the scope of the auction exemption. LPTV and TV translator facilities, however, qualify as NCE stations under section 397(6)(B) of the Act, if they are owned and operated by municipalities and transmit only NCE programs. This definition does not turn on our eligibility rules, and so applicants of the latter type are exempt from auction.

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

> Whether a low power applicant or licensee is noncommercial or not-for-profit is a decision properly made by the licensee on the basis of applicable corporate and tax law, pertinent requirements of the Corporation for Public Broadcasting and perceived characteristics of the market in which it proposes to operate. Section 73.621 of the Commission rules (the eligibility and programming rules regarding NCE TV stations) will not apply to lower power stations.

The same applies to TV translators, because LPTV and TV translators are virtually the same; the difference between the two is that LPTV licenses can originate more programming than TV translator licensees, but licensees can switch between the two through simple letter notification to the Commission. Although we have exempted LPTV and TV translator licensees from administrative fees on certain conditions, we do not license these facilities as NCE stations, with the result that the programming and service requirements for NCE stations do not apply. Given that we do not license LPTV and TV translator facilities as NCE stations, and did not do so as of the effective date of section 397(6), these stations (other than those defined in section 397(6)(B)) do not fall within the scope of section 309(j)(2)(C).

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

B. Licensing of Non-Reserved Spectrum

15. *Background.* In the *2FNPRM,* we offered two different proposals for licensing noncommercial educational applicants on non-reserved spectrum. As one option, we proposed to hold applicants for NCE station licenses simply ineligible for non-reserved spectrum. As an alternative, we proposed to accept applications for both commercial and NCE stations in the non-reserved spectrum, with the latter applications subject to dismissal if they were mutually exclusive with the former. We also asked whether we should amend the anti-collusion rule to permit mutually exclusive commercial and NCE applicants for AM stations a prior opportunity to resolve their conflicts through settlements.

16. *Discussion.* We adopt our proposal to allow applicants for NCE stations to submit applications for non-reserved spectrum in a filing window, subject to being returned as unacceptable for filing if there is any mutually exclusive application for a commercial station. We also will allow applicants for AM stations and secondary services a prior opportunity to resolve their mutually exclusive applications through

settlements. We prefer this approach to that of holding applicants for NCE stations ineligible to apply for non-reserved spectrum. These policies are designed to preserve opportunities for applicants for NCE broadcast stations to use non-reserved spectrum, consistent with section 309(j), as amended, and in a manner that will not unduly delay the initiation of any broadcast service to the public. We recognize that these opportunities are limited to those situations in which commercial applicants do not file mutually exclusive applications for the spectrum, and to certain services in which the applicants reach a settlement, but these situations can and do happen.

17. As a practical matter, and as is currently our practice, we will begin the licensing process for non-reserved spectrum by opening an auctions filing window. Applicants for NCE stations may submit applications in the window in the same way as commercial applicants, using FCC Form 175, the ''short-form'' application to participate in an auction. Applicants that seek an NCE station license must identify themselves by checking the box labeled ''noncommercial educational,'' which will serve as a preliminary showing that they intend to use the station to advance an educational program and that they meet all other Commission eligibility requirements for NCE stations. Applicants that do not check this box will be considered, as a matter of law, applicants for commercial broadcast stations. Because an applicant's self-identification as ''noncommercial educational'' affects its eligibility to hold an NCE station license and therefore its eligibility to participate in an auction, we will treat any applicant's attempt to change its self-identification as a major amendment, which is prohibited after the short-form application filing deadline. Applications for NCE stations that are mutually exclusive only with one another will not proceed to auction and instead will be resolved by the same point system selection procedures that we have established for the reserved band. Any application for an NCE station that is mutually exclusive with any application for a commercial broadcast station will, after any settlement opportunities expire, be returned as unacceptable for filing.

18. *Anti-Collusion Rule.* We adopt the approach outlined in the *2FNPRM* to amend our anti-collusion rule to permit mutually exclusive applicants for AM stations to settle, when the applicants include at least one for an NCE station. The anti-collusion rule generally prohibits applicants that have filed mutually exclusive applications from ''discussing or negotiating settlement agreements'' among themselves after the short-form filing deadline. The Commission, however, has carved out limited exceptions for certain applicant groups in the broadcast and Instructional Fixed Television (ITFS) services, namely those involving applications for major modifications that are mutually exclusive with one another or with applications for new stations, as well as those involving secondary services. The Commission created these exceptions based in part on the fact that it is possible for the applicants to devise engineering solutions to remove the technical conflicts between their applications.

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

C. Allocating Spectrum

20. *Background.* In the *R&O* in this proceeding, the Commission decided to allocate a channel as reserved if a proponent demonstrated: For radio, that it is technically precluded from using a reserved channel and would provide a first or second NCE radio service to 10% of the population within its 1mV/m contour, and for television, that there is no reserved channel available in the proponent's community and it would provide the first or second NCE television service to 2000 or more people who constitute 10% of the population within its noise limited contour. The Commission adopted these standards for use at the allocation stage of the licensing process, and thus expressly declined to extend them to existing (vacant) allotments, pending applications, and services such as AM that do not use an allocations process. In the *2FNPRM,* we asked whether we should further relax the reservation standards, and if so what the standard should be. We also asked whether we should establish opportunities for interested parties to reserve existing allotments that we have not yet licensed (*i.e.*, ''vacant'' allotments), and if so what the standards should be.

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

22. *Future Allocations.* The Commission already has reserved twenty (201–220) out of a total of one hundred FM channels for the exclusive use of NCE stations, and will reserve any of the remaining eighty channels (221–300) for NCE stations if one of three tests is satisfied. The Commission's original purpose in reserving a band of channels was simply to ensure that NCE stations would develop; when establishing the FM and TV services, the Commission was concerned that commercial stations, due to their financial advantage, would make such immediate use of the spectrum for these services that none would remain available for NCE stations when they were prepared to make use of it. In order to ensure that NCE stations could in fact make use of the reserved band of channels, the Commission adopted two tests for reserving channels outside this band;

the Commission will allocate a new FM channel as reserved if a would-be applicant for an NCE station can show that it cannot use another reserved channel to provide its service without causing interference to either a foreign station or a domestic TV station operating on channel 6. Moreover, in order ''to mitigate any potential hardship that the auction process might impose on noncommercial entities,'' the Commission adopted a third test for reserving channels outside 201–220 in the *R&O* in this proceeding. Under this third standard, the Commission will allocate a new FM channel as reserved if a would-be applicant for an NCE station can show that it is technically precluded from using a reserved channel, and that it will provide a first or second NCE service to 10% of the population within its proposed protected service contour. Since the Commission further relaxed the standard, several parties have asked the Commission to allocate a particular FM channel as reserved pursuant to the relaxed reservation standards, and we have done so.

23. Our third test thus requires a proponent for reservation to demonstrate that NCE service is needed in their proposed service area (by showing that they will provide the first or second NCE service within some portion of their proposed service contour), and to show that they are ''technically precluded'' from using a reserved channel. NCE service is not technically precluded if it is possible to specify a location at which same-class reserved band NCE facilities could be licensed to the proposed community in compliance with NCE technical rules. A reservation proponent must satisfy two criteria: First, that class-maximum facilities at the allotment reference site would provide a new first or second NCE service to ten percent or more of the population in a station's service area; and second, that a same-class reserved band facility that would provide the requisite level of new NCE service is—to a reasonable degree of certitude—technically precluded.

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

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

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

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

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

29. *Vacant Allotments.* We will authorize entities to use the relaxed reservation standards that we reaffirm today not only for future allocations, but also for FM channels for which we initiated an allocation proceeding before the effective date of these standards, August 7, 2000, and for which we never opened a filing window to accept applications. There are approximately 450 such FM channels, including approximately 350 that were previously scheduled for auction. In determining whether to reevaluate the status of an FM channel that already has been the subject of an allocation rulemaking proceeding, we believe that the public interest requires us to weigh the delay in the introduction of new FM service to the public that would be associated with such a review, against the public interest benefits of additional review, and fairness to all interested parties. For FM channels for which Commission initiated an allocation proceeding before August 7, 2000, and for which it has no applications on file, we believe that the balance of these concerns favors further review. On the one hand is delay, as some commenters indicate, as well as

unfairness to the proponents of these channels, each of which petitioned the Commission to allocate the channel, and has affirmatively expressed an interest in filing an application and competing for the channel at auction. On the other hand, proponents of channels have no ''finder's preference'' for them, and entities that wish to use these FM channels to operate NCE stations have not had meaningful opportunities to acquire the licenses for them. This is because these entities never had opportunities to reserve these channels using our relaxed reservation standards, and although we will still permit them to apply for these channels, their applications will be returned as soon as they become mutually exclusive with those for commercial stations. Allowing entities that wish to use these FM channels to operate NCE stations an opportunity to reserve them also ensures that we will allocate them as reserved or non-reserved according to whether there is a greater need for commercial or NCE service, as determined by our relaxed reservation standards, such that the delay of service occasioned by our further review of the nature of the channel is offset by the public interest benefit of more diverse service. Thus, on balance, we believe that the public interest is best served by allowing interested parties an opportunity to reserve FM channels using the standards that were not previously available to them. As a result, we will direct the staff to open a short window in the near future, during which interested parties may attempt to reserve any FM channel for which we initiated an allocation rulemaking before August 7, 2000, using the standards that became effective that day and that we reaffirm and clarify here. Interested parties objecting to any proffered reservation showing we receive may of course file opposing pleadings. We will release a Public Notice containing the details of our procedures for reserving vacant allotments in advance of the window.

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

31. *Pending Applications.* Consistent with our conclusion not to open these newer vacant allotments to reconsider reserving the channels, we also reaffirm the decision in then *R&O* in this proceeding not to permit applicants for NCE stations in pending mixed groups a further opportunity to reserve the channels for which they have applied. At the time of the 2FNPRM, a total of forty mixed groups were pending. We offered these groups an opportunity to settle, and many took advantage of that opportunity, with the result that approximately twenty groups remain. The channels at issue here are altogether different from the allotments discussed because they have advanced to a farther point in our licensing process: the Commission opened a filing window for some of these channels nearly ten years ago, already had long-form applications on file for them, and in fact had originally scheduled to award the licenses by auction in 1999. As a result, when compared to the allotments for which we never opened a filing window, further review of the channels associated with the pending applications would cause even greater delay in our licensing process and the introduction of broadcast service, and also would cause greater unfairness to applicants for commercial stations, because all interested parties have spent the time and money necessary to complete all of the engineering and legal components of a long-form application. Particularly given that we have already offered settlement opportunities to all applicants in these pending cases, we are not persuaded that the equities favoring the applicants for NCE stations in these pending proceedings outweigh the delay in initiating new broadcast service to the public as well as the unfairness to applicants for commercial stations. As a result, we believe that it will serve the public interest best to return as unacceptable for filing the pending applications for NCE stations, and move the process forward by subjecting any remaining mutually exclusive applications to auction. This auction will be closed; we will not open a new filing window. Prior to auction, we will not review these applicants' long-form applications already on file, nor will we accept amendments to these forms. If only one commercial application remains after the return of all mutually exclusive NCE applications, we will process that applicant's pending long-form application in accordance with our applicable rules. This approach will end the administrative delay in processing these applications, and will result in licensing new broadcast facilities to serve the public more quickly.

32. Other Allocation Issues. NPR, with the support of a few other commenters, asked us to reallocate TV channel 6 for NCE radio use. A number of NCE TV licensees, however, stated that this issue is outside the scope of this proceeding. We agree, and decline to adopt NPR's proposal. We also conclude that Amherst Alliance's request that we expand the reserved band, and limit eligibility to the expanded reserved particular types of NCE stations, is likewise outside the scope of this proceeding.

IV. Conclusion

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

V. Final Regulatory Flexibility Analysis

34. As required by the Regulatory Flexibility Act of 1980, as amended (''RFA''), an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the *2FNPRM* in this docket. The Commission sought written public comment on the proposals in the *2FNPRM*, including comment on the IRFA. No comments addressed the IRFA. This present Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.

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

35. The Commission adopts the *2R&O* to establish new policies for licensing spectrum that the Commission has not specifically reserved for the exclusive use of noncommercial educational (''NCE'') broadcast stations. In the *R&O* in this docket, the Commission decided to resolve competing applications for commercial and NCE stations in this ''non-reserved'' spectrum via competitive bidding, but the U.S. Court of Appeals for the D.C. Circuit overturned that result. In the *2FNPRM* in this docket, the Commission sought

comment on how to allocate and license this spectrum, consistent with the court's opinion and the Communications Act. The *2R&O* resolves the issues we raised in the *2FNPRM*.

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

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

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

37. 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. A ''small organization'' is generally defined as ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field * * *.'' A ''small governmental jurisdiction'' is generally defined as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand * * *.''

38. The rules adopted in the *2R&O* will affect applicants for NCE stations on non-reserved channels and frequencies. Under the applicable provisions of the Act, NCE stations are those owned and operated by: (1) Nonprofit educational organizations after showing that they will use the stations to advance educational programs, or (2) municipalities that use the stations to air only noncommercial programs for educational purposes. The rules could also affect commercial stations by causing delay in processing their applications; although the new rules establish that applications for NCE stations will be returned as unacceptable for filing if they become and remain mutually exclusive with applications for commercial stations, the rules continue to permit applicants for NCE stations to apply for non-reserved channels, and in some services, the opportunity to negotiate a settlement with a competing applicant for a commercial station. In addition, our new policies may cause some delay to applicants for commercial stations, whether large or small, that seek to use certain vacant allotments; although as a general matter we will allow applicants for NCE stations to attempt to reserve channels only when we are conducting an allocation proceeding to amend the Table of Allotments, we will permit applicants for NCE stations an opportunity to reserve channels for which we have already concluded the allocation proceeding, if the Commission initiated the proceeding before August 7, 2000, and never accepted applications for the channel. Thus, the rules may affect ''small business concerns,'' ''small organizations,'' and ''small governmental jurisdictions.'' The number of possible future applicants cannot be determined.

39. *Radio.* Applicants could also include existing radio stations. As of June 30, 2002, the Commission had licensed a total of 13,261 radio stations, of which 4,811 were AM stations, 6,147 were commercial FM stations, and 2,303 were NCE FM stations. As of the same date, the Commission had also licensed 3,770 FM translator and booster stations (commercial and NCE). SBA defines as a small business those radio broadcasting stations that have no more than $6 million in annual receipts. According to Commission staff review of BIA Publications, Inc. Master Access Radio Analyzer Database on August 22, 2002, about 10,800 commercial radio stations have revenue of $6 million or less. Many commercial radio stations, however, are affiliated with larger corporations with higher revenue, with the result that the estimate of 10,800 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.

40. *Television.* Applicants could also include TV stations. As of June 30, 2002, the Commission had licensed a total of 1,712 full-power TV stations, of which 1,331 commercial TV stations, were 381 were NCE TV stations. As of the same date, the Commission had licensed 4,741 TV translator stations, 2,120 LPTV stations, and 554 Class A TV stations. SBA defines a television broadcasting station that has no more than $12 million in annual receipts as a small business. According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database on August 22, 2002, about 870 of the commercial TV stations have revenues of $12 million or less. Many commercial TV stations, however, are affiliated with larger corporations with higher revenue, with the result that the estimate of 870 commercial TV 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.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

41. The Commission anticipates that none of the rules adopted in the *2R&O* will result in an increase in the existing reporting and recordkeeping requirements of potential applicants.

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

42. 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.

43. The *2R&O* establishes new policies for licensing non-reserved spectrum, in a manner consistent with the court's decision in the *NPR* case, and the applicable provisions of the statute. As explained in detail in the *2R&O,* section 309(j)(1) of the Act generally requires the Commission to resolve mutually exclusive applications for licenses to use spectrum via competitive bidding, but section 309(j)(2)(C) exempts the licenses for NCE stations from this process. In the *R&O* in this docket, the Commission concluded that the auction exemption applied only to licenses for NCE stations to use the channels that Commission has reserved for their exclusive use, and that applicants for licenses for NCE stations to use non-reserved spectrum must compete for them via competitive bidding; in the *NPR* case, the D.C. Circuit decided that the auction exemption extended to licenses for NCE stations to use non-reserved spectrum. As a result, the Commission's new

policies and rules must distinguish between commercial station and NCE stations in terms of how it allocates and licenses this spectrum. Thus, the Commission cannot distinguish between ''small'' and ''non-small'' entities in applying the relevant statutory standards.

44. Although it is not necessarily true that more applicants for NCE stations would qualify as ''small entities'' than applicants for commercial stations, the Commission has attempted, within the applicable legal constraints, to maximize the opportunities for applicants for NCE stations to obtain licenses to use non-reserved spectrum, consistent with the mandate in section 604(a)(5) of the RFA that an agency consider alternatives to minimize significant economic impact on small entities. For example, in the *2FNPRM,* the Commission proposed two alternatives for licensing non-reserved spectrum: Hold applicants for NCE stations ineligible for the spectrum, or permit them to apply for this spectrum, subject to the Commission returning their applications as unacceptable for filing if any mutually exclusive applications for commercial stations remained after the expiration of any settlement period. In the *2R&O,* the Commission has adopted the second of these alternatives, which permits NCE stations to obtain licenses for non-reserved spectrum, while the first one did not. This alternative is equally beneficial to both large and small entities, because it permits all entities the opportunity to acquire licenses for non-reserved spectrum. Moreover, the Commission has also reaffirmed its process that permits would-be applicants for NCE stations, both large and small, to reserve more FM and TV channels for their exclusive use upon showing that an already-reserved channel is not available for use, and there is a need for NCE service in a given area. The Commission will allow interested parties an opportunity to apply these criteria to future allocation proceedings, and to channels already in the Table of Allotments for which the Commission initiated an allocation proceeding before the effective date of the criteria, and for which it never accepted applications.

Report to Congress

45. The Commission will send a copy of the *2R&O,* 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 the *2R&O,* including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *2R&O* and this FRFA (or summaries thereof) will also be published in the **Federal Register**.

Ordering Clauses

46. Pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, and 309 of the Communications Act, as amended, 47 U.S.C. 151, 152(a), 154(i), 303, 307, and 309 of this *2R&O* is *adopted,* and parts 73 and 74 of the Commission's rules are amended, effective June 16, 2003.

47. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *2R&O,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

48. This proceeding is *terminated.*

List of Subjects in 47 CFR Parts 73 and 74

Radio, Television.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 73 and 74 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

■ 2. Section 73.3571 is amended by revising paragraphs (h)(1)(i), (h)(2)(i), and (h)(3) to read as follows:

§ 73.3571 Processing of AM broadcast station applications.

* * * * *

(h) * * *

(1)(i) The FCC will specify by Public Notice, pursuant to § 73.5002, a period for filing AM applications for a new station or for major modifications in the facilities of an authorized station. AM applications for new facilities or for major modifications, whether for commercial broadcast stations or noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), will be accepted only during these specified periods. Applications submitted prior to the appropriate filing period or ''window'' opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

* * * * *

(2) * * *

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

* * * * *

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

* * * * *

■ 3. Section 73.3572 is amended by revising the section heading and paragraph (e) to read as follows:

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

* * * * *

(e) The FCC will specify by Public Notice a period for filing applications for a new non-reserved television, low power TV and TV translator stations or for major modifications in the facilities of such authorized stations, whether for

commercial broadcast stations or noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), and major modifications in the facilities of Class A TV stations.

* * * * *

■ 4. Section 73.3573 is amended by revising paragraphs (f)(2)(i), (f)(3)(i), and (f)(4) to read as follows:

§ 73.3573 Processing of FM broadcast station applications.

* * * * *

(f) * * *

(2)(i) The FCC will specify by Public Notice, pursuant to § 73.5002(a), a period for filing non-reserved band FM applications for a new station or for major modifications in the facilities of an authorized station. FM applications for new facilities or for major modifications, whether for commercial broadcast stations or noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), will be accepted only during the appropriate filing period or ''window.'' Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

* * * * *

(3) * * *

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

* * * * *

(4) If, after the close of the appropriate window filing period, a non-reserved FM allotment remains vacant, the window remains closed until the FCC, by Public Notice, specifies a subsequent period for filing non-reserved band FM applications for a new station or for major modifications in the facilities of an authorized station pursuant to paragraph (f)(2)(i) of this section. After the close of the filing window, the FCC will also release a Public Notice identifying the short-form applications which are found to be non-mutually exclusive, including any applications for noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6). These non-mutually exclusive applicants will be required to submit the appropriate long-form application within 30 days of the Public Notice and, for applicants for commercial broadcast stations, pursuant to the provisions of § 73.5005(d). Non-mutually exclusive applications for commercial broadcast stations will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584. Non-mutually exclusive applications for noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.7004 and 73.3584. If the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience, and necessity will be served by the granting of the non-mutually exclusive long-form application, it will be granted.

* * * * *

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

■ 5. The heading in subpart I of part 73 is revised as set forth above.

■ 6. Section 73.5000 is amended by revising paragraph (b) to read as follows:

§ 73.5000 Services subject to competitive bidding.

* * * * *

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

■ 7. Section 73.5002 is amended by revising the section heading and paragraphs (a), (b), (c) introductory text and adding paragraph (d)(4) to read as follows:

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

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

(b) To participate in broadcast service or ITFS auctions, or to apply for a noncommercial educational station, as described in 47 U.S.C. 397(6), on a non-reserved channel, all applicants must timely submit short-form applications (FCC Form 175), along with all required certifications, information and exhibits, pursuant to the provisions of § 1.2105(a) of this chapter and any Commission public notices. So determinations of mutual exclusivity for auction purposes can be made, applicants for non-table broadcast services or for ITFS must also submit the engineering data contained in the appropriate FCC form (FCC Form 301, FCC Form 346, FCC Form 349 or FCC Form 330). Beginning January 1,

1999, all short-form applications must be filed electronically. If any application for a noncommercial educational broadcast station, as described in 47 U.S.C. 397(6), is mutually exclusive with applications for commercial broadcast stations, and the applicants that have the opportunity to resolve the mutually exclusivity pursuant to paragraph (c) and (d) of this section fail to do so, the application for noncommercial educational broadcast station, as described in 47 U.S.C. 397(6), will be returned as unacceptable for filing, and the remaining applications for commercial broadcast stations will be processed in accordance with competitive bidding procedures.

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

* * * * *

(d) * * *

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

■ 8. Section 73.5005 is amended by revising paragraph (d) to read as follows:

§ 73.5005 Filing of long-form applications.

* * * * *

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

■ 9. Section 73.5006 is amended by revising paragraph (a) to read as follows:

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

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

* * * * *

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

■ 10. The heading in subpart K of part 73 is revised as set forth above.

■ 11. Section 73.7001 is amended by revising paragraph (b) and adding paragraph (c) to read as follows:

§ 73.7001 Services subject to evaluation by point system.

* * * * *

(b) A point system will be used to evaluate mutually exclusive applications for new radio, television, and FM translator facilities, and for major changes to existing facilities, on non-reserved channels, only when all of the mutually exclusive applications are for noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6)(A) or 47 U.S.C. 397(6)(B).

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

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

■ 11. The authority citation for part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307, 336(f), 336(h) and 554.

■ 12. Section 74.1233 is amended by revising paragraphs (d)(2)(i), (d)(3)(i), (d)(4) to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

* * * * *

(d) * * *

(2)(i) The FCC will specify by Public Notice, pursuant to § 73.5002(a) of this chapter, a period for filing non-reserved band FM translator applications for a new station or for major modifications in the facilities of an authorized station. FM translator applications for new facilities or for major modifications, whether for commercial broadcast stations or noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6), will be accepted only during these specified periods. Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

* * * * *

(3) * * *

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

* * * * *

(4) After the close of the filing window, the FCC will also release a Public Notice identifying any short-form applications which are found to be non-mutually exclusive, including any applications for noncommercial educational broadcast stations, as described in 47 U.S.C. 397(6). These non-mutually exclusive applicants will be required to submit the appropriate long form application within 30 days of the Public Notice and, for applicants for commercial broadcast stations, pursuant to the provisions of § 73.5005 of this chapter. Non-mutually exclusive applications for commercial broadcast stations will be processed and the FCC

will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584 of this chapter. Non-mutually exclusive applications for noncommercial educational broadcast stations, as described by 47 U.S.C. 397(6), will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.7004 and 73.3584 of this chapter. If the applicants are duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the non-mutually exclusive long-form application, the same will be granted.

* * * * *

[FR Doc. 03–12057 Filed 5–14–03; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 300, 600, and 679

[Docket No. 020801186 3073 02; I.D.053102D]

RIN 0648 AQ09

Pacific Halibut Fisheries; Subsistence Fishing; Correction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; correction.

SUMMARY: This document corrects the final rule that implemented the Pacific Halibut Subsistence Program, which published on April 15, 2003.

DATES: Effective on May 15, 2003.

FOR FURTHER INFORMATION CONTACT: Patsy A. Bearden, NMFS, 907–586–7228 or e-mail at *patsy.bearden@noaa.gov*.

SUPPLEMENTARY INFORMATION: This document corrects the final rule, which published on April 15, 2003 (68 FR 18145) FR Doc. 03–8822, and which will become effective on May 15, 2003. The intext table entitled VII. NORTH PACIFIC FISHERY MANAGEMENT COUNCIL of 50 CFR part 600.725(v) was incorrect. This action corrects the heading by removing ''Allowable gear types'' and by adding in its place ''Authorized gear types.'' This action will not have any substantive regulatory effect.

Classification

This action corrects a typographic error, a non-discretionary technical change with no substantive effects. Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator of Fisheries (AA), NOAA, finds good cause to waive prior notice and comment procedures otherwise required by the section. NOAA finds that prior notice and comment are unnecessary as this final rule makes a minor, non-substantive change to correct wording in a heading of a table. NOAA finds that because of the technical, non-substantive nature of the correction, no particular public interest exists in this rule for which prior notice and comment would otherwise be needed. For the above reasons, the AA also finds good cause, under 5 U.S.C. 553(d) not to delay for 30 days the effective date of this action.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: May 8, 2003.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 1. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C 561, 16 U.S.C. 773 *et seq*., and 16 U.S.C. 1801 *et seq.*

■ 2. On page 18161, bottom of second column, in § 600.725, paragraph (v), correct table VII. NORTH PACIFIC FISHERY MANAGEMENT COUNCIL, by removing the second heading in the boxhead, ''Allowable gear types'', and adding in its place ''Authorized gear types''.

[FR Doc. 03–12040 Filed 5–14–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 030303053–3118–02; I.D. 022403C]

RIN 0648–AQ70

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Revision of Charter Vessel and Headboat Permit Moratorium Eligibility Criterion

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement a corrected Amendment for the charter vessel/headboat permit moratorium established in Amendment 14 to the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (Amendment 14) and in Amendment 20 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (Amendment 20). This final rule revises, consistent with the actions taken by the Gulf of Mexico Fishery Management Council (Council), one of the eligibility criteria for obtaining a charter vessel/headboat permit under the moratorium. This final rule also reopens the application process for obtaining Gulf charter vessel/headboat moratorium permits and extends the applicable deadlines; extends the expiration dates of valid or renewable open access permits for these fisheries; clarifies, as requested by the Council, a constraint on issuance of historical captain permits under the moratorium; and extends the expiration date of the moratorium to account for the delay in implementation. In addition, NMFS informs the public of the approval by the Office of Management and Budget (OMB) of the collection-of-information requirements contained in this final rule and publishes the OMB control numbers for those collections. The intended effect of this final rule is to implement the charter vessel/headboat moratorium in the Gulf of Mexico consistent with the actions taken by the Council.

DATES: This final rule is effective June 16, 2003.