

FCC PROPOSES SIGNIFICANT CHANGES TO
PROCEDURES FOR AWARDING
COMMERCIAL SPECTRUM IN THE AM AND
FM BANDS

COMMENTS DUE JULY 13, 2009
REPLY COMMENTS DUE AUGUST 11, 2009



The FCC has issued a Notice of Proposed Rule Making (“NPRM”) that considers a wide range of changes to the FCC’s current procedures for awarding commercial broadcast spectrum in the AM and FM broadcast bands. The stated goal of this proceeding is to promote the fair distribution of broadcast licenses to smaller communities, rural areas, and tribal areas; however, implementation of these proposals will make it more difficult to obtain approval for new FM allotments, new and major change AM applications, and applications for changes to a station’s community of license where the proposed community of license is located within or adjacent to an urbanized area. The FCC also has proposed new rules and procedures that are designed to afford greater opportunities to participate in competitive bidding, promote the filing of technically sound applications, and deter speculation.

Proposed Changes to FM Allotment Priorities. The FCC’s FM allotment priorities, which were subsequently also applied to mutually-exclusive new and major change AM applications submitted during an auction filing window, award priority between or among conflicting proposals to those that would provide new service to unserved (Priority 1) or severely underserved (Priority 2 – for second aural service) populations, and to those bringing first local transmission service to a community that has no such service (Priority 3). Conflicts between proposals that cannot be resolved by application of the first three allotment priorities are analyzed under the “other public interest” standard (Priority 4). Because applications proposing a first or second aural service are rare, new FM allotments and mutually exclusive AM applications are typically analyzed under either Priority 3 or Priority 4.

When evaluating competing proposals for a first local service (Priority 3) preference, the FCC’s long-standing practice is to favor service to the community with the largest population. Similarly, under Priority 4, the FCC often gives a dispositive preference to the proposal that will serve the largest population. The FCC is concerned that its current evaluation of proposals under Priority 3 and Priority 4 unduly favors suburban communities near or adjacent to large cities and urbanized areas with larger populations, at the expense of smaller communities and rural areas. To rectify this perceived procedural bias, the FCC seeks comment on the following:

- Whether the tentative conclusion that any new station proposal that would be located within an urbanized area or that would place a daytime principal community signal over 50% or more of an urbanized area (or that could be modified to provide such coverage), should be deemed a proposal to serve the urbanized area and not the proposed community of license. Absent an effective rebuttal of that presumption, such a proposal would not be awarded a Priority 3 dispositive preference. The FCC also seeks comment on which factors should serve to rebut that presumption.
- Whether the FCC’s existing test for determining a proposed community’s independence from an urbanized area (the so-called “Tuck” analysis) retains any validity given the FCC’s shift to use urbanized area coverage as the primary factor in determining whether an

applicant may claim a Priority 3 preference.

- With respect to mutually-exclusive AM applications, whether the FCC should stop awarding a dispositive preference for applicants that cannot qualify for a preference under Priorities 1, 2, or 3, and instead require that the mutual-exclusivity be resolved by competitive bidding. Alternatively, should the FCC award a dispositive Priority 4 preference only in very narrowly defined circumstances, such as where existing transmission or reception services to the proposed community or service area fall below a service level “floor”. In this regard, the FCC has tentatively concluded where 75% or more of the population within a proposed new AM station’s principal community contour already receives more than five aural services, and where the proposed community of license already has more than five transmission services, no dispositive preference would be awarded.
- Whether the Priority 4 analysis of mutually-exclusive new AM station applications should be evaluated using the “service value index” (“SVI”), a method of discounting raw population totals based on the number of services received (and currently used in FM allotment proceedings) to level the playing field between proposals to serve larger and more populous communities and smaller communities and rural areas.
- Whether the FCC should establish an “underserved listeners” priority, co-equal with current Priorities 2 and 3, for proposals that would provide a third, fourth, or fifth aural reception service to a substantial portion of a proposed service population.
- Whether the FCC should formalize its tentative conclusion to provide federally recognized American Indian Tribes and Alaska Native Villages a likely dispositive priority in FM allotment proceedings, between or among conflicting AM filing window applications, and between or among conflicting noncommercial, educational FM filing window applications.

Proposed Limits on Moves of Existing Stations from Smaller Communities. Under current rules, an existing licensee or permittee may change its designated community of license by means of first come-first served minor modification applications. In order to prevent the loss of radio service to smaller and more rural communities, the FCC has proposed that:

- A community of license change that creates “white” or “grey” areas (meaning areas with no or only one reception service) should not be allowed under any circumstances.
- Applications to move a station to become a new community’s first local service will not qualify for a Priority 3 preference if the new facility would be located in, or would or could be modified to place a daytime principal community signal over 50% or more of, a near-by urbanized area.
- A proposed station move that would deprive a significant population of its third, fourth or fifth reception service should be presumed to be contrary to the public interest. The FCC also seeks comment on whether the removal of the second local service from a community, even to provide first local service to a new community, should be prohibited.

AM Auction Filing Window Proposals. The FCC has proposed the following procedural changes relating to applications filed in response to AM auction filing windows:

- An applicant for a mutually-exclusive application that receives a dispositive preference should not be allowed to downgrade that proposal such that it serves a smaller population, or otherwise negates the factors that led to the award of the dispositive preference.

- All applications filed in future AM broadcast auction windows be required to meet basic technical and eligibility criteria, including community of license coverage (day and night) and protection of co- and adjacent-channel stations and prior-filed applications (day and night), and to prohibit the amendment of applications that, at the time of filing, are technically ineligible to proceed with auction processing. For example, if the facilities proposed in an auction application would not provide the requisite coverage to the station's proposed community of license, that application could not be amended to correct that deficiency and would not qualify for consideration.

- The FCC should limit the number of AM applications that may be filed by individual applicants during AM auction windows.

- The FCC should use the Section 73.182(k) interference standards to determine nighttime mutual exclusivity between applications, meaning that two applications would be deemed to be mutually exclusive if either application would be subject to dismissal because it would enter the 25% root-sum-square ("RSS") nighttime limit of the other.

Alternate Methods for Predicting FM Contours. Under Section 73.313(e), alternate methods for predicting FM contours may be employed in cases where the terrain in one or more directions from the antenna site "departs widely" from the average elevation used by FCC staff in predicting contours. The FCC proposes to codify the following two standards as the showings required in order to justify submission of contour calculations by methods other than the FCC's standard methodology. First, terrain will be considered to depart widely when the antenna height above average terrain ("HAAT") along a single radial in the direction of a community's center, from three to 16 kilometers from the antenna site, varies by more than 30% from the HAAT along the same radial, measured from three kilometers from the antenna site to the community's outer boundary. Second, when there is line of sight coverage from the antenna to the community of license, terrain will be found to depart widely when the actual terrain roughness factor, measured along the radial running from the antenna site to the community center from a distance of 10 to 50 kilometers from the antenna site (known as "delta-h"), is less than or equal to 20 meters or greater than or equal to 100 meters.

Prohibition on FM Translator Band Hopping. The FCC proposes to prohibit FM translator stations from moving into the reserved band from the non-reserved band, or into the non-reserved band from the reserved band, unless the FM translator's license application has been filed and the station has been operational for at least two years.

Clarification of New Entrant Bidding Credits. In order to encourage participation by small, minority- and women-owned businesses, the FCC has incorporated "new entrant" bidding credits into the broadcast auction process. A new entrant bidding credit enables qualified applicants to lower the cost of their winning bid. Currently, a winning bidder is not eligible for a new entrant bidding credit if it, or any party with an attributable interest in the winning bidder, has an attributable interest in a full power broadcast station the principal community contour of which overlaps the principal community contour of the winning bidder's proposed facility. The FCC proposes to clarify that, for purposes of a bidding credit, the contour of a proposed facility will be defined by the maximum class of the proposed facility at the allotment site.

The FCC currently requires a recipient of a new entrant bidding credit to reimburse the government for all or part of the bidding credit (on a sliding scale, over time), plus interest, if the winning bidder either assigns or transfers control of the permit or license to an entity that is not eligible for the same bidding credit. The FCC has tentatively concluded that the same reimbursement analysis should apply to assignments or transfers of control that are

considered *pro forma* in nature.

Finally, the FCC proposes to amend its rules to state unequivocally that a new entrant bidding credit may be diminished based on post-filing changes to the bidder's status, such as a bidder's acquisition of attributable interests that negate their new entrant status.

Comments in this proceeding are due by July 11, 2009, with reply comments due by August 11, 2009.

Should you have any questions concerning the issues raised in the NPRM, or if you are interested in filing comments in this proceeding, please contact any attorney in our office.

This memorandum is intended only as a general discussion of these issues and should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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