(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: March 7, 2011.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 74

[MB Docket No. 09–52; FCC 11–28]

Policies To Promote Rural Radio Service and To Streamline Allotment and Assignment Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopted a number of procedures, procedural changes, and clarifications of existing rules and procedures, designed to promote ownership and programming diversity, especially by Native American tribes, and to promote the initiation and retention of radio service in and to smaller communities and rural areas.

DATES: Effective May 6, 2011, except for the amendment to § 73.7000, which contains information collection requirements that have not been approved by OMB. The Commission will publish a document in the **Federal Register** announcing the effective date.

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SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Second Report and Order and First Order on Reconsideration (Second R&O), FCC 11–28, adopted and released March 3, 2011. The full text of the Second R&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, BCPI, Inc., Portals II, 445 Twelfth Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. via their Web site, *http://www.bcpi.com,* or call 1–800–378–3160. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact the FCC by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

Paperwork Reduction Act of 1995 Analysis

This Second R&O adopts new or revised information collection requirements, subject to the Paperwork Reduction Act of 1995 (PRA) (Pub. L. 104–13, 109 Stat 163 (1995) (codified in 44 U.S.C. 3501–3520)). These information collection requirements will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. The Commission will publish a separate notice in the **Federal Register** inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved them and the Commission has published a notice announcing the effective date of the information collection requirements. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

Synopsis of Order

1. In the Second R&O, the Commission addressed one of the issues set forth in the Further Notice of Proposed Rule Making (FNPRM) that accompanied the First Report and Order in this proceeding (75 FR 9797, March 4, 2010, FCC 10–24, rel. Feb. 23, 2010) (First R&O), and additionally addressed those issues set forth in the Notice of Proposed Rule Making in this proceeding, 24 FCC Rcd 5239 (2009) (Rural NPRM) that were not addressed in the First R&O. It set forth a waiver standard for Native American Tribes and Alaska Native Villages (Tribes) seeking to avail themselves of the Tribal Priority adopted in the First R&O, but that do not have Tribal Lands as defined by the Commission. The Tribal Priority as adopted requires that a Tribe or Tribal-owned entity proposing a new radio station qualifying for the Tribal Priority must show that 50 percent or more of the proposed station's signal covers Tribal Lands. Not all Tribes possess reservations or other Tribal Lands, however. Because the record was not fully developed on this issue, rather than set forth an alternate coverage standard, the Commission stated it would be receptive to requests to waive the requirement of Tribal Land coverage, setting forth various factors that would be considered probative in a determination of the functional equivalent of Tribal Lands. The Second R&O also adopted some of the changes proposed in the Rural NPRM in the Commission's procedures for awarding new channel allotments and assignments under section 307(b) of the Communications Act, 47 U.S.C. 307(b); adopted a rule prohibiting FM translator applicants from proposing to change channels from the non-reserved to reserved bands and vice-versa; and codified existing standards for determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window.

2. In the FNPRM, the Commission noted the concern of some commenters that the Tribal Priority, as originally adopted in the First R&O, would benefit only those Tribes possessing Tribal Lands, as the Commission defined that term in the First R&O. The requirement that at least 50 percent of the proposed station's principal community contour cover Tribal Lands was designed to ensure that a facility qualifying for the Tribal Priority is primarily used for its intended purpose, namely, to assist Tribes in their mission of promulgating Tribal language and culture, promoting Tribal self-governance, and serving the specific needs of Tribal communities. Commenters noted, however, that while there are 563 Tribes in the United States, there are only 312 reservations, with some Tribes occupying more than one reservation. Thus, not all Tribes could avail themselves of the Tribal Priority as adopted.

3. The record on this issue was not as well-developed as the Commission anticipated. Commenters noted that the situations of different Tribes are extremely varied and are likely to require different showings, necessitating flexible standards. The Commission thus decided against adopting a specific standard for defining a functional equivalent of Tribal Lands. Rather than modify the Tribal Priority at this time,

the Commission encouraged Tribes lacking Tribal Lands to seek waiver in appropriate cases of the tribal coverage requirements of the Tribal Priority. Because, as noted in the First R&O, approximately two-thirds of all Tribal citizens do not live on Tribal Lands, the Commission recognized the potential need for the availability of a Tribal Priority in such circumstances, and will accordingly be receptive to waiver requests that demonstrate waiver would serve the goals of the Tribal Priority—to enable the Tribe to provide radio service uniquely devoted to the needs, language, and culture of the Tribal community—because a majority of the proposed service would cover the functional equivalent of Tribal Lands.

4. A waiver of the tribal coverage provisions of the Tribal Priority should be formally requested by an official of a federally recognized Tribe who has proper jurisdiction and is empowered to speak for the Tribe. Beyond that requirement, as is the case with any waiver request, an applicant seeking to establish eligibility for the Tribal Priority may submit any evidence probative of a connection between a defined community or area and the Tribe itself. Such a waiver showing should explain that the communities or areas associated with the Tribe do not fit the definition of Tribal Lands set forth in the First R&O. A waiver showing should also detail how a proposed service to the area would aid the Tribe in serving the needs and interests of its citizens in that community, and thus further the goals of the Tribal Priority. Factors probative of a geographically identifiable Tribal population grouping might include, for example, evidence of an area to which the Tribe delivers services to its citizens, or evidence of an area to which the federal government delivers services to Tribal members, for example, federal service areas used by the Indian Health Service, Department of Energy, or Environmental Protection Agency. Probative evidence might also include evidence of Census Bureau-defined tribal service areas, used by agencies such as the Department of Housing and Urban Development. Evidence that a Tribal government has a defined seat, such as a headquarters or office, in combination with evidence that Tribal citizens live and/or are served by the Tribal government in the immediate environs of such a governmental seat, would also be probative of a nexus between that community and the Tribe. Further, absent a physical seat of Tribal government, a Tribe might, for example, provide evidence that a majority of members of the Tribal council or board live within a certain radius of the proposed station (similar to 47 CFR 73.7000, under which an applicant for a noncommercial educational radio station may qualify for a "local applicant" credit by establishing that it is physically headquartered, has a campus, or has 75 percent of its governing board living within 25 miles of the reference coordinates of the proposed community of license). An applicant might also provide a showing under the standard enunciated in 25 CFR 83.7(b)(2)(i), that more than 50 percent of Tribal members live in a geographical area exclusively or almost exclusively composed of members of the Tribe. Additionally, tribes might provide other indicia of community, such as Tribal institutions (e.g., hospitals or clinics, museums, businesses) or activities (e.g., conferences, festivals, fairs).

5. Regardless of the waiver showing provided, an applicant seeking to take advantage of the Tribal Priority must set forth a defined area for the functional "Tribal Lands" to be covered, and the community on those lands that would be considered the community of license. This showing is necessary to duplicate, as closely as possible, the Tribal Land coverage provisions of the Tribal Priority, and also to make determinations such as community coverage. Additionally, the showing should demonstrate the predominantly Tribal character of the coverage area sought, and that such area does not include regions so non-Native in their character or location as to defeat the shared purposes of both the Commission and the Tribes, namely, to enable Tribes to serve their citizens, to perpetuate Tribal culture, and to promote self-government. The Commission found that the use of waivers to establish the equivalent of Tribal Lands will serve the public interest by affording maximum flexibility to Tribes in non-landed situations, particularly given that the circumstances of such Tribes are so varied. In evaluating such waiver requests, the Commission noted that it will delineate the "Tribal Lands" equivalent as narrowly as possible, viewing most favorably those proposals that seek facilities narrowly designed, to the extent feasible under technical and geographic constraints, to provide service to Tribal citizens rather than to non-Tribal members living in adjacent areas or communities.

6. In the Rural NPRM, the Commission observed that new allotments for FM channels and, especially, awards for new AM stations were being made based on either (a) dispositive 47 U.S.C. 307(b) (section 307(b)) preferences under Priority (3) of the Commission's allotment priorities, to proponents for first local transmission service, at communities located in or very near large Urbanized Areas, or (b) dispositive preferences under Priority (4), "other public interest matters," based solely upon the differential in raw population totals to be served under the proposal. This has led to a disproportionate number of new FM allotments and AM construction permits being awarded as additional services to already well-served urbanized areas, in some cases at the expense of smaller communities or rural areas that received fewer services. The Commission noted that the vast majority of mutually exclusive groups of applications for new AM stations were being resolved under section 307(b), rather than through competitive bidding, pursuant to 47 U.S.C. 309(j) (section 309(j)). The Commission expressed the same concerns with regard to moves of stations (i.e., changes of community of license) from smaller communities and rural areas toward urbanized areas, because the same section 307(b) criteria are used to compare the applicant's former and new community and/or service areas.

7. Accordingly, the Commission tentatively concluded that it should modify its policies to more equitably distribute radio service among urban and rural areas, and to promote the resolution of mutual exclusivity through competitive bidding where section 307(b) principles do not dictate a preference among communities. First, the Commission tentatively concluded that it should establish a rebuttable presumption that an FM allotment or AM new station proponent seeking to locate at a community in an urbanized area, or that would cover or could be modified to cover 50 percent or more of an urbanized area, was in fact proposing a service to the entire urbanized area, and that accordingly it would not award such an applicant a preference for providing first local transmission service under Priority (3) of the FM allotment priorities to a small community within that area. Second, in the case of applicants for new AM stations, the Commission tentatively concluded that it should change its application of Priority (4)—other public interest matters—and sought comment on alternative proposals in this regard. The alternatives included ceasing treating Priority (4) as a dispositive section 307(b) criterion, or a more narrowly defined application of Priority

(4), under which no dispositive preference would be awarded if the population in 75 percent of the proposed station's principal community contour already receives five or more aural services, and the proposed community of license already has more than five transmission services, except where the applicant can make a successful showing as set forth in the case of *Greenup, Kentucky and Athens, Ohio,* 2 FCC Rcd 4319 (MMB 1987) (Greenup). An applicant whose proposed contour did not meet the five reception/five transmission service criteria would proceed to a modified Priority (4) analysis. The Commission suggested that, as part of this modified analysis, a Greenup showing, involving calculation of a Service Value Index (SVI), which takes into account both population and the number of reception services, could be useful. The Commission tentatively concluded that, in such a situation, it would award a dispositive section 307(b) preference under Priority (4) if the SVI difference was 50 percent or greater. Otherwise, the application would proceed to competitive bidding. Third, the Commission proposed an "underserved listeners" preference, that would be co-equal with Priorities (2) and (3), under which it would grant a section 307(b) preference to an applicant proposing to provide third, fourth, or fifth aural reception service to a substantial portion of its covered population.

8. With regard to proposed community of license change applications, the Commission tentatively concluded that there should be an absolute bar on proposals that would leave populations with no or only one reception service. The Commission also proposed to apply the same Priority (3) standards to community of license changes as it proposed for new FM allotment and AM applications, when determining whether a proposed community change represents a preferential arrangement of allotments. Finally, the Commission sought comment on a number of other proposals: whether to disallow community changes that would remove third, fourth, or fifth reception service to a significant population; whether to bar removal of a second local transmission service at a community; and whether provision of service to underserved listeners should outweigh a proposal of first local transmission service, in both the community change and new station/allotment contexts.

9. Many commenters opposed these changes, arguing that they were unnecessary. They contended that 80 percent of the U.S. population lived in urbanized areas, and that locating radio stations where most people live was the most efficient use of spectrum and of distributing radio service. Some commenters also objected that the Commission's proposed changes would have a disproportionate effect on minorities and radio stations owned by and programming to minorities, as most of their audiences live in urbanized areas. The Commission observed that section 307(b)'s purpose was to ensure that all Americans, whether living in large urbanized areas or small communities or rural areas, had access to a variety of radio services, to the extent that demand exists to provide such service. The limited goal of the Rural NPRM was to provide greater opportunities for those applicants who propose such service with the expectation that it would be viable, to the extent that they are mutually exclusive with applicants proposing yet more service to urbanized areas whose residents already have an abundance of radio listening choices. The Commission further rejected the contention that its proposals would disproportionately affect minority broadcasters and listeners, noting that while most members of minority groups live in urbanized areas, most Americans generally live in such areas, and in roughly the same proportions. The same considerations apply in rural and smaller communities, that also have minority populations that are equally deserving of radio service. The Commission thus stated that the speculative benefit of additional service in urban areas did not outweigh its concern that the current priorities fail to promote new service, or the retention of existing service, at less well-served communities and that the current allocation priorities do not realistically reflect broadcasters' actual economic incentives. The Commission also took into account a commenter's analysis showing that, in many cases, the community of license of a station represented a small percentage of the total population covered by the station, and often was not the largest community served by the station. It concluded that awards of section 307(b) preferences should take into account the totality of a station's service, not merely the community of license designated by the applicant or proponent.

10. The Commission adopted its proposals, in somewhat modified form, noting that the procedural changes would take place in three related, but distinct, contexts: (1) Applications for new AM stations; (2) proposals for new commercial FM allotments; and (3) applications to change the community of license of an existing radio station (in which the moving station's new facilities are compared to its existing facilities under section 307(b), for a determination of whether the new community constitutes a preferential arrangement of allotments).

11. With regard to applications for new AM radio stations, the Commission noted its Congressional mandate to use competitive bidding as the primary means of awarding new service. As a threshold matter, the Commission will restrict the award of dispositive section 307(b) preferences among mutually exclusive AM applications to those situations where there is a significant difference between the proposals. First, with regard to proposals for first local transmission service under Priority (3), it adopted its tentative conclusion that any new AM station proposal for a community located within an urbanized area, that would place a daytime principal community signal over 50 percent or more of an urbanized area, or that could be modified to provide such coverage, will be presumed to be a proposal to serve the urbanized area rather than the proposed community. This is the standard the Commission has heretofore used in determining whether an applicant for a new AM station must provide a showing under *Faye and Richard Tuck,* 3 FCC Rcd 5374, 5376 (1988) (*Tuck*). Recognizing the possibility that the majority of a proposed station's daytime principal community contour could cover part of an urbanized area without necessarily triggering the urbanized area service presumption—for example, when the proposed contour covers only 45 percent of an urbanized area, but urbanized area coverage constitutes well over half of the contour—the Commission stated its willingness to entertain challenges, at the appropriate stage of the application or allotment proceeding, detailing the reasons the proposal should nonetheless be treated as one to serve the urbanized area rather than the named community of license. For AM facilities, the determination of whether a proposed facility "could be modified" to cover 50 percent or more of an urbanized area will be limited to a consideration of rule-compliant minor modifications to the proposal, without changing the proposed antenna configuration or site, and spectrum availability as of the close of the filing window.

12. The urbanized area service presumption may be rebutted by a compelling showing (1) That the proposed community is truly independent of the urbanized area, (2)

of the community's specific need for an outlet for local expression separate from the urbanized area and (3) the ability of the proposed station to provide that outlet. The required compelling showing may be based on the existing three-pronged *Tuck* test (*see Tuck,* 3 FCC Rcd at 5378). However, the *Tuck* factors, especially the eight-part test of independence, will be more rigorously scrutinized than has sometimes been the case in the past. For example, an applicant should submit actual evidence of the number of local residents who work in the community, not merely extrapolations from commute times or observations that there are businesses where local residents could work if they so chose.[1] Similarly, the record should include actual evidence that the community's residents perceive themselves as separate and distinct from the urbanized area, rather than merely self-serving statements to that effect from town officials or business leaders. Moreover, certain of the *Tuck* independence factors have become increasingly anachronistic, and accordingly will not be given as much weight. For example, as local telephone companies have started to discontinue routine distribution of telephone directories, factor five is less meaningful than it once was. Similarly, with the closing of even major city newspapers, the lack of a local newspaper should not necessarily be fatal to a finding of independence, though it is still a relevant factor. However, the mere existence of a city- or town-posted site on the World Wide Web is not a substitute for evidence of independent media also covering a community, as a means of demonstrating a community's independence from an urbanized area. In addition to demonstrating independence, a compelling showing sufficient to rebut the urbanized area service presumption must also include evidence of the community's need for an outlet for local expression. For example, an applicant may rely on factors such as the community's rate of growth; the existence of substantial local government necessitating coverage; and/or physical, geographical, or cultural barriers separating the community from the remainder of the urbanized area. An applicant will be afforded wide latitude in attempting to overcome the presumption, but a compelling showing will be required.

13. The Commission did not believe it necessary or desirable to eliminate completely an applicant's ability to make its public interest case for additional service at a community under Priority (4), other public interest matters. It nonetheless found that large service population differentials between competing proposals should not suffice, in and of themselves, for a dispositive section 307(b) preference under Priority (4), especially when the proposed new population is already abundantly served. Such a preference often unfairly disadvantages those who would provide additional media voices to those needing them most. The Commission thus adopted, in modified form, the proposal to emphasize underserved populations, that is, those receiving fewer than five aural services, under Priority (4). Accordingly, a new AM applicant proposing third, fourth, and/or fifth reception service to at least 25 percent of the population in the proposed primary service area, as defined in 47 CFR 73.182(d), where the proposed community of license has two or fewer local transmission services, may receive a dispositive section 307(b) preference under Priority (4). For purposes of this analysis, "community of license" will be considered to be the entire urbanized area if the proposed community of license is subject to the urbanized area service presumption.

14. The Commission further adopted the proposal to allow, but not require, new AM applicants not meeting the above-stated 25 percent/two transmission service standard to submit an SVI showing as set forth in *Greenup* (6 FCC Rcd at 1495) in order to receive a dispositive Priority (4) preference. An applicant opting to present a *Greenup* analysis must demonstrate a 30 percent differential in SVI between its proposal and the next-highest ranking proposal before the Commission will award a dispositive section 307(b) preference under Priority (4). The Commission in *Greenup* found an 18.8 percent SVI differential to be dispositive in an FM allotment case. Because, unlike in an FM allotment proceeding, an applicant for a new AM station need not receive a section 307(b) preference, but may proceed to auction, a higher SVI differential should be required in this context. A 30 percent SVI differential is sufficiently high to demonstrate that a proposed community merits a dispositive section 307(b) preference, but is not so low as to undermine section 309(j)'s general preference for awarding new commercial stations primarily through competitive bidding. An applicant receiving a dispositive section 307(b) preference under Priority (4) will, of course, be subject to the prohibition on reducing service set forth in the First R&O (25 FCC Rcd at 1598–99) and codified in 47 CFR 73.3571(k)(i).

15. Except under the circumstances outlined above, dispositive section 307(b) preferences will not be granted under Priority (4). Thus, as is currently the practice, mutually exclusive application groups in which no applicant receives a section 307(b) preference will proceed to competitive bidding. These new procedures will not be applied to pending applications for new AM stations and major modifications to AM facilities filed in the 2004 AM Auction 84 filing window, but will only apply to those applications filed after the Second R&O's release date. This is because the AM Auction 84 applications have been pending for many years, and in most cases the applicants have invested considerable resources in technical studies, settlements and technical resolutions, and section 307(b) showings, thus applying the new procedures to such applications would place undue hardship on the applicants.

16. With regard to proposals for new allotments to be added to the FM Table of Allotments (47 CFR 73.202), although the section 307(b) considerations of fair, efficient, and equitable distribution of new radio service in the non-reserved FM band are much the same as they are in the AM band, the mechanism for evaluating the respective section 307(b) merits of competing allotment proposals is quite different, insofar as competing proposals for new FM allotments cannot simply be sent to auction if no dispositive section 307(b) difference can be found. Accordingly, the standards for awarding section 307(b) preferences cannot be as strict or as limited as those set forth above with regard to dispositive section 307(b) preferences for new AM applications.

17. As regards Priority (3) (first local transmission service) preferences, the Commission adopted the same urbanized area service presumption set forth above. The determination of whether a proposed facility "could be modified" to cover 50 percent or more of an urbanized area will be made based on an applicant's certification that there are no existing towers in the area to which, at the time of filing, the applicant's antenna could be relocated pursuant to a minor modification application to serve 50 percent or more

[1] *See Lincoln and Sherman, Illinois,* Memorandum Opinion and Order, 23 FCC Rcd 15835, 15842–43 (2008) (Commissioners Copps and Adelstein, jointly dissenting); *Evergreen, Alabama and Shalimar, Florida,* Memorandum Opinion and Order, 23 FCC Rcd 15846, 15852–53 (2008) (Commissioners Copps and Adelstein jointly dissenting).

of an Urbanized Area.[2] If a proposal does not qualify for a first local transmission service preference, the Commission will consider proposals to provide third, fourth, and/or fifth reception service to more than a *de minimis* population under Priority (4), as is the case now. However, the Commission directed the staff to accord greater weight to service to underserved populations than to the differences in raw population totals, concluding that raw population total differentials should be considered only after other Priority (4) factors that a proponent might present, including the number of reception services available to the proposed communities and reception areas, population trends in the proposed communities of license/reception areas, and/or number of transmission services at the respective communities. Because it is impossible to anticipate every possible competing allotment proposal, the Commission did not eliminate outright any factor, including reception population, for determining dispositive section 307(b) preferences in the FM allotment context. For now, the Commission limited its direction to a determination that, of all considerations in making new FM allotments, raw reception population totals—of whatever magnitude—should receive less weight than other legitimate service-based considerations. These procedures shall not apply to any non-final FM allotment proceeding, including "hybrid" coordinated application/allotment proceedings, in which the Commission has modified a radio station license or granted a construction permit. Although it is well settled that the Commission may apply modified rules to applications that are pending at the time of rule modification, substantial equitable considerations apply to these categories of proceedings. Affected licensees and permittees may have expended considerable sums or entered into agreements following such actions. Moreover, filings and licensing actions subsequent to a license modification could impose significant burdens on parties forced to take steps to protect formerly licensed facilities. The revised procedures will apply, however, to all pending petitions to amend the FM Table of Allotments, and to all other open FM allotment proceedings and non-final FM allotment orders.

18. Licensees and permittees seeking to change community of license differ from applicants in the above two categories insofar as, for section 307(b) purposes, they do not face comparative analysis with respect to communities proposed by competing applicants. Rather, the section 307(b) comparison is between the applicant's present community and the community to which it seeks to relocate (*see* 47 CFR 73.3571(j)(2) and 73.3573(g)(2)). The applicant must demonstrate that the facility at the new community represents a preferential arrangement of allotments (FM) or assignments (AM) over the current facility. In such cases, the Commission adopted certain changes designed to require more specificity on the part of licensees and permittees regarding the actual effects of the proposed moves, while still affording flexibility to propose truly favorable arrangements of radio allotments and assignments. First, it adopted the urbanized area service presumption outlined above, which may be rebutted in the same manner as set forth herein, and will be subject to the same determinations described above as to whether the proposed facility "could be modified" to cover over 50 percent of an urbanized area. Additionally, applicants not qualifying for Priority (3) preferences under this standard will still be able to make a Priority (4) showing that will require them to provide a more detailed explanation of the claimed public interest benefits of the proposed move.

19. With regard to Priority (4) claims, the Commission sought, again, to limit the presumption that raw net population gains, in and of themselves, represent a preferential arrangement of allotments or assignments under section 307(b). It imposed an absolute bar to any facility modification that would create white or gray area. The Commission also stated it would strongly disfavor any change that would result in the net loss of third, fourth, or fifth reception service to more than 15 percent of the population in the station's current protected contour (noting that loss of service to underserved listeners offset by proposed new service to a greater number of underserved listeners would not constitute a "net loss of service" to such listeners, and would be viewed more favorably). Applicants would also be required not only to set forth the size of the populations gaining and losing service under the proposal, but also the numbers of services those populations will receive if the application is granted, and an explanation as to how the proposal advances the revised section 307(b) priorities. For example, an applicant will not only be required to detail that it is providing 500,000 listeners with a 21st reception service, and removing the sixth reception service from 50,000 listeners, but also to provide a rationale to explain how this service change represents a preferential arrangement of allotments or assignments.[3] Additionally, the Commission will strongly disfavor any proposed removal of a second local transmission service from a community of substantial size (with a population of 7,500 or greater) when determining whether a proposed community of license change represents a preferential arrangement of allotments or assignments. The Commission retains its presumption against removal of sole transmission service. Finally, as is and has always been the case, under Priority (4) applicants may offer any other information they believe to be pertinent to a public interest showing, including the need for further transmission service at the new community, a drop in population justifying the removal of transmission service at the old community, population growth in areas surrounding the proposed new community that can best be met by a centrally located service, or any other changes in circumstance believed relevant to Commission consideration. These procedures shall apply to any applications to change community of license that are pending as of the release date of the Second R&O.

20. The Commission stated its intent that the changes introduced here will, first, cause applicants to give more

[2] Specifically, a proponent would need to certify that there could be no rule-compliant minor modification on the proposed channel to provide a principal community signal over 50 percent or more of an Urbanized Area, in addition to covering the proposed community of license. In doing so, proponents will be required to consider all existing registered towers in the Commission's Antenna Structure Registration database, in addition to any unregistered towers currently used by licensed radio stations. Furthermore, all applicants and allotment proponents must consider widely-used techniques, such as directional antennas and contour protection, when certifying that the proposal could not be modified to provide a principal community signal over the community of license and 50 percent or more of an Urbanized Area. While this is not a conclusive test, it is one that the Commission will treat as establishing a rebuttable presumption of an allotment that could not be modified to serve both the majority of an Urbanized Area and the community of license.

[3] Such explanation need not be a granular accounting of the reception service provided each individual or population pocket in the proposed contour. A detailed summary should suffice, for example, to point out that 50,000 people would receive 20 or more services, 10,000 would receive between 15 and 20 services, 7,000 would receive between 10 and 15 services, etc. The showing should, however, state what service the modified facility would represent to the majority of the population gaining new service, e.g., the 16th service to 58 percent of the population, and the corresponding service that the majority of the population losing service would lose, e.g., 60 percent of the current coverage population would lose the ninth reception service. New service or service losses to underserved listeners should be detailed.

consideration to the effects of proposed station moves on listeners, both those they would serve at a new community and those from whom they would remove existing service; and second, that a fuller explanation of the claimed benefits of a station move will introduce greater transparency into the community change procedure, both to aid in decision-making and for the benefit of affected listeners. The Commission expects that these procedures will help to achieve a balance between distribution of radio service to the largest populations, on the one hand, and distribution of new service to those most in need of it on the other.

21. In the Rural NPRM, the Commission noted that the current rules permit FM translator stations originally authorized in the non-reserved band (channels 221–300) to modify their authorizations to "hop" into the reserved band (channels 201–220). *See* 47 CFR 74.1233. By making these modifications, translator stations are able to operate under the less restrictive NCE rules, which permit the use of alternative methods of signal delivery, such as satellite and terrestrial microwave facilities. Likewise, FM translators authorized in the reserved band are currently able to file modifications to hop into the non-reserved band. The filing of such band-hopping applications by FM translator stations prior to construction of their facilities wastes staff resources, and potentially precludes the use of those frequencies in future reserved band filing windows for FM translators. The integrity of the window filing process is critical to provide equal opportunity to frequencies for translator applicants across the country. The Commission therefore tentatively concluded that § 74.1233 of the Commission's rules should be modified to require that applications to move into the reserved band from the non-reserved band, or to move into the non-reserved band from the reserved band, may only be filed by FM translator stations that have filed license applications or are licensed, and that have been operating for at least two years. In addition to seeking comment on the proposal, the Commission sought comment on the duration of the proposed holding period.

22. Some commenters opposed the proposal, questioning the extent of the band-hopping problem, or suggesting instead that individual FM translator permits and licenses contain conditions prohibiting band-hopping. Another commenter supported the prohibition but suggested an exception for translator operators who could show that they had been displaced and the only frequencies available were in the other band. The Commission found over 160 translator applicants in the last non-reserved band filing window had "hopped" to the reserved band and were operating there. The Commission concluded that adoption of the prohibition proposed in the Rural NPRM, in conjunction with the two-year holding period, will best preserve the fairness of the window filing process while providing flexibility for translators that have operated long enough to have an established listener base. Even though the Commission did not codify a rule that would permit the filing of non-minor-change displacement proposals, it directed Commission staff to continue to consider such waiver requests on a case-by-case basis.

23. As the Commission observed in the Rural NPRM, the first and most fundamental step in the AM auction process is a staff determination as to which applications filed during the relevant filing window are mutually exclusive with one another. In the context of an AM auction, mutual exclusivity is determined by an evaluation of engineering data provided in conjunction with the FCC Form 175. Applicants must specify a frequency on which they seek to operate in accordance with the Commission's existing interference standards.

24. It is well established that mutual exclusivity arises when grant of one application would preclude grant of a second, and the interference rules and protection requirements are the technical standards used to determine mutual exclusivity. Public notices released prior to an AM auction specifically note that the staff applies 47 CFR 73.37, 73.182, and 73.183(b)(1), among other standards, to make mutual exclusivity determinations. In the AM service, mutual exclusivity may occur during three operational timeframes: daytime, critical hours, and nighttime. There are three classes of nighttime interference contributors: (a) A high-level interferer, defined as a station that contributes to the fifty percent exclusion root-sum-square (RSS) nighttime limit of another station; (b) a mid-level interferer, defined as a station that enters the twenty-five but not fifty percent RSS of another station; and (c) a low-level interferer, defined as a station that does not enter into the twenty-five percent RSS of another station. To combat the extreme levels of interference that have led to a deterioration of the AM service, the Commission established a strict new standard, stating that a new station may be authorized only if it qualifies as a low interferer with respect to any other station on the same or first adjacent channel. The nighttime protection requirements are codified in 47 CFR 73.182. For AM auction window applications, the staff analyzes the daytime, critical hours, and nighttime facilities specified in each application against every other application filed in the window. Two AM applications filed during the same filing window are considered mutually exclusive if either fails to fully protect the other as required by the Commission's technical rules.

25. The Commission tentatively concluded, in the Rural NPRM, to codify its decision in *Nelson Enterprises, Inc.,* 18 FCC Rcd 3414 (2003), in which the Commission concluded that the staff properly applied 47 CFR 73.182(k) interference standards to establish mutual exclusivity between window-filed applications, i.e., determined that the rule limits the interference a new station application may cause to another application filed in the same AM window. Because the rule establishes that the RSS methodology should be applied for the calculation of nighttime interference for non-coverage purposes, the Commission concluded that the staff properly relied on the rule for making mutual exclusivity determinations, and found it proper to apply 47 CFR 73.182 in considering the effect of nighttime interference caused and received by simultaneously filed AM auction filing window proposals, as well as existing stations.

26. In the Rural NPRM, the Commission also tentatively concluded that it should modify § 73.3571 of the rules, by explicitly providing that the interference standards in § 73.182(k) of the Commission's rules apply when determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window. That is, two applications would be deemed to be mutually exclusive if either application would be subject to dismissal because it would enter the twenty-five percent exclusion RSS nighttime limit of the other. Two parties filed comments, arguing that these standards would reduce the number of new AM construction permits awarded in filing windows. The Commission disagreed, noting that several mechanisms in AM new application processing, including technical resolutions and settlements, could lead to multiple grants, that the interference rules and protection requirements are the technical standards used for establishing mutual exclusivity, and that the criteria applied by the staff

were fully consistent with the strict interference limitations established by the Commission. The Commission thus concluded that codifying the applicability of 47 CFR 73.182(k) AM nighttime interference standards to mutually exclusive AM auction applications promotes the integrity of the AM service, and is thus in the public interest.

27. *First Order on Reconsideration.* In the First R&O, the Commission adopted a Tribal Priority, giving federally recognized Tribes and majority Tribal-owned entities a section 307(b) priority for proposing service, 50 percent or more of which would cover "Tribal Lands," as defined in the First R&O, as long as the proposals met certain conditions. Two parties called attention to perceived difficulties with the implementation of the Tribal Priority that might inadvertently limit the ability of qualifying entities to receive the Tribal Priority. One party argued that Alaska Native Regional Corporations, created pursuant to the Alaska Native Claims Settlement Act of 1971 (ANCSA) should be allowed to claim the Tribal Priority. The Commission found, however, that such corporations are not sovereign or quasi-sovereign entities, as are Tribes, and because the Tribal Priority was based on the government-to-government relationship between the United States Government and Tribes, the Commission could not extend the Tribal Priority to such corporations.

28. Native Public Media and the National Congress of American Indians (NPM/NCAI) jointly observed that some Tribes have Tribal Lands that are either too small to comprise 50 percent or more of a station's principal community contour, or are so irregularly shaped that 50 percent or more of a station's contour could not cover Tribal Lands. They contended that such Tribes could not qualify for the Tribal Priority under the coverage provisions set forth in the First R&O, therefore an alternative coverage provision was needed. The Commission agreed that an alternative was needed, but sought to craft a standard that would include such Tribes while ensuring that the Tribal Priority would be used for its intended purpose, that is, for Tribes to provide radio service to their members, rather than to primarily non-Tribal areas. Accordingly, a Tribe may claim the Tribal Priority if (a) at least 50 percent of the area within the proposed facility's principal community contour is over that Tribe's Tribal Lands, as set forth in the First R&O, or (b) the proposed principal community contour (i) encompasses 50 percent or more of that Tribe's Tribal Lands, (ii) serves at least 2,000 people living on Tribal Lands, and (iii) the total population on Tribal Lands residing within the station's service contour constitutes at least 50 percent of the total covered population. In neither (a) nor (b) may the applicant claim the priority if the proposed principal community contour would cover more than 50 percent of the Tribal Lands of a non-applicant Tribe. The first and second requirements of the alternative test ensure that the proposed station will serve substantial Tribal Lands and populations. The Commission found that service to fewer than 2,000 people should generally be considered insufficient to claim the Tribal Priority.[4] However, a situation could arise where a proposal meets these requirements but the population of the applicant's Tribal Lands represents a relatively small percentage of the total population residing in the coverage area, and in this circumstance a Tribal Priority might potentially deprive the majority, non-tribal population of needed local service. To address this concern, the Tribal Priority cannot be claimed if the combined population on Tribal Lands within the proposed station's service contour constitutes less than 50 percent of the total covered population. This requirement is designed to avoid applying the Tribal Priority to regions and populations that are largely non-Native in character or location, in keeping with the priority's goals. The Commission will entertain waiver requests from applicants proposing Tribal service to service areas in which the population on Tribal Lands is less than 50 percent of the covered population, in appropriate situations.[5] Finally, the limitation that the applicant will not cover more than 50 percent of the Tribal Lands of a non-applicant Tribe will avoid exhausting the remaining spectrum in areas where many Tribes have Tribal Lands in close proximity, before all qualifying Tribes have an opportunity to apply. This limitation will also encourage different Tribes whose lands are in close proximity to each other to form consortia to establish radio service serving the various Tribes' needs, as well as share the expense of starting new radio service.

[4] A tribal proposal that covers 50% of Tribal Lands but does not meet the 2,000 population threshold may be able to make a persuasive waiver showing if it serves Tribal Lands that are isolated and does not propose service to a significant non-Tribal population.

[5] For example, if all the tribes in a densely populated area were to form a consortium to provide service covering all of their Tribal Lands, and the collective population still does not constitute 50 percent of the total covered population, the Commission would be receptive to a showing that the proposed facility is designed to minimize non-Tribal coverage while still providing needed service to Tribal Lands. The Commission would also consider other factors, such as: the abundance of non-Tribal radio service in the area; the absence of Tribal radio service in the area; and the absence of other Tribal-owned or Tribal-oriented media of mass communications in the area, or a showing that other such Tribal-directed media are inadequate to serve the needs of Tribal communities.

Final Regulatory Flexibility Analysis

29. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), 5 U.S.C. 601–612, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Rural NPRM. The Commission sought written public comment on the proposals in the Rural NPRM, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need for, and Objectives of, the Report and Order

30. The Second R&O adopted rule and procedural changes to codify or clarify certain allotment, assignment, auction, and technical procedures. In the Second R&O, the Commission also codified a prohibition against "band hopping" FM translator station applications, and codified standards determining nighttime AM mutual exclusivity among window-filed applications for new AM broadcast stations. In the Second R&O, the Commission also addressed issues raised in the FNPRM released with the First R&O. The Tribal Priority, adopted by the Commission in the First R&O, is available to applicants meeting all of the following eligibility criteria: (1) The applicant is either a federally recognized Tribe or tribal consortium, or an entity 51 percent or more of which is owned or controlled by a Tribe or Tribes, at least part of whose tribal lands (as defined in note 30 of the Rural NPRM) are covered by the principal community contour of the proposed facility; (2) at least 50 percent of the daytime principal community contour of the proposed facilities covers tribal lands; (3) the proposed community of license must be located on tribal lands; and (4) the applicant proposes first aural, second aural, or first local tribal-owned commercial transmission service at the proposed community of license, in the case of proposed commercial facilities, or at least first local tribal-owned noncommercial educational transmission service, in the case of proposed NCE facilities. Although "tribal lands" was given an expansive definition in the First R&O, commenters noted that not all Tribes had reservations or other tribal lands as the

Commission defined that term. Thus, in the FNPRM the Commission sought comment on how the Tribal Priority could be applied to Tribes that lacked tribal lands. Additionally, the Commission sought comment on whether, and how, to establish a bidding credit to assist Tribes seeking to establish commercial radio stations, and competing with non-Tribal applicants for such facilities at auction.

31. After considering the few comments filed in response to the FNPRM, the Commission determined that the record did not support the establishment of a specific coverage standard for Tribes without Tribal Lands. Instead, such Tribes may, through a Tribal official with proper jurisdiction, request waiver of the tribal coverage criterion of the Tribal Priority, by making an appropriate showing of a defined geographic area identified with the Tribe. Among the probative factors in such a showing would be evidence of an area to which the Tribe delivers services to its citizens, or evidence of an area to which the federal government delivers services to Tribal members. Probative evidence might also include evidence of Census Bureau-defined tribal service areas, used by agencies such as the Department of Housing and Urban Development. Additionally, if a Tribe were able to provide evidence that its Tribal government had a defined seat, such as a headquarters or office, this in combination with evidence that Tribal citizens lived and/or were served by the Tribal government in the immediate environs of such a governmental seat would provide strong evidence of a nexus between that community and the Tribe. Absent a physical location for Tribal government, a Tribe might also, for example, provide evidence that a majority of members of the Tribal council or board lived within a certain radius of a community. The Commission would also accept a showing under the standard enunciated in 25 CFR 83.7(b)(2)(i), that more than 50 percent of Tribal members live in a geographical area exclusively or almost exclusively composed of members of the Tribe. Other evidence, such as evidence of the existence of Tribal institutions or events in a defined area, would also be considered probative of a geographically identifiable Tribal population grouping. Regardless of the evidence provided, the Tribe must define a reasonable boundary for the "tribal lands" to be covered, and the community on those lands that would be considered the community of license, with an eye toward duplicating as closely as possible the Tribal Land coverage provisions of the Tribal Priority.

32. In the Rural NPRM, the Commission also stated that the procedures and priorities it had been using to allocate radio service had not been completely successful in effecting the fair, efficient, and equitable distribution of radio service mandated by section 307(b) of the Communications Act. Specifically, the Commission noted that current policies had resulted in an inordinate number of new services in large, already well-served urban areas, as well as moves of existing stations from smaller and rural communities into or near to urbanized areas. The Commission further observed that in many cases, the sole determinant in assigning new service was the number of people receiving new service, and that reliance on the differences in populations receiving new service in already abundantly served areas may have an adverse impact on the fair distribution of service in new AM and FM station licensing, and may be inconsistent with statutory and policy goals.

33. In order to address these concerns, the Commission concluded in the Second R&O that it should rectify the policies that it perceived as overwhelmingly favoring proposals in and near urbanized areas at the expense of smaller communities and rural areas. First, the Commission established a rebuttable presumption that an FM allotment or AM new station proponent seeking to locate at a community in an urbanized area, or that would cover or could be modified to cover more than 50 percent of an urbanized area, in fact proposes service to the entire urbanized area, and accordingly will not receive a section 307(b) preference for providing first local transmission service. This urbanized area service presumption may be rebutted by a compelling showing, not only that the proposed community is truly independent of the urbanized area, but also of the community's specific need for an outlet for local expression separate from the urbanized area and the ability of the proposed service to provide that outlet. Additionally, in the case of applicants for new AM stations, the Commission stated that an applicant proposing third, fourth, and/or fifth reception service to at least 25 percent of the population in the proposed primary service area, where the proposed community of license has two or fewer local transmission services, may receive a dispositive section 307(b) preference under Priority (4). An applicant whose proposed contour does not meet the 25 percent/two transmission service criteria may, but is not required to, provide a Service Value Index showing as set forth in the *Greenup* case. Such a showing, however, must yield a difference in SVI of at least 30 percent over the next-highest ranking proposal in order to receive a dispositive section 307(b) preference under Priority (4) of the assignment priorities. Absent such a showing, no dispositive section 307(b) preference will be awarded, and the competing applications for new AM stations will proceed to competitive bidding.

34. In the case of new FM allotments, before awarding a dispositive section 307(b) preference to an applicant proposing first local service at a community, the Commission will apply the rebuttable urbanized area service presumption as described in the preceding paragraph. If a proposal does not qualify for a first local transmission service preference, the Commission will consider proposals to provide third, fourth, and/or fifth reception service to more than a *de minimis* population under Priority (4), but directs the staff to accord greater weight to service to underserved populations than to the differences in raw population totals. The Commission concluded that raw population total differentials should be considered only after other Priority (4) factors that a proponent might present, including the number of reception services available to the proposed communities and reception areas, population trends in the proposed communities of license/reception areas, and/or number of transmission services at the respective communities.

35. As noted above, in the Rural NPRM the Commission expressed concern over the movement of radio stations away from smaller and rural communities and toward urbanized areas. In order to change its community of license, a radio station must show that service at the new community constitutes a preferential arrangement of allotments or assignments compared to service at the current community. Currently, a substantial number of such applicants justify the benefits of such moves by setting forth the greater number of listeners who would receive a new service at the new community of license. The Commission sought to limit the presumption that such raw net population gains, in and of themselves, represent a preferential arrangement of allotments or assignments under section 307(b). The Commission adopted its proposal to prohibit any community of license change that would create white or gray area, that is, leave any area with no reception services or only one reception service. As with proposals for

new AM stations and FM allotments, the Commission will apply the rebuttable urbanized area service presumption as described above to an applicant for a change of community of license that proposed to provide the new community with its first local transmission service. An applicant not qualifying for a first local transmission service preference may then make a showing under Priority (4), other public interest matters. Such a showing, however, will require the applicant to provide a more detailed explanation of the claimed public interest benefits of the proposed move than is currently the case. A Priority (4) showing that reveals a net loss of third, fourth, or fifth reception service to more than 15 percent of the population in the station's current protected contour will be strongly disfavored. The Commission will now require applicants not only to set forth the size of the populations gaining and losing service under the proposal, but also to summarize the numbers of services those populations will receive if the application is granted, and an explanation as to how the proposal advances the revised section 307(b) priorities. Additionally, pursuant to the Commission's proposal in the Rural NPRM, it will accord significant weight against any proposed removal of a second local transmission service from a community of substantial size (with a population of 7,500 or greater) when determining whether a proposed community of license change represents a preferential arrangement of allotments or assignments. Applicants may also offer, as part of a Priority (4) showing, any other information they believe to be pertinent to a public interest showing, including the need for further transmission service at the new community.

36. In the Rural NPRM, the Commission also noted that the current rules permit FM translator stations originally authorized in the non-reserved band (channels 221–300) to modify their authorizations to "hop" into the reserved band (channels 201–220). Such modifications enable translator stations to operate under the less restrictive NCE rules, permitting the use of alternative methods of signal delivery, such as satellite and terrestrial microwave facilities. Likewise, FM translators authorized in the reserved band are currently able to file modifications to hop into the non-reserved band. The Commission stated that such band-hopping applications by FM translator stations prior to construction of their facilities wastes staff resources, potentially precludes the use of those frequencies in future reserved band filing windows for FM translators, and diminishes the integrity of the window filing process. The Commission therefore tentatively concluded that 47 CFR 74.1233 should be modified to prohibit this practice. In the Second R&O, the Commission adopted its tentative conclusion, and codified this prohibition.

37. The Commission also tentatively concluded, in the Rural NPRM, that it should modify 47 CFR 73.3571 to codify the Commission's decision in *Nelson Enterprises, Inc.,* 18 FCC Rcd 3414 (2003), by explicitly providing that the AM nighttime interference standards found in 47 CFR 73.182(k) should apply in determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window. The Commission believed this rule change was needed to promote the strict interference standard that the Commission has determined is necessary to revitalize the AM service. In the Second R&O, the Commission adopted its tentative conclusion, and codified these procedures.

38. The Commission also released, with the Second R&O, a First Order on Reconsideration, dealing with two issues raised by commenters with regard to the Tribal Priority. One of these issues concerned whether to extend the Tribal Priority to corporations established pursuant to the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. 1601 *et seq.* Such regional corporations are established in the ANCSA statutes and are incorporated under Alaska law. These corporations, however, are not themselves Tribes, and their shares are owned by individual Natives rather than the Tribes themselves. The Commission determined that, because the basis for the Tribal Priority was the government-to-government relationship between the Tribes and the federal government, and because the regional corporations established pursuant to ANCSA are not sovereign or quasi-sovereign entities, the Tribal Priority could not be extended to such corporations.

39. The second issue on reconsideration concerned Tribes with small or irregularly shaped tribal lands. As originally established, the Tribal Priority requires that at least 50 percent of the principal community contour of a proposed station cover tribal lands. A commenter noted that some Tribes had tribal lands that, in total, would not comprise 50 percent of even a small radio station's contour, and moreover that some tribal lands were, for example, strips of land following rivers, that would not fit into the generally circular contours of non-directional radio stations. The Commission adopted a modification of the Tribal Priority: A Tribe may claim the Tribal Priority if (a) at least 50 percent of the proposed facility's principal community contour covers that Tribe's Tribal Lands, as set forth in the First R&O, or (b) the proposed principal community contour (i) covers 50 percent or more of that Tribe's Tribal Lands, (ii) serves at least 2,000 people living on Tribal Lands, and (iii) the total population on Tribal Lands residing within the station's service contour constitutes at least 50 percent of the total covered population. In neither (a) nor (b) may the applicant claim the priority if the proposed principal community contour would cover more than 50 percent of the Tribal Lands of a non-applicant Tribe. This is intended to facilitate use of the Tribal Priority by Tribes with small or irregularly shaped lands, while avoiding the problem of certain Tribes claiming the remaining spectrum in certain areas where many Tribes have smaller tribal lands in close proximity before all qualifying Tribes have an opportunity to apply. In such situations, different Tribes, whose lands are in close proximity to each other, might be encouraged to form consortia to establish radio service serving the various Tribes' needs, as well as sharing the expense of starting new radio service. The Commission also determined that Tribes complying with these new criteria might still provide service to very small Tribal populations situated among much larger non-Tribal populations. This is also designed to ensure that the Tribal Priority is used primarily to establish service to Tribal populations and communities, rather than proportionally minimal Tribal populations. The limitations on claiming the Tribal Priority in these situations is subject to waiver requests in appropriate situations (such as proposals covering a number of Tribes, narrowly tailored to minimize non-Tribal coverage, in areas where there is abundant non-Tribal service and no Tribal service).

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

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

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

41. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the

rules adopted herein. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," small organization," and "small government 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 which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

42. The subject rules and policies potentially will apply to all AM and FM radio broadcasting licensees and potential licensees. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public. Included in this industry are commercial, religious, educational, and other radio stations. Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included. However, radio stations that are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number. The SBA has established a small business size standard for this category, which is: firms having $7 million or less in annual receipts (13 CFR 121.201, NAICS code 515112 (updated for inflation in 2008)). According to BIA Advisory Services, L.L.C., MEDIA Access Pro Database on January 13, 2011, 10,820 (97%) of 11,127 commercial radio stations have revenue of $7 million or less. Therefore, the majority of such entities are small entities. We note, however, that many radio stations are affiliated with much larger corporations having much higher revenue. Our estimate, therefore, likely overstates the number of small entities that might be affected by any ultimate changes to the rules and forms.

Description of Projected Reporting, Record Keeping and Other Compliance Requirements

43. As described, certain rules and procedures will change, although the changes will not result in substantial increases in burdens on applicants. A question will be modified in FCC Form 340, to reflect the changed tribal coverage provisions for claiming eligibility for the Tribal Priority. These are largely self-identification questions reflecting the applicant's status, although in the case of tribal coverage some geographic analysis may be required, and/or a showing may be needed to establish eligibility for the Tribal Priority in the absence of tribal lands as defined in the First R&O. In certain cases (AM auction filing window applications, FM allotment proceedings, and applications to change community of license), section 307(b) information is already required. In some cases, the procedures set forth in the Second R&O require more stringent analysis of information already requested of such applicants, resulting in little or no increase in burden on those applicants. In other cases, especially with regard to applications to change community of license, applicants may need to perform more analysis than is currently the case, increasing the reporting burden. Also, new showings may be required of certain applicants claiming the Tribal Priority, in order to demonstrate their eligibility for the priority. However, these burdens should be moderate to minimal, and are needed in order to achieve the Commission's statutory mandate of fair, efficient, and equitable distribution of radio service (and, in the case of Tribal Priority claimants, are necessary in order to open up the Tribal Priority to greater numbers of Tribes seeking to establish new radio service). The remaining procedural changes in the Second R&O are either changes in Commission procedures, requiring no input from applicants, or more stringent regulation of existing requirements. For example, AM auction filing window applicants will continue to be evaluated for mutual exclusivity based on the nighttime interference standards set forth in the *Nelson Enterprises, Inc.* case, and any burden will not be increased merely because those standards are now codified. Likewise, codifying a limitation on FM translator "band hopping" applications may require potential applicants to evaluate whether they are eligible to file, but will not require greater reporting burdens.

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

44. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities (5 U.S.C. 603(c)(1) through (c)(4)).

45. With regard to the proposals in the FNPRM, the Commission did receive and consider two alternative proposals for Tribes without tribal lands wishing to claim the Tribal Priority. The Commission did not adopt either proposal, choosing instead to consider requests for waiver of the tribal coverage criterion of the Tribal Priority. The waiver standard allows requesting parties the flexibility to determine how much or how little information is necessary to overcome the criterion, and thus can be less burdensome than a more rigid standard.

46. In the Rural NPRM, the Commission put forth several alternative proposals for modifications to its section 307(b) evaluation procedures, in an effort to encourage the establishment of new service at smaller and rural communities and prevent stations already serving such communities from moving out. Many of these were ultimately rejected in favor of less burdensome alternatives. For example, the Commission considered not awarding dispositive section 307(b) preferences to AM filing window applicants unless they proposed *bona fide* first transmission service or better, eliminating a Priority (4) "other public interest matters" analysis entirely. After considering comments, the Commission decided that applicants should be afforded the opportunity to demonstrate that they would provide service to underserved populations, and thus that new service at the proposed community fulfilled the objectives underlying section 307(b). The Commission also proposed to require a *Greenup* Service Value Index showing but, due to the expense of such showings, determined that such a showing should be optional but not required. Certain other alternatives, proposed as high priorities or mandatory showings in the *Rural NPRM,* were instead included in Priority (4), other public interest matters or were otherwise downgraded in the *Second R&O.* For example, the Commission did not, as proposed, establish a priority for underserved listeners (those who would receive third, fourth, and fifth service), but rather indicated that it would strongly favor such showings under Priority (4); moreover, the Commission did not adopt the proposal to bar absolutely community of license changes that would remove service to underserved listeners, although it indicated it would strongly disfavor such moves. Similarly, the Commission did not adopt a proposal to bar removal of second local transmission service at a community,

stating instead that such removals would weigh heavily against such moves in communities of over 7,500 population. These modifications of the Rural NPRM proposals were made based upon comments filed by broadcasters, many of whom are small businesses, and are designed to accommodate their concerns while still rectifying the problems identified by the Commission in making its Rural NPRM proposals. The Commission thus determined that the procedural changes, as adopted, represent the least burdensome means of achieving the stated policy goals.

47. With regard to the proposed rule banning translator "band hopping" applications, the Commission did consider commenter's proposals but decided to adopt the rule as proposed. The alternatives proposed and considered did not, in the Commission's view, fully address the basic unfairness inherent in allowing certain translator permittees and licensees to change frequencies in order to take advantage of different operating rules in another frequency band. Because this practice gives an unfair advantage to a small subset of translator operators, the Commission believed the proposed rule was necessary to make the operating rules uniform for all such operators.

48. The proposed rule applying AM nighttime mutual exclusivity standards to mutually exclusive AM filing window applications merely codifies current procedure established in Commission precedent, and presents no change or new burden on applicants requiring consideration of less burdensome alternatives. The Commission did propose, in the Rural NPRM, to codify certain guidelines for submitting contours using alternate prediction methods. However, in part because commenters identified certain technical difficulties and burdens associated with the proposed guidelines, the Commission declined to adopt the proposal.

49. Finally, the Commission granted on reconsideration a proposal for an alternative tribal coverage provision of the Tribal Priority. As discussed above, Tribes with small tribal lands in some cases could not comply with the Tribal Priority condition that 50 percent or more of the proposed principal community contour cover those tribal lands. Only one proposal was submitted to rectify this problem. While the Commission adopted this proposal, it modified it to provide that the Tribal Priority would not be afforded an applicant who covered more than 50 percent of another, non-applicant Tribe's tribal land. The Commission made this modification to avoid a situation in which Tribes with tribal lands in close proximity raced to be the first to claim limited spectrum in an area. Likewise, on its own motion the Commission determined that proposed service to small Tribal Lands of less than 2,000 population would not be considered significant enough to qualify for the Tribal Priority, and that the Tribal population covered by the proposal is at least 50 percent of the total covered population. This is to avoid the situation in which a relatively small Tribe would gain a priority for service to a potentially much larger non-Tribal population. Thus, while other alternatives were not presented, the Commission considered the problem and arrived at its own modifications in order to avoid potential conflicts among qualified Tribal applicants, and in order to avoid unfairness to non-Tribal applicants at the expense of small Tribes, who nonetheless retain the ability to form consortia to establish new radio service and qualify for the Tribal Priority.

Report to Congress

50. The Commission will send a copy of the Second R&O, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801(a)(1)(A)). In addition, the Commission will send a copy of the Second R&O, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Second R&O, First Order on Reconsideration, and FRFA (or summaries thereof) will also be published in the **Federal Register** (*See* 5 U.S.C. 604(b)).

Ordering Clauses

51. Accordingly, *it is ordered,* pursuant to the authority contained in sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 303, 307, and 309(j), that this Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making *is adopted.*

52. *It is further ordered* that, pursuant to the authority found in sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 548, the Commission's rules are hereby amended as set forth herein.

53. *It is further ordered* that the rules adopted herein will become effective May 6, 2011, except for Section 73.7000, which contains information collection requirements that have not been approved by OMB. The Commission will publish a document in the **Federal Register** announcing the effective date.

List of Subjects

47 CFR Part 73

Radio broadcast services.

47 CFR Part 74

Experimental radio, auxiliary, special broadcast and other program distributional services.

Federal Communications Commission.

Bulah Wheeler,

Deputy Manager.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 73 and 74 to read 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, 336, and 339.

■ 2. Section 73.3571 is amended by revising paragraph (h)(1)(ii) and adding a Note to the end of the section to read as follows:

§ 73.3571 Processing of AM broadcast station applications.

* * * * *

(h) * * *

(1) * * *

(ii)(A) Such AM applicants will be subject to the provisions of §§ 1.2105 of this chapter and 73.5002 regarding the submission of the short-form application, FCC Form 175, and all appropriate certifications, information and exhibits contained therein. Applications must include the following engineering data:

(*1*) Community of license;

(*2*) Frequency;

(*3*) Class;

(*4*) Hours of operations (day, night, critical hours);

(*5*) Power (day, night, critical hours);

(*6*) Antenna location (day, night, critical hours); and

(*7*) All other antenna data.

(B) Applications lacking data (including any form of placeholder, such as inapposite use of "0" or "not applicable" or an abbreviation thereof) in any of the categories listed in paragraph (h)(1)(ii)(A) of this section will be immediately dismissed as incomplete without an opportunity for amendment. The staff will review the remaining applications to determine whether they meet the following basic eligibility criteria:

(*1*) Community of license coverage (day and night) as set forth in § 73.24(i), and

(*2*) Protection of co- and adjacent-channel station licenses, construction permits and prior-filed applications (day and night) as set forth in §§ 73.37 and 73.182.

(C) If the staff review shows that an application does not meet one or more of the basic eligibility criteria listed in paragraph (h)(1)(ii)(B) of this section, it will be deemed "technically ineligible for filing" and will be included on a Public Notice listing defective applications and setting a deadline for the submission of curative amendments. An application listed on that Public Notice may be amended only to the extent directly related to an identified deficiency in the application. The amendment may modify the proposed power, class (within the limits set forth in § 73.21 of the rules), antenna location or antenna data, but not the proposed community of license or frequency. Except as set forth in the preceding two sentences, amendments to short-form (FCC Form 175) applications will not be accepted at any time. Applications that remain technically ineligible after the close of this amendment period will be dismissed, and the staff will determine which remaining applications are mutually exclusive. The engineering proposals in eligible applications remaining after the close of the amendment period will be protected from subsequently filed applications. Determinations as to the acceptability or grantability of an applicant's proposal will not be made prior to an auction.

* * * * *

Note to § 73.3571: For purposes of paragraph (h)(1)(ii) of this section, § 73.182(k) interference standards apply when determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window. Two applications would be deemed to be mutually exclusive if either application would be subject to dismissal because it would enter into, i.e., raise, the twenty-five percent exclusion RSS nighttime limit of the other.

■ 3. Section 73.7000 is amended by revising the definition of "Tribal coverage" to read as follows:

§ 73.7000 Definition of terms (as used in subpart K only).

* * * * *

Tribal coverage. (1) Coverage of a Tribal Applicant's or Tribal Applicants' Tribal Lands by at least 50 percent of a facility's 60 dBu (1 mV/m) contour, or

(2) The facility's 60 dBu (1 mV/m) contour—

(i) Covers 50 percent or more of a Tribal Applicant's or Tribal Applicants' Tribal Lands,

(ii) Serves at least 2,000 people living on Tribal Lands, and

(iii) The total population on Tribal Lands residing within the station's service contour constitutes at least 50 percent of the total covered population. In neither paragraphs (1) nor (2) of this definition may the applicant claim the priority if the proposed principal community contour would cover more than 50 percent of the Tribal Lands of a non-applicant Tribe. To the extent that Tribal Lands include fee lands not owned by Tribes or members of Tribes, the outer boundaries of such lands shall delineate the coverage area, with no deduction of area for fee lands not owned by Tribes or members of Tribes.

* * * * *

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

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

Authority: 47 U.S.C. 154, 302a, 303, 307, 336(f), 336(h) and 554.

■ 5. Section 74.1233 is amended by revising paragraph (a)(1), to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

(a) * * *

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. For FM translator stations, a major change is any change in frequency (output channel) except changes to first, second or third adjacent channels, or intermediate frequency channels, and any change in antenna location where the station would not continue to provide 1 mV/m service to some portion of its previously authorized 1 mV/m service area. In addition, any change in frequency relocating an unbuilt station from the non-reserved band to the reserved band, or from the reserved band to the non-reserved band, will be considered major. All other changes will be considered minor. All major changes are subject to the provisions of §§ 73.3580 and 1.1104 of this chapter pertaining to major changes.

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