



# NEWS

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action.  
See MCI v. FCC, 515 F 2d 385 (D.C. Circ 1974).

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FOR IMMEDIATE RELEASE  
April 10, 2003

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## **FCC ADOPTS PROCEDURES FOR NON-RESERVED SPECTRUM**

Washington, DC – The Federal Communications Commission (“FCC”) today released new procedures to allocate and license “non-reserved” broadcast spectrum where conflicting commercial and noncommercial uses are proposed. Non-reserved spectrum is broadcast spectrum that the FCC has not reserved for the exclusive use of noncommercial educational (“NCE”) broadcast stations.

The FCC adopted its new procedures in light of a decision by the U.S. Court of Appeals for the D.C. Circuit. Section 309(j)(1) of the Communications Act generally requires the FCC to resolve competing applications for construction permits or licenses via auction, but section 309(j)(2)(C) exempts NCE stations from this process. In April 2000, the FCC decided that the “auction exemption” of section 309(j)(2)(C) applied only when applicants for NCE stations sought the FM and TV channels reserved specifically for them; thus, the FCC decided that applicants for NCE stations, like applicants for commercial stations, must compete at auction for non-reserved spectrum. In order to mitigate any hardship for NCE stations, the FCC also decided to reserve additional FM and TV channels for their exclusive use whenever a proponent for reservation could demonstrate that it is technically precluded from using an already-reserved channel, and that it will provide needed NCE service in a given area, according to a particular test.

In July 2001, the U.S. Court of Appeals for the D.C. Circuit rejected the FCC’s interpretation of the auction exemption and said that “nothing in the Act authorizes the Commission to hold auctions for licenses issued to NCEs to operate in the unreserved spectrum,” because section 309(j)(2) denied the FCC the authority to use competitive bidding “based on the nature of the station that ultimately receives the license, and not on the part of the spectrum in which the station operates.” The court’s decision did not have any impact on the relaxed standards for reserving additional FM and TV channels. In order to resolve the issues raised by the court’s decision, the FCC issued a *Second Further Notice of Proposed Rulemaking* seeking comment on the scope of the auction exemption, and on options for resolving the competing interests of applicants for commercial and NCE stations in the non-reserved spectrum.

Today’s *Report and Order* makes several determinations. First, the FCC said the auctions exemption for NCE stations applies to two types of broadcast stations: (1) AM, FM, and full-power TV stations that a nonprofit educational organization demonstrates will be used to advance an educational program and are eligible to be licensed as NCE stations pursuant to applicable service-specific standards; and (2) stations that will be used by a municipality to transmit only noncommercial programs for educational purposes. These standards track the definition of NCE stations that the Communications Act uses for purposes of section 309(j)(2)(C).

Applicants that do not satisfy one of these standards must compete at auction for licenses. Thus, an applicant is not exempt from auction under the first of the two standards if it applies for a station in a service for which the FCC does not have NCE eligibility rules, or if it fails to demonstrate it will use the station to advance an educational purpose.

Second, although the FCC will not hold applicants for NCE stations ineligible for non-reserved channels (in the same way that applicants for commercial stations are ineligible for reserved channels), applications for NCE stations will be dismissed if they conflict with an application for a commercial station after any applicable settlement window expires. Under existing rules, applicants for secondary services (*i.e.*, LPTV and translator services) already have a limited opportunity to resolve their application conflicts outside of the auction process, in part because engineering solutions are possible. Under the new procedures, the FCC will extend a similar opportunity to resolve application conflicts to mixed groups of applicants for AM service, because engineering solutions are likewise possible.

Finally, the FCC reaffirmed that it will continue to reserve additional FM and TV channels for NCE stations if the proponent for reservation demonstrates that it is technically precluded from using an already-reserved channel, and it will provide needed NCE service in a given area. As a result of today's action, the FCC will allow proponents for reservation to apply these criteria not only in future allocation proceedings, but also to FM and TV channels currently in the Table of Allotments for which the FCC initiated an allocation proceeding prior to the effective date of these reservation standards, and for which the FCC has never accepted applications.

Action by the Commission, March 4, 2003 by Report and Order (FCC 03-44) Chairman Powell, Commissioners Abernathy, Martin and Adelstein, with Commissioner Copps concurring and issuing a separate statement.

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