



Federal Communications Commission
Washington, D.C. 20554

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Small Entity Compliance Guide

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

FCC 10-24
MB Docket No. 09-52
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This Guide is prepared in accordance with the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities—small businesses, small organizations (non-profits), and small governmental jurisdictions—comply with the new rules adopted in the above-referenced FCC rulemaking docket(s). This Guide is not intended to replace the rules and, therefore, final authority rests solely with the rules. Although we have attempted to cover all parts of the rules that might be especially important to small entities, the coverage may not be exhaustive. This Guide may, perhaps, not apply in a particular situation based upon the circumstances, and the FCC retains the discretion to adopt approaches on a case-by-case basis that may differ from this Guide, where appropriate. Any decisions regarding a particular small entity will be based on the statute and regulations.

In any civil or administrative action against a small entity for a violation of rules, the content of the Small Entity Compliance Guide may be considered as evidence of the reasonableness or appropriateness of proposed fines, penalties or damages. Interested parties are free to file comments regarding this Guide and the appropriateness of its application to a particular situation; the FCC will consider whether the recommendations or interpretations in the Guide are appropriate in that situation. The FCC may decide to revise this Guide without public notice to reflect changes in the FCC's approach to implementing a rule, or to clarify or update the text of the Guide. Direct your comments and recommendations, or calls for further assistance, to the FCC's Consumer Center:

1-888-CALL-FCC (1-888-225-5322)
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Decision Document and Internet Link

• *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order and Further Notice of Proposed Rule Making, Procedures, First Report and Order and Further Notice of Proposed Rulemaking, FCC 10-24, 25 FCC Rcd 1583 (2010); *see also* for the First Report and Order, 75 Fed. Reg. 9797 (March 4, 2010); and for the Further Notice of Proposed Rulemaking, 75 Fed. Reg. 9856 (March 4, 2010).

The links to these documents are as follows:

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-24A1.doc;
http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-24A1.pdf

Background

• As part of the Commission's commitment to diversity of ownership and programming, as well as the federal government's obligation to assist Tribes in preserving their cultures and languages, as well as to promote tribal self-government, the Commission proposed a Tribal Priority under Section 307(b) of the Communications Act of 1934, as amended, to assist Tribes and tribal entities that propose primarily to serve tribal lands and populations in obtaining new radio stations. The proposed Tribal Priority thus addressed the marked imbalance in the tribal population of the United States and the area of tribal lands, versus the number and reach of tribal-owned radio stations to serve these populations. On February 3, 2010, the Commission released a *First Report and Order* adopting rules that establish the Tribal Priority for federally recognized Native American Tribes and Alaska Native Villages ("Tribes"), tribal consortia, and entities that are majority owned or controlled by Tribes. Additionally, in the *First Report and Order*, the Commission amended, codified, and clarified certain assignment, allotment, and auction policies and procedures, in order to streamline these procedures, and to provide greater clarity and certainty in the radio licensing process.

Key Objectives of Proceeding

- Authorize and implement the Tribal Priority.
- Amend, codify, and clarify certain assignment, allotment, and auction policies and procedures in order to streamline the radio licensing processes and expedite authorization of new radio service to the public.

Entities Directly Affected by the Rule

- Federally recognized Native American Tribes and Alaska Native Villages and their citizens
- Applicants for AM, FM, Noncommercial Educational ("NCE") FM radio stations
- AM, FM, NCE FM radio broadcasters
- Proponents of new FM allotments in the non-reserved FM band

Key Compliance Requirements

• **Tribal Priority.** To qualify for the Tribal Priority, an applicant must demonstrate that it meets 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. Qualifying Tribes or tribal entities must be those at least a portion of whose tribal lands lie within the principal community contour of the proposed facility. Although the 51 or greater percent Tribal control threshold need not consist of a single Tribe, the qualifying entity must be 51 percent or more owned or controlled by Tribes at least a portion of whose tribal lands lie within the facility's principal community contour;
- (2) at least 50 percent of the daytime principal community contour of the proposed facility must cover tribal lands;
- (3) the proposed community of license must be located on tribal lands; and
- (4) the tribal applicant must propose first or second aural (reception) service, or first local tribal-owned commercial transmission service at the proposed community of license, in the case of a proposed commercial facility. The tribal applicant must propose first or second aural service, or a first local tribal-owned noncommercial educational transmission service, in the case of a proposed NCE facility.

• In the event that two or more applicants claiming the Tribal Priority are mutually exclusive, the one providing the highest level of service to the greatest population will prevail. The Tribal Priority ranks between the current Priority (1) and co-equal Priorities (2) and (3) in the case of commercial applicants. Thus, the Tribal Priority will not take precedence over a proposal to provide first reception service to a greater than *de minimis* population, but will take precedence over the provision of second local reception service, or over a proposal for first local non-tribal owned transmission service. Likewise, an NCE applicant qualifying for the Tribal Priority will take precedence over all mutually exclusive applications, except an applicant proposing *bona fide* first aural reception service to a greater than *de minimis* population.

• The Tribal Priority will be applied at the allotment stage of the commercial FM licensing procedures; to commercial AM applications filed during an AM filing window, as part of the threshold Section 307(b) analysis; and to applications filed in an NCE FM filing window as the first part of the fair distribution analysis. NCE applicants must also meet all NCE eligibility and licensing requirements.

• Holding period restrictions, commencing with the award of a construction permit until the completion of four years of on-air operation, will apply to any authorization or allotment awarded pursuant to the Tribal Priority. In the case of an AM or NCE FM authorization awarded to a tribal applicant, the permittee/licensee will be prohibited during this period from making: (1) any change that would lower tribal ownership below the 51 percent threshold; (2) a change of community of license; or (3) a technical change that would cause less than 50 percent of the principal community contour to cover tribal lands. However, gradual changes in the composition of an NCE board that do not change the nature of the organization or break continuity of control will not violate the four-year holding period restrictions. In the case of a commercial FM allotment, the restrictions will apply only to any proposed change of community of license or technical change as described above. The winner at auction of an FM allotment added to the

Table of Allotments under a Tribal Priority, whether the winning bidder is Tribal or non-Tribal, must still provide broadcast service primarily to tribal lands for the entire four-year holding period.

• **Other Auction Policies and Procedures.** A commercial AM auction applicant receiving a dispositive preference under Section 307(b), without going to auction, will be required to operate with substantially the same facilities as those on which the dispositive preference was awarded for four years of on-air operations. An AM licensee or permittee receiving a dispositive preference may modify its facilities as long as it continues to provide the same priority service to substantially the same number of persons who would have received such service under the initial proposal. “Substantially” means that any modification must not result in a decrease of more than 20 percent of any population figure that was a factor in obtaining the Section 307(b) preference.

- AM auction applicants must now submit technical proposals that meet minimum technical eligibility criteria, including day- and nighttime community coverage, and protection of co- and adjacent-channel stations and prior-filed applications. Applicants not meeting these criteria will receive one opportunity to file a curative amendment before their applications are dismissed.

- The Commission has delegated authority to the staff to allow certain qualifying AM auction filing window applicants to submit settlements or technical resolutions that resolve fewer than all mutual exclusivities in the group, as long as the party proposing a technical resolution eliminates all of at least one applicant’s mutual exclusivities in the group. In other words, a settlement or technical resolution does not need to break up or resolve all mutual exclusivities within an entire application group, but at least one singleton application must emerge from the group after grant of a settlement or technical resolution.

- The Commission has delegated authority to the staff to limit the number of AM applications that may be filed by any one applicant in an AM auction filing window, as a way to deter speculative applications, reduce administrative burdens, and expedite new service to the public. The specific cap for a given auction will be announced in the Public Notice announcing that auction.

- The Commission has delegated authority to the staff to extend the firm 30-day deadline for filing post-auction long-form applications, set forth in Section 73.5005 of the Rules. The staff may extend this deadline when deemed necessary, for example, when the filing deadline would fall during holiday seasons.

- The Commission clarifies, in Section 73.5007(b) of the Rules, that for purposes of the new entrant bidding credit, an applicant’s existing station is considered to be in the “same area” as an FM allotment being auctioned if the existing station’s contour overlaps the maximum class facilities of the FM allotment being auctioned, without regard to whether the applicant specifies preferred site coordinates on its FCC Form 175 application.

- To prevent unjust enrichment by parties that acquire broadcast permits in auctions through the use of a new entrant bidding credit, Section 73.5007(c) of the Rules requires reimbursement to the Commission upon a subsequent assignment or transfer, if the proposed assignee or transferee is not eligible for the same percentage of bidding credit. The Commission also clarifies, in Section 73.5007(c), that unjust enrichment payments to the government must be made even when an assignment or transfer is *pro forma* (filed on FCC Form 316).

- The Commission codifies existing case law holding that new entrant bidding credit eligibility can be diminished or lost as a result of post-filing changes in the applicant's status, which changes must be reported immediately, and no later than five business days after the change occurs. That is, an auction applicant's eligibility for the new entrant bidding credit is not "frozen" as of the short-form filing deadline, but may be reduced or eliminated if, for example, the applicant acquires new attributable interests in media of mass communications.

Licensing:

- Electronic Filing Required: FCC Forms 301, 314, 315, 316, and 340 must still be filed electronically using the Commission's Consolidated Database System ("CDBS") Electronic Filing System via the Internet from the Media Bureau's Web site at: <http://www.fcc.gov/mb/cdb.html> or http://fjallfoss.fcc.gov/prod/cdb/forms/prod/cdb_ef.htm.
- FCC Form 175 must be filed electronically using the Commission's Integrated Spectrum Auction System ("ISAS"). Filing instructions are provided in pre-auction Public Notices.
- Tribes, tribal consortia, and tribal-owned or controlled entities wishing to apply for noncommercial educational FM broadcast stations in the reserved band, and that wish to employ the Tribal Priority, must use FCC Form 340, which has been modified to include questions regarding eligibility to claim the Tribal Priority.
- Tribes, tribal consortia, and tribal-owned or controlled entities wishing to apply for commercial AM broadcast stations will continue to use FCC Form 175 for their applications. They will claim eligibility for the Tribal Priority when instructed to submit Section 307(b) information, if applicable.
- Tribes, tribal consortia, and tribal-owned or controlled entities wishing to petition to add FM allotments to the Table of Allotments (Section 73.202(b) of the Rules) will continue to do so by submitting Petitions for Rule Making seeking to add an FM allotment. They will claim eligibility for the Tribal Priority in the Petition for Rule Making.