

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 85-125
35597

In the Matter of)
)
Amendment of Sections 73.3572 and) MM Docket No. 84-750
73.3573 Relating to Processing of)
FM and TV Broadcast Applications)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 14, 1985 ; Released; May 6, 1985

By the Commission:

Introduction

1. The Commission has before it a Notice of Proposed Rule Making ("Notice") in the above-captioned proceeding, 1/ and comments filed in response thereto. The Notice proposed replacing the existing two-step cut-off procedure utilized to process applications for new commercial FM and TV stations and modifications to existing stations in these services 2/ with an alternative processing system designed to expedite authorization of new or expanded service to the public. 3/ Under the proposed approach, the Commission would announce a one-time, fixed filing period - or "window" - governing all applications for currently vacant channels in the commercial FM

1/ FCC 84-356 (released September 7, 1984), 49 Fed. Reg. 36523 (September 18, 1984).

2/ Parallel provisions for the processing of television and FM applications are contained, respectively, in Sections 73.3572 and 73.3573 of the Commission's rules.

3/ We observed in the Notice that "we do not contemplate application of these procedures to noncommercial FM and TV channels" because of the "special problems of ... applicants [for such channels] in securing funding, staff and programming before applying for a new station." Notice at n.10. We are convinced that our initial reasoning on this matter remains valid. Accordingly, we will not generally apply the new processing standards adopted herein to applications for reserved, noncommercial channels. In certain limited circumstances, however, where conflicts between noncommercial and commercial facilities occur, "first come/first serve" procedures applicable to commercial licensing will affect noncommercial applicants. See n.35 and para. 37 infra.

and TV Tables of Allotments or for modifications to existing facilities. 4/ All mutually exclusive applications filed during the window would be subject to comparative hearings to determine the best applicant. If only a single acceptable application is filed during the window, then that application alone would be grantable, subject to the usual qualification criteria. In the event a window closes and no acceptable applications have been filed during the window period, a "first come/first serve" processing standard would then apply whereby the first acceptable application received would cut off the filing rights of any subsequent applicants. Applications for allotments added by future Commission orders would be subject to similar filing windows, as announced in the appropriate allotment order. 5/

2. Commenters were invited to address the legal ramifications of the proposed changes, with particular reference to the notice requirements, to review the practical efficacy of the proposal, and finally to comment on the specifics of the proposal, including the appropriate duration of the window periods. After careful review of the record and analysis of the probable costs and benefits of the proposed changes, we are persuaded that, with certain modifications, adoption of the alternative processing procedures set forth in the Notice is warranted.

Comments

3. The commenting parties generally opposed the proposed changes, 6/ contending that a filing window will encourage a "gold rush" mentality with its attendant mass filings and abuse by professional application promoters. The National Association of Broadcasters and Dow, Lohnes, and Albertson argue that the proposed process substitutes artificial regulatory incentives for actual demand and that broadcasters will be forced to file defensive modification applications in order to avoid being "locked out" of future facilities changes. Most commenters also point to the Commission's experiences with date-certain filing procedures, such as those governing the low power television, cellular radio and multichannel multipoint distribution

4/ The FM "Table of Allotments" is found in §73.202 of the Commission's rules and the TV "Table of Assignments" is found in §73.606. Both tables shall be referred to herein as "Tables of Allotments." At present, the FM Table contains 76 available commercial channels and the TV Table contains 129 vacant commercial channels. A list of these vacant allotments will be published in the near future. Our decision, however, in the Report and Order in BC Docket No. 80-90, 94 FCC 2d 152 (1983), and subsequent implementing actions, will add some 689 new allotments to the FM Table. See n.12 infra.

5/ A more detailed description of the filing window - "first come/first serve" processing system is provided at paragraphs 27-36, infra.

6/ Parties filing comments in this proceeding are: Lauren Colby; Doug McConnell; Black Citizens for a Fair Media and Citizens Communications Center, filing jointly; National Association of Broadcasters; National Radio Broadcasters Association; Dow, Lohnes, & Albertson; International Broadcasting System; Thomas C. Smith; South Wisconsin Co. and Terry Posey, filing jointly; Cohen and Dippell; Newport Engineering; and, Eric Hilding.

services, and maintain that the problems in these services of massive application filings and the Commission's inability to timely process those applications will be repeated here if we implement the proposed changes. Many commenters fear that a sudden influx of applications, which they predict will result from the proposed processing system, will force the Commission to adopt a lottery mechanism for TV and FM services. Several commenters suggest, as well, that actions less drastic than implementation of a filing window and "first come/first serve" procedure can achieve the Commission's stated goals yet avoid the dangers they see inherent in our proposal. They contend, for example, that requiring more stringent showings as to financial qualifications and site availability would cut down on "strike" applications.

4. Citizens Communications Center and Black Citizens for a Fair Media ("CCC-BCFM"), as well as other commenters, express concern that the proposed 45 day duration for the filing window will particularly disadvantage minorities, women and small businesses. They maintain that only well-financed and established entities will be able to respond within such a limited time frame. These commenters also focus on the "first come/first serve" aspect of the proposed changes, asserting that no public interest rationale has been advanced for barring competing applications after the window is closed. They argue that the public is best served when the Commission's applications processing procedures emphasize selection of the best possible candidate rather than expedition of service or administrative savings.

5. Commenters supporting the proposed changes agree with our suggestion in the Notice that the new procedures will deter strike applications and promote rapid service to the public. Newport Engineering specifically contends that the reduction in comparative hearings, and the expenses and delays attendant to such hearings, resulting from the elimination of existing cut-off procedures will particularly benefit minorities and small businesses. 7/

Discussion

6. As an initial matter, we have decided to apply the window filing and "first come/first serve" processing system to FM services only. Upon review, it became apparent that the TV processing line, because of significantly lower applications volume, has not experienced the range and intensity of problems that have faced the FM processing line. There is no appreciable backlog in TV nor is there the pressure of a large number of new allocations such as the 689 new channels added to the FM Tables as a result of Docket 80-90. Therefore, television applications will continue to be processed under their current rules.

7. The Table of Allotments for FM broadcast frequencies is designed to promote "fair, efficient and equitable distribution" of these services

7/ Reply comments were filed by the National Radio Broadcasters Association, CCC-BCFM and A.D. Ring and Associates. These commenters reiterated their opposition to the proposed processing scheme, maintaining that the Commission will not achieve any real benefit by its adoption.

among various communities. 8/ The Commission's role in designing an applications process to assign these frequencies is not simply to administer spectrum allocations or to prevent stations from interfering with one another. Rather, the Commission also strives to ensure that an expansive menu of programming alternatives is made rapidly available to the American public. In developing processing guidelines, then, the Commission must strike a balance between the dual and sometimes divergent goals of selecting the best possible applicant and the commitment to bring new service to the public as expeditiously as possible.

8. In an effort to limit delays in the authorization of new broadcast service, our current processing rules utilize a cut-off list procedure to restrict the filing rights of applicants. Under these rules, once a channel is assigned through a rule making, a construction permit application can be filed. After an initial review, the lead application is placed on an "A" cut-off list. The public notice announcing the "A" cut-off list states that the lead application is acceptable for filing. This notice alerts the public to the cut-off date (at least 30 days subsequent) by which applications mutually exclusive with and petitions to deny the lead application must be filed. The lead applicant is permitted, as a matter of right, to make major amendments to its application during this period. The second stage of the process involves an initial review of applications filed in response to the "A" cut-off list, a determination as to which of these applications are mutually exclusive with the lead application, and, finally, publication of a list - the "B" cut-off list - enumerating such applications. The "B" list sets forth a date for filing petitions to deny against those applicants on the "B" list and for filing minor amendments as a matter of right.

9. Our experience indicates that this cut-off processing procedure, particularly the publication of the "A" cut-off list which identifies the lead applicant and gives notice that its application is on file with the Commission, has had the effect of facilitating competing applications that are intended to block or delay the initial application. Such applications are anticompetitive in nature and effectively postpone service to the public by precipitating unnecessary comparative hearings. 9/ Beyond delay, of course, these hearings also visit substantial costs on both the lead applicant and the Commission. Further, as we stated in the Notice, "these costs and delays may deter investors in new broadcast ventures and may have a deleterious effect on an individual applicant's ability to finance a new broadcast station." 10/

10. Additionally, we have noted the filing of what appear to be purely speculative applications that take advantage of the effort and expense of the initial applicant and the announced availability of its application by copying costly engineering data from the lead application. These applications

8/ 47 U.S.C. §307.

9/ Comparative broadcast hearings may require as long as two to three years to complete.

10/ Notice at para. 2.

seem to be motivated by a desire to elicit a settlement from the lead applicant or to simply enhance the filing party's chances of success by substantially and inexpensively increasing the number of active applications before the Commission on its behalf. Like blocking applications, these speculative filings encumber and delay the processing of the applications of "ready, willing and able" applicants and thus contravene our processing policy objectives of expediting service to the public and minimizing administrative costs for both applicants and the Commission.

11. We also are concerned that our existing approach to processing minor modification applications lacks sufficient certainty and, as a result, may be wasteful of the Commission's and applicants' resources. Currently, when an application for a minor modification is filed, notice of its acceptance is given and it is placed in line for processing. Applications in conflict or mutually exclusive with the minor modification application may be filed up until the day the latter application is granted. Thus, after full review of the modification application itself is complete, the Commission is required to search its applications files in an effort to determine prior to grant whether conflicting applications have been filed. Further, since there is some unavoidable delay between receipt and posting of modification applications, it is impossible to make this determination without manually sorting through the most recent filings. It is possible, therefore, to grant a modification application and subsequently discover a timely filed conflicting application which would necessitate revoking the grant and reopening the application process. This uncertain and time-consuming process has proven frustrating both to the Commission and to applicants and is clearly undesirable.

12. Moreover, our concern with efficiency and finality in modification processing is considerably heightened by our recent decision significantly expanding the scope of facilities changes deemed to be minor modifications. 11/ That action should increase appreciably the number of applications to be processed under minor modification standards and underscores the necessity that these standards be clear, certain and workable.

13. Finally, the need to reduce processing delays affecting applications for new stations and modifications and to more effectively utilize our applications processing resources has become increasingly urgent as the Commission continues planning for the expected influx of FM applications for the 689 new allocations stemming from our decision in BC Docket No. 80-90. 12/ This large group of newly-designated allocations must not become entangled in a processing morass if our underlying objective of substantially expanding the availability of FM broadcast service to the public is to be achieved.

11/ In the First Report and Order in MM Docket No. 83-1377, FCC 84-298 (adopted June 27, 1984), the Commission changed the definition of minor modification to encompass all changes in power, antenna location or antenna height, without regard to their effect on coverage area.

12/ The First Report and Order in MM Docket No. 84-231, FCC 84-640 (adopted December 19, 1984), added 689 channels to the FM Table, thereby implementing our decision in the Report and Order in BC Docket No. 80-90, 94 FCC 2d 152 (1983).

14. Despite the reservations expressed by the commenters, we are persuaded that the filing window and "first come/first serve" processing system outlined in the Notice can significantly ameliorate the foregoing problems. The filing window approach, for example, should dramatically reduce the filing of anticompetitive and speculative applications. These applications depend inherently on access by potential competing applicants to the lead application prior to the filing deadline. The existing "A" cut-off list processing system ensures such availability by utilizing the lead application to trigger the 30 day filing period for mutually exclusive applications. By contrast, the new processing system will generally use the allotment order adding a new channel to the Tables to trigger a filing window for applications directed to that channel. 13/ Potential applicants must file during this window, without the assurance of prior access to other applicants' applications, or risk losing the channel to an applicant that does file in the window or that files first after the window closes. Similarly, the "first come/first serve" aspect of the new processing system will reduce delays in authorizing service and encourage "ready, willing and able" applicants by eliminating the competing application stage in cases where the channel in question has already been subject to a filing window and applications have not been forthcoming. The revised processing standards will also remedy the present uncertainty associated with minor modification applications. After an initial filing window prescribed in this Report and Order, most minor modification applications filed by existing FM stations would be subject to "first come/first serve" standards whereby an applicant's rights would vest upon filing.

15. In sum, we believe the proposed processing system offers numerous benefits. Before examining the details of this processing scheme, however, and the specific objections to it of various commenting parties, we must first consider whether our proposed approach properly accommodates the procedural rights of prospective broadcast applicants to a hearing, as delineated in existing case law.

16. The Commission traditionally has balanced an applicant's right to a comparative hearing with the public's interest in having frequencies occupied and operating. As we observed in the Notice, the Communications Act of 1934, as amended, does not specifically provide for the filing of mutually exclusive applications for new facilities. The Act does provide that applications for new facilities cannot be granted for thirty days following public notice of their acceptance for filing and that those applications cannot be denied without affording the applicant the right to a hearing. 47 U.S.C. §309. In Ashbacker v. FCC, 326 U.S. 327 (1945), the Court construed these provisions to require the Commission to consider two mutually exclusive

13/ Application filing windows for vacant channels currently on the Tables, of course, were not prescribed in the original allotment orders adding those channels. This Report and Order will serve that purpose. Furthermore, as explained below, we will announce filing windows for allotments added as a result of our actions in Dockets 80-90 and 84-231 by separate public notices in order to control the Commission's workload. In all cases, however, the filing windows will be independent of any lead application for the channel concerned.

broadcast applications, both of which had been accepted for filing, in a comparative hearing before denying one and granting the other. The Court noted, however, that the Commission could promulgate regulations limiting the filing rights of competing applicants. 14/ Thus, while Ashbacker requires comparative hearings in choosing between mutually exclusive applicants, it leaves to the Commission's discretion the circumstances under which applications are considered mutually exclusive. 15/

17. The Commission has exercised this discretion over the years and limited the filing rights of competing applicants in order to provide certainty, to avoid disruptions in the processing procedures for high demand services or to further other compelling public interest objectives. In the Report and Order in MM Docket No. 83-1148, 16/ for example, we determined that competing applications should not be permitted to be filed against the application of an incumbent licensee for a higher class channel where additional channels of similar class were available for which other applicants could compete. In this situation, the Commission found that expedition of service and the promotion of enhanced service from existing licensees outweighed the interest in selecting licensees by comparative processes. 17/ Similarly, in the domestic one-way paging service, the Commission insulates certain applicants proposing to change frequencies from competing applications in order to expedite service and encourage the negotiation and settlement of frequency conflicts. 18/ Finally, the use of cut-off procedures has been acknowledged by the Court as a reasonable and necessary limitation on the statutory right to a comparative hearing. 19/ However, any regulations limiting the right to a hearing must give fair notice to the public of what is being cut-off. 20/ Therefore, although the Commission can be flexible in establishing "housekeeping" rules, 21/ applicants must be treated equally and fairly by giving them notice of the due dates for their applications.

18. Under the window filing and "first come/first serve" processing system full and complete notice is achieved. Each frequency added to the Table of Allotments is the result of a notice and comment rule making in which

14/ See Ashbacker v. FCC, 326 U.S. 327, 333 n.9.

15/ MCI Airsignal International, Inc., FCC 84-397, Mimeo No. 34965 (released August 17, 1984).

16/ FCC 84-358, 49 Fed. Reg. 34007 (August 28, 1984), 56 RR 2d 1253 (1984).

17/ See Report and Order in MM Docket No. 83-1148, FCC 84-358, Mimeo No. 34861 (released August 16, 1984).

18/ See MCI Airsignal International, Inc., supra n.15 and Digital Electronic Message Service, 88 FCC 2d 1716, 1723 and nn.10, 12 (1982).

19/ Radio Athens v. FCC, 401 F.2d 398, 400-401 (D.C. Cir. 1968).

20/ See Ridge Radio v. FCC, 292 F.2d 770, n.6 (D.C. Cir. 1961).

21/ Century Broadcasting Corp. v. FCC, 310 F.2d 864, 867 (D.C. Cir. 1962).

the public has had an opportunity to participate. Thus, inclusion in and publication of the Tables in the Federal Register constitutes notice to the world of a channel's availability. 22/ By designating "window" filing dates, all interested parties will be on notice that the Commission will grant the vacant channel to a sole qualified applicant who files or that it will designate mutually exclusive applicants for a comparative hearing. 23/ Under the "first come/first serve" aspect of our proposal, all vacant channels that are not applied for during the window will be granted to the first qualified applicant to file. Of course, the statutory right to file petitions to deny will be preserved to assure that any allegations that an application is inconsistent with the "public interest, convenience and necessity" may be raised. 24/ We believe this system fully comports with the requirements of Ashbacker and subsequent cases.

19. Turning from legal requirements to policy considerations, many of the commenters maintain that the proposed processing system will create a "gold rush" mentality with applicants filing out of fear of being foreclosed rather than in response to marketplace stimulus. To the extent the window filing and "first come/first serve" system motivates interested parties to act quickly rather than to wait for the lead applicant to come forward, we believe it directly furthers the public interest. A fallow frequency on the Tables of Allotments represents a loss to the community and the public benefits from serious candidates moving quickly to bring service on line. To the extent commenters may be suggesting that parties will file protectively even though economic conditions do not warrant proceeding, we are not convinced that this possibility poses any real risk.

20. Many commenters point to the flood of applications received in other services subject to "date-certain" application processes, i.e., low power television, cellular radio, and multichannel multipoint distribution, as evidence supporting their predictions of a large influx of applications if the proposed processing criteria are implemented. Beyond the fact that these are all new services, several factors distinguish our decision here from those referred to by commenters. First, all applications received during the window

22/ Window processing may be found appropriate for nontabled services when another event constitutes notice. See Report and Order in MM Docket No. 83-1350 (Low Power Television and Translator Service); 49 Fed. Reg. 47837 (December 7, 1984).

23/ There is now substantial Commission precedent for the use of filing "windows" or date-certain processing to expedite service. Date-certain procedures have been used, for example, in processing common carrier [First Report and Order, 89 FCC 2d 1337 (1982)], private radio [Second Report and Order, 90 FCC 2d 1281 (1982)], and low power television [Report and Order in MM Docket No. 83-1350, supra n.22] applications.

24/ The Communications Act of 1934, as amended, §309(d)(i) secures the right of any party in interest to file a petition to deny and §73.3504 of the Commission's rules sets forth the procedures for making such filings.

for FM channels are subject to full comparative hearings if mutually exclusive applications are received. The substantial effort and expense involved in such proceedings should serve to discourage frivolous and speculative applications.

21. Moreover, we now have the advantage of hindsight in reviewing our past experiences with date-certain filings and we are acutely aware of previous shortcomings. Those experiences and useful suggestions by various commenters in this proceeding have prompted us to take a "hard-look" approach to the processing of applications in order to deter the frivolous filings that frustrate ready applicants and the Commission's processing systems.

22. Several commenters suggested that site availability certification be utilized to deter speculative applications. We think this proposal has merit. The Commission has held that although an applicant need not necessarily go as far as to demonstrate absolute assurance, an applicant should be able to show some reasonable assurance that the site for each proposed transmitting antenna is available. A mere possibility that a site will be available is not sufficient. William F. Wallace and Anne K. Wallace, 49 FCC 2d 1424 (Rev. Bd. 1974). Commission requirements will be satisfied when an applicant has contacted the property owner or owner's agent and has obtained reasonable assurance in good faith that the proposed site will be available for the intended purpose. Therefore, we are adding a question to FCC Form 301 25/ which will require an applicant to certify that reasonable assurance has been obtained from the property owner that the site will be available. In the interim, before the changed Form 301 is available, applicants should attach such certification to the old form. The certification will include a reference to the name and telephone number of the person contacted. This additional step simply requires verification of our current policy and will aid in deterring frivolous applications that frustrate our processing goals. To that same end, the Commission will contact, on a random basis, the property owners or their agents who have been named in an application to determine whether the required assurances have been obtained.

23. As a further component of our "hard look" approach we are instituting a tender review of applications. Under our previous system, many errors in key portions of the applications remained undetected until considerable processing time and effort had already been expended. Discovery of fundamental errors so far along in the processing chain resulted in significant delays both in disposing of the flawed applications and in processing problem-free but mutually exclusive applications as well as impeded the disposition of unrelated, problem-free applications. Therefore, to prevent carelessly prepared, unprocessable applications from burdening the processing system, we will require applications to be substantially complete at tender or they will be returned, thereby losing their filing status. In order to assist applicants in satisfying our tender standards, we are attaching hereto as Appendix "D" a detailed list of the criteria utilized in evaluating the substantial completeness of applications. This strict approach to the tenderability of applications comports with our concurrent commitment

25/ "Application for Authority to Construct or Make Changes in an Existing Commercial Broadcast Station." See Appendix B.

to strictly enforce construction permit schedules. 26/ Both will deter the filing of speculative applications by parties not ready, willing and able to construct.

24. As an additional component of our "hard-look" approach, we reiterate our position with respect to multiple applications. Applicants will not be permitted to "flood the Commission's processing line and hearing docket with multiple applications many of which could not be granted under our multiple ownership rules." Storer Broadcasting Co., 43 FCC 1254, 1256 (1953). Accordingly, we shall regard Section 73.3555 as establishing the maximum number of applications acceptable for filing by an applicant. Applications tendered in excess of this number shall be considered inconsistent with Section 73.3518 and returned as unacceptable for filing. In this regard, we note that stations in which the applicant currently holds a cognizable ownership interest would be taken into account in determining the maximum number of acceptable applications. 27/

25. The Commission believes that important benefits can be obtained from this "hard-look" approach. First, the reduction of frivolous and speculative applications will enable us to expedite the processing of applications tendered by serious candidates who are "ready, willing and able" to rapidly bring service to the public. Secondly, streamlining our processing procedures will minimize the Commission's administrative costs, enabling us to make more efficient use of our limited staff and other resources. These benefits are critical to making the window filing and "first come/first serve" process work smoothly and with minimal delay in processing large numbers of applications.

26. Finally, several commenters maintain that minorities, women and small businesses are disadvantaged by the short filing cycles which they believe will result from the adoption of the proposed processing system. We note, however, that a routine notice and comment rule making proceeding to establish a new allotment requires at least 90 days to complete. Adding this period to the 45 days normally required before an allotment order becomes effective and the subsequent 30 day filing window, yields a lead time of at least 165 days in which interested parties may prepare applications. This

26/ Section 73.3598(b) of the Commission's Rules specifies a 12 month construction period for new FM stations or modifications to existing FM facilities. The Commission will not favorably consider applications for extensions of this time to construct except in the most unusual circumstances. See Public Notice, "Guidelines Established for Processing of Applications for Additional Time Within Which to Construct AM and FM Broadcast Stations," released May 14, 1984, Mimeo No. 4144. Failure to comply with the construction deadlines imposed by the permit will result in forfeiture of the authorization pursuant to Section 73.3599 of the Commission's Rules.

27/ In the event that multiple applications exceeding the prescribed limits are filed on the same day, the Commission will sequentially consider them in whatever order they are reached on the processing line until the multiple ownership limit is reached. Any remaining applications will be returned.

length of time seems entirely adequate to avoid any disadvantage to minorities, women or small businesses in availing themselves of newly allotted channels. Similarly, in the case of the estimated 689 new channels allocated in the wake of our decision in BC Docket No. 80-90, all interested parties will have fully adequate time to prepare. The First Report and Order in MM Docket No. 84-231, which specified the channels which would be added to the FM Table and the communities in which such channels would be available, was adopted in December 1984. 28/ Today, in a companion item, we are announcing a random selection system that will be used to determine the sequence in which these allotments will be opened for applications. 29/ The first window in a series of windows for these allocations will probably open sometime this summer and subsequent windows will be opened on a rolling basis until all are completed. Therefore, even for the first availability, parties will have had several months to prepare and will have several years for the last allocation in this group. Finally, we note that the new processing system is intended to reduce the incidence of unnecessary comparative hearings and to expedite applications processing generally. We believe this will directly benefit minorities and other prospective applicants with limited resources. 30/

The Filing Window - "First Come/First Serve" Processing System ✓✓

27. The following is a brief discussion of the details of the applications processing system we are today adopting. For purposes of clarity, we will break the system discussion into two parts: (A) treatment of applications filed within the window period and (B) treatment of applications for channel allotments that received no applications during their filing windows and are thus subject to "first come/first serve" processing.

A. The Window Processing System

28. With respect to channels which, as of the adoption date hereof, are either already in the Table and available for application or will be added to the Table pursuant to orders previously adopted by the Commission but which are not yet effective, the 30-day filing window will open on the thirty-first (31st) day after the date of publication of this Report and Order in the Federal Register and will close on the sixtieth (60th) day after such publication. An existing licensee or permittee should file an application for modification during this window period if its proposed change would affect or be affected by potential operations on a vacant channel allotment or by modifications to other existing stations.

28/ See n.12 supra.

29/ Second Report and Order in MM Docket No. 84-231, FCC 85-124, adopted March 14, 1985.

30/ Congress, in its Conference Report on lotteries, stated "It is clear that the current comparative hearing has not resulted in the award of significant numbers of licenses to minority groups. Many minority applicants are simply unable to participate in comparative hearings which often take a considerable period of time and require substantial economic resources." H.R. Rep. No. 97-765 (accompanying H.R. 3239), 97th Cong., 2d Sess. 44 (1982).

29. For future allotments, we will use the Commission's decision to add a channel to the FM Table of Allotments as the invitation to all interested parties to file applications for that channel. Each Report and Order designating a new channel will identify a window filing period which will begin upon the effective date of the allotment Order and continue for not less than 30 days thereafter. In the case of the 689 new allocations created by Docket 80-90, the Audio Services Division of the Commission's Mass Media Bureau will issue Public Notices establishing applicable window filing periods as its workload permits.

30. All applications filed within the relevant window period will be processed for consolidated consideration, with appropriate opportunities for the filing of petitions to deny. Any mutually exclusive applications for new facilities or for modifications to existing facilities filed during the window will be grouped for comparative hearings.

31. In evaluating applications, any and all amendments filed before the close of the applicable filing window will be considered with the application. Applications will be thereafter restricted as to when amendments may be filed. 31/ Applications which have been found acceptable for tender purposes will be placed on publicly released Notices of Tenderability. From the release of such notice, applicants will have a 30 day period to amend or perfect their applications at will and as a matter of right. However, if an incomplete application has been inadvertently accepted for tender, it will be stripped of its file number and returned; it may not be perfected to pass tender review. Amendments may only go to the acceptability or grantability of an application. 32/ The amendment period will have one further restriction, an application may not retain window status if it is amended, even for perfecting purposes, after the window closes and the effect of such amendment is to produce a conflict with an application filed prior to the amendment. We believe this restriction is essential to maintain the integrity of the new processing system and that it is fully consistent with James River Broadcasting v. FCC, 393 F.2d 581 (D.C. Cir. 1968). That case held that the Commission had violated its own rules in refusing to permit an applicant to perfect its application with an amendment and to retain its initial filing status. The court also stated that, as a policy matter, perfecting amendments should be allowed "[so] long as the defect can be removed without otherwise injuring any public or private interests" Id. at 584. First, we note that the processing rules that were the basis for James River are herein dramatically changed. In any event, to permit a perfecting amendment that creates a conflict with an application filed prior to such amendment harms the public interest in expedition of service and processing certainty that the

31/ It is proper for us to make these revisions to the amendment process on our own motion. Both the Administrative Procedure Act and our own regulations exempt rules of practice and procedure from notice and comment rule making requirements. 5 U.S.C. §553(b)(A); 47 C.F.R. §1.412(a)(5).

32/ There are two classes of amendments that are acceptable at any time: (1) amendments required by 47 C.F.R. §1.65 and (2) amendments which extricate an application from conflict with other applications and which trigger no new conflicts, including amendments filed pursuant to an agreement between applicants under 47 C.F.R. §73.3525.

window processing system seeks to accomplish. Under such a system, we would be unable to process otherwise grantable applications on the possibility that unrelated applications might be amended to produce a conflict. Moreover, to allow such amendments to retain priority as to intervening applications for other channels or in other communities would prejudice the private interests of the applicants for these other channels who sought in good faith to initiate service to the public. Finally, the nonacceptance of a perfecting amendment in James River resulted in an applicant being foreclosed from the comparative process because, by being disqualified and thereby missing the cut-off date, he lost his opportunity to compete for a license. Here, the limitation on perfecting amendments that create a conflict with prior applicants results not in foreclosure but simply in site restriction. ←

32. Following the passage of the 30-day amendment period, the application and any amendments will be studied for acceptability, i.e., compliance with the technical requirements for FM facilities. If the application is found acceptable, it will be placed on a publicly released "Notice of Acceptability" inviting the filing of petitions to deny. If the application is found to be unacceptable, it will be returned. Resubmission of such an application with a curative amendment will not gain it nunc pro tunc status since applicants were afforded 30 days after the release of the Notice of Tenderability to amend their applications into acceptable form. To permit curative amendments after that period poses too great a threat to the orderly functioning of our new processing procedures.

B. The "First Come/First Serve" Processing System

33. If no applications are filed during the window, the first acceptable application for the channel will cut-off the filing rights of subsequent applications for that channel and applications for any channel in conflict with or for modifications to existing facilities that are inconsistent with the first-filed application. If an application for modification is the first-filed after the window closes, applicants for the new channel and applicants for inconsistent modifications would be limited thereby in their site selections. We believe that any subsequent applicants were on notice of the availability of the channel from its inclusion in the Table, and they had ample opportunity to file during the window or to be first-filed after the window period. Therefore, cutting off such applications is not unreasonable and will expedite new service to the public on a fallow channel. All "first come" applications will be considered as simultaneously filed if filed on the same day. As with window applications, we will process the application(s), entertain petitions to deny and, where appropriate, designate applications for hearings.

34. Applications received after the lead application will be grouped behind the lead application in a queue according to the date of filing. Priority rights for the lead applicant as against other applicants for the same channel, applicants for other channels or in other communities whose applications conflict with the lead application and applicants for modifications to existing facilities that are inconsistent with the lead application are determined by the filing date of the lead application. The filing dates of subsequent applicants for that channel and community, however,

only determine their place in the queue. The rights of an applicant in the queue would ripen as to applicants outside the queue only upon a finding that the lead application is unacceptable and then only if the queued application is reached and found acceptable. We will process within the queue until we find an acceptable application. If a queued applicant is determined to be acceptable, his rights, vis a vis applicants outside the queue, vest on the date of his acceptance. The queue will remain behind the lead applicant until a construction permit is granted. 33/ If there is no queue or no queue member is found to be acceptable, that channel remains subject to "first come/first serve" treatment. At the grant of a construction permit the queue dissolves.

35. With respect to amendments in the "first come/first serve" processing system, applicants may amend their applications for a period of thirty days following the issuance of the Notice of Tenderability. For reasons directly analogous to those underlying our restriction on certain amendments of applications filed during a window, we will not permit a "first come" applicant to amend its application and to retain its initial filing priority date as to applicants for other channels or in other communities or for modifications to existing facilities and with whom the amendment creates a conflict. 34/ As with window applications, we believe this approach is necessary to preserve the certainty and expedition that our new processing system is intended to achieve and that it is entirely consistent with the court's decision in James River Broadcasting v. FCC, supra.

36. If a channel allotment is vacated after issuance of the construction permit, regardless of whether the construction permit was granted as a result of window or "first come/first serve" processing, we will, by public notice, announce a subsequent filing window for the acceptance of new applications for that channel.

Other Matters

37. In a small number of cases where the commercial and non-commercial FM bands are adjacent, our decision to apply the window processing system to commercial channel applicants but not to applicants for reserved channels may create some problems. 35/ It is appropriate, therefore, that we clarify our procedures for these exceptional cases. If an applicant for a reserved channel has generated a cut-off list that overlaps a commercial window, the commercial applicant must file within the cut-off period - it may not rely on its window deadline - if it seeks mutually exclusive status with the educator. After the relevant commercial window closes, an educator and a commercial applicant would both be subject to "first in time, first in right"

33/ Any applicant determined by the Commission to be unacceptable would be deleted from the queue.

34/ See para. 31 supra.

35/ Noncommercial, educational entities applying for a channel on the commercial band will be subject to the filing window and "first come/first serve" processing system.

status as to each other. 36/ Of course, any conflict between educational applicants will continue to be resolved through the traditional cut-off procedures. We anticipate minimal effect on educators, but alert them that in those areas of the FM band where spacing as against commercial licensees is problematical they may be affected by the "first come/first serve" rules applicable to the commercial FM band.

38. To ensure a smooth transition to the new processing guidelines, we are hereby instituting a freeze on applications for new commercial FM stations and modifications to existing facilities in these services for a period of 30 days following publication of this document in the Federal Register. This step is essential to permit the Commission to reduce the number of currently pending applications, to which existing processing criteria apply, in preparation for shifting over to the new processing system and standards.

39. Procedural fairness requires us to complete processing of those applications for new channels or major modification of existing facilities that are currently on file. Therefore, applications and petitions to deny tendered after today will be accepted only if they are in response to "A" and "B" cut-off lists of pre-freeze applications.

40. The only minor modification applications that will be acceptable during the freeze are those filed in response to applications already on file as of the adoption date of this decision. Moreover, the applicant must identify the application that he is filing against. 37/ However, in keeping with current minor modification processing practices, any application now on file may be granted at any time and such grant will cut-off the filing rights of all subsequent applicants.

41. Pursuant to the requirements of Section 603 of the Regulatory Flexibility Act, 5 U.S.C. §603, a final regulatory flexibility analysis has been prepared and is attached hereto as Appendix C.

42. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified

36/ Commercial applicants whose filing window has not yet opened at the time a potentially conflicting noncommercial application is filed may not file a competing application for the commercial channel in response to the noncommercial applicant's "A" cut-off list. To permit such a filing would undermine the control over applications processing that the window mechanism is intended to provide. The prospective commercial applicant may, of course, file a petition to deny against the noncommercial application within the prescribed filing period for such petitions.

37/ This requirement is necessary in order to simplify and expedite the processing of modifications during the freeze. Any modification application not so identifying a pre-freeze application as a basis for filing will be judged unacceptable for filing during the freeze period.

requirements or burdens upon the public. Implementation of any new or modified requirement or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

43. Accordingly, IT IS ORDERED, THAT Part 73 of the Commission's Rules IS AMENDED, effective June 12, 1985, as set forth in the attached Appendix A.

44. IT IS FURTHER ORDERED, THAT effective as of the close of Commission business on the day of adoption of this Order and until 30 days after its publication in the Federal Register, applications MAY NOT BE FILED either for new commercial FM channels or for modification of existing facilities in this service, except to the extent such applications are filed in response to Commission cut-off lists resulting from applications filed prior to the adoption date of this Order or are filed against and in conflict with modification applications already on file as of the adoption date of this Order. 38/

45. IT IS FURTHER ORDERED, THAT the Secretary SHALL CAUSE a copy of the Report and Order to be printed in the FCC Reports.

46. IT IS FURTHER ORDERED, THAT the Secretary SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy, Small Business Administration.

47. IT IS FURTHER ORDERED, THAT this proceeding IS TERMINATED.

48. This action is taken pursuant to authority contained in Sections 1, 4(i) and (j), 5(d)(1), 303 and 309(b) of the Communications Act of 1934, as amended.

49. For further information concerning this proceeding, contact Lane Howard Moten, Mass Media Bureau (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

38/ Immediate implementation of this Order is required because a 30-day delay would frustrate the purpose of the freeze.

APPENDIX A

Part 73-Radio Broadcast Services

1. §73.3564 is amended by revising paragraphs (a), (c) and (d) to read as follows:

(a) Applications tendered for filing are dated upon receipt and then forwarded to the Mass Media Bureau, where an administrative examination is made to ascertain whether the applications are complete. Except for low power TV, TV translator applications and non-reserved band FM (except for Class D) applications, those found to be complete or substantially complete are accepted for filing and are given file numbers. In the case of minor defects as to completeness, the applicant will be required to supply the missing information. Applications that are not substantially complete will be returned to the applicant. In the case of non-reserved band FM applications, those found to be substantially complete at tender are accepted for tender and are given file numbers. Non-reserved band FM applications that are not substantially complete will be returned to the applicant. In the case of low power TV and TV translator applications, those found to be complete are accepted for filing and are given file numbers. Low power TV and TV translator applications that are not complete will be returned to the applicant.

(b) * * *

(c) At regular intervals, the FCC will issue a Public Notice listing all applications and major amendments thereto which have been accepted for filing, except for non-reserved band FM stations and low power TV and TV translator stations. Pursuant to §§73.3571(c), 73.3572(c) and 73.3573(d) such notice shall establish a cut-off date (not less than 30 days from the date of issuance) for the filing of mutually exclusive applications and petitions to deny. However, no application will be accepted for filing unless certification of compliance with the local notice requirements of §73.3580(h) has been made in the tendered application.

(d) New and major change applications for non-reserved band FM stations (except for Class D stations) and for low power television and television translator stations will be accepted only on date(s) specified by the Commission. Low power TV and TV translator station filing period(s) will be designated by the Commission in a Public Notice. Non-reserved band FM facilities and major change applications will have filing dates designated by the Commission in the following manner:

(1) For all vacant non-reserved band FM allocations listed on the FM Table of Allotments, §73.202, as of March 14, 1985, a one-time filing period or "window" will open for 30 days, beginning on the 31st day after the date of publication of the Report and Order in MM Docket No. 84-750 in the Federal Register and will close on the 60th day after such publication. (This filing window does not apply to the 689 FM channels added to the FM Table of Allotments by the Commission's decision in MM Docket No. 84-231).

(2) The 689 FM allocations added to the FM Table of Allotments by MM Docket 84-231 will be subject to a series of windows. The Audio Services Division of the Mass Media Bureau will establish, by Public Notice, the window filing dates for this group of allotments.

(3) Each Report and Order specifying a new non-reserved FM band allocation will identify the window filing period which will begin upon the effective date of that Order and continue for at least 30 days.

(4) Where no applications are tendered during a window filing period, applications may be tendered any time after the window closes. These applications will be processed on a "first come/first serve" basis and will be treated as simultaneously filed if filed on the same day. Any applications received after the filing of a lead applicant will be placed in a queue, according to filing date, behind the lead applicant.

(5) If a non-reserved band FM channel allotment is vacated after the grant of a construction permit becomes final, because of a lapsed construction permit or for any other reason, the FCC will, by Public Notice, announce a subsequent filing window for the acceptance of new applications for such channels.

(6) However, no application will be accepted for tender unless certification of compliance with the local notice requirements of §73.3580(h) has been made in the tendered application.

2. §73.3573 is amended by revising paragraphs (d) and (e) and adding paragraphs (f) and (g) to read as follows:

§73.3573 Processing FM Broadcast and FM Translator Station Applications

* * * * *

(d) Applications for reserved band and Class D FM broadcast stations will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically release a Public Notice listing applications which have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and/or petitions to deny the listed applications must be filed.

(e) Where reserved band plus Class D applications are mutually exclusive because the distance between their respective proposed transmitter sites is contrary to the station separation requirements set forth in §73.507, such applications will be processed and designated for hearing at the time the application with the lower file number is reached for processing. In order to be considered mutually exclusive with a lower file number application, the higher file number application must have been accepted for filing at least one day before the lower file number application has been acted upon by the FCC.

(f) Processing non-reserved FM broadcast station applications.

(1) Applications for non-reserved FM broadcast stations will be processed as nearly as possible in the order in which they are tendered. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. The FCC will specify, pursuant to §73.3564(d), the filing periods for non-reserved band FM applications.

(2) All applications received during the appropriate filing period or "window" which are found to be mutually exclusive will be designated for hearing. All other applications will, if the applicants are duly qualified, receive grants. The FCC will periodically release a Public Notice listing applications pending hearings or grant and announcing a date (not less than 30 days after issuance) by which petitions to deny must be filed.

(3) If, after the close of the appropriate window filing period, a non-reserved FM allotment remains vacant, processing for that channel will be on a "first come-first serve" basis with the first acceptable application cutting off the filing rights of subsequent applicants. All applications received on the same day will be treated as simultaneously tendered and, if they are found to be mutually exclusive, will be designated for hearing. Applications received after the tender of a lead application will be grouped, according to filing date, behind the lead application in a queue. The priority rights of the lead applicant, as against all other applicants, are determined by the date of filing but the filing date for subsequent applicants for that channel and community only reserves a place in the queue. The rights of an applicant in a queue ripen only upon a final determination that the lead applicant is unacceptable and if the queue member is reached and found acceptable. The queue will remain behind the lead applicant until a construction permit is finally granted, at which time the queue dissolves. If there is no queue or if no queue member is found acceptable, that allotment remains subject to "first come-first serve" processing. The FCC will periodically release a Public Notice listing those pending hearings or grant and announcing a date (not less than 30 days after issuance) by which petitions to deny must be filed.

(g) Resolving processing conflicts between the reserved and non-reserved bands. The reserved bands include Class D stations.

(1) Reserved band applicants, applying for a channel on the non-reserved band are subject to the processing procedures in Section (f).

(2) If a reserved band applicant has generated a cut-off list that overlaps a non-reserved band window filing period, the non-reserved band applicant must file within the cut-off if he seeks mutually exclusive status with the reserved band applicant.

(3) Following the close of a non-reserved band application filing window, the non-reserved band applicant is subject to the "first come/first serve" rules and would lose to a pre-filed reserved band applicant.

3. §73.3522 is amended by revising paragraphs (a)(1) and (a)(2) and adding paragraph (a)(6) to read as follows:

§73.3522 Amendment of applications

(a) Predesignation amendment. (1) Subject to the provisions of §§73.3525, 73.3571, 73.3572, 73.3573, and 73.3580, and except as provided in paragraph (a)(2) of this section, any application, other than an application for a low power TV, TV translator station, or a non-reserved band FM station may be amended as a matter of right prior to the adoption date of an order designating such applications for hearings, merely by filing the appropriate number of copies of the amendments in question duly executed in accordance with §73.3513. If a petition to deny (or to designate for hearing) has been filed, the amendment shall be served on the petitioner.

(2) Subject to the provisions of §§73.3525, 73.3571, 73.3572, 73.3573 and 73.3580, and except for applications for low power TV, TV translator stations, or a non-reserved band FM station, mutually exclusive broadcast applications may be amended as a matter of right by the date specified (not less than 30 days after issuance) in the FCC's Public Notice announcing the acceptance for filing of the last-filed mutually exclusive application. Subsequent amendments prior to designation of the proceeding for hearing will be considered only upon a showing of good cause for late filing or pursuant to §1.65 or §73.3514. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration.

(3) * * *

(4) * * *

(5) * * *

(6) Subject to the provisions of §§73.3525, 73.3573 and 73.3580, applications for non-reserved band FM stations (minus Class D) may be amended as a matter of right during the appropriate window filing period pursuant to §73.3564(d). For a period of 30 days following the FCC's issuance of a Notice of Tenderability announcing the acceptance of the applications, amendments that go to the acceptability or grantability of an application may be filed as a matter of right. Subsequent amendments prior to designation for hearing or grant will be considered only upon a showing of good cause for late filing or pursuant to §1.65 or §73.3514. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration. However, an amendment to a non-reserved band application will not be accepted after the close of the appropriate filing window if the effect of such amendment is to alter the proposed facility's coverage area so as to produce a conflict with an applicant who files subsequent to the initial applicant but prior to the amendment application. Similarly, an applicant subject to "first come/first serve" processing will not be permitted to amend its application and retain filing priority if the result of such amendment is to alter the facility's coverage area so as to produce a conflict with an applicant who files subsequent to the initial applicant but prior to the amendment.

* * * * *

4. §73.203 is amended to read as follows:

§73.203 Availability of channels.

Applications may be filed to construct FM broadcast stations only at the communities and on the channels contained in the Table of Allotments (§73.202(b)). Applications that fail to comply with this requirement, whether or not accompanied by a petition to amend the Table, will not be accepted for tender.

APPENDIX B

To be included with FCC Form 301, Application to Construct or Make Changes in an Existing Commercial Broadcast Station.

CERTIFICATION OF SITE AVAILABILITY

1. The applicant certifies that it has reasonable assurance in good faith that the site or structure proposed in Items 1 and/or 2, Section V-G, FCC Form 301, as the location of its transmitting antenna, will be available to the applicant for applicant's intended purpose.

YES _____ NO _____

If no, explain fully:

2. If reasonable assurance is not based on applicant's ownership of the proposed site or structure, applicant certifies that it has obtained such reasonable assurance by contacting the owner or person possessing control of the site or structure.

Name of Person Contacted

(_____) _____
Telephone Number

Person contacted (check one):

Owner _____

Owner's Agent _____

Other (specify) _____

Applicant's Signature

Date

APPENDIX C

Final Regulatory Flexibility AnalysisI. Need for and Purpose of Rule

Our experience indicates that the current cut-off procedures for the acceptance of competing applications for commercial full service FM and TV stations delay service to the public and disrupt the processing of the initial application. The filing of speculative and anticompetitive, delaying applications often precipitate costly and unnecessary comparative hearings. Also, current modification procedures lack sufficient certainty and, as a result, may be wasteful of the Commission's and applicants' resources.

The purposes of the rule changes adopted herein are to limit applications to those seriously interested in providing better service and to provide more certainty within the processing system.

II. Flexibility Issues Raised in the Comments

The most significant regulatory flexibility issue raised in the comments concerns the duration of the window filing period. Several commenters maintained that only well-financed, established entities would be able to respond within the proposed 45 day window and therefore the system would particularly disadvantage minority groups and small businesses. However, under the new rules, a slightly longer filing period will be provided than under the current procedures. (See para. 29.) In addition to a slightly longer filing period, small business groups and minorities should benefit from the expected reduction of speculative and dilatory applications. These filings entail processing delays and often result in costly and unnecessary comparative hearings that disadvantage groups with funding limitations.

III. Significant Alternatives Considered But Not Adopted

The only significant alternative considered but not adopted was the implementation of an extended window filing period. Since the new processing procedures will allow for a longer period to prepare filings than does the current system, further lengthening the filing window period appeared unwarranted, particularly since such action would contravene the important Commission goal of expediting service to the public.



PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/254-7674. Recorded listing of releases and texts 202/632-0002.

APPENDIX D

STATEMENT OF NEW POLICY REGARDING COMMERCIAL FM APPLICATIONS THAT ARE NOT SUBSTANTIALLY COMPLETE OR ARE OTHERWISE DEFECTIVE

As part of our effort to expedite applications in conjunction with the implementation of the new "window" and "first come, first serve" processing procedures (Report and Order in MM Docket 84-750, Adopted March 14, 1985), we are adopting a new policy with respect to the definition and treatment of applications that are defective or not substantially complete when filed. 1/

Expedition of processing in the face of the possibility of a large increase in commercial FM applications compels us to shift to the beginning of the process some of the application checks previously made later in the process. This shift may well result in a loss of filing status for a returned application that it otherwise would have retained under the previous processing procedures. Such an outcome cannot be avoided if we are to achieve the benefits of the new window and first come, first serve processing procedures.

At the time an application for a commercial FM station or for a modification to an existing commercial FM station is tendered and before an application reference number is assigned, the application will be given a thorough initial review to determine if it is substantially complete. Although all applicable elements of Form 301 are examined by the Commission staff in the course of processing a construction-permit application, certain items are much more critical than others. Without them, processing simply cannot commence. A substantially complete application, one that the Commission deems in condition or sufficient for tender, must meet all of the following requirements.

1. The applicant's name and address must be provided. Failure of an applicant to do so renders it impossible for the processing staff:
 - a. to communicate with the applicant concerning the contents of the application; and
 - b. to discern and resolve issues relating to the applicant's identity, e.g., multiple-ownership and alien-interest questions.

1/ This policy applies only to commercial FM applicants. AM applicants and non-commercial FM applicants are still subject to the policy set out in our Public Notice of August 2, 1984. TV applicants remain subject to applicable case law.

2. In recent years, the Commission has reduced the amount of information required to be provided in applying for a construction permit and has accordingly simplified Form 301. Applicants are now permitted to make certifications of various types instead of having to provide evidentiary showings. Having relieved applicants of the need to make such showings, the Commission attaches considerable importance to the certifications that take their place. Accordingly, certifications in the following areas are crucial in the absence of full showings.
 - a. Compliance with 47 U.S.C. §310(b). An application which violates the alien-interest provisions of the Communications Act is statutorily ungrantable. Failure to respond to the question by which certification of compliance is invited renders the application so fundamentally defective that further processing is unwarranted.
 - b. Financial ability to construct. The Commission authorizes new or changed facilities with the expectation that such will be built quickly and that service will be expeditiously provided via those facilities to the public. It is pointless to grant an authorization of facilities that cannot be built. It is likewise pointless to process an application where a response to certification of financial ability to construct is not provided.
 - c. Compliance with the local public notice provisions of 47 C.F.R. §73.3580. It is important that local public notice occur. An informed local populace can bring to the Commission's attention information about the applicant or the facility proposal that might otherwise remain undetected. Thus, where local public notice is required, an applicant who fails to respond to the appropriate item of Form 301 will have its application returned as not sufficient for tender.
 - d. Site availability. The Commission does not require of applicants absolute certainty of site availability, but rather reasonable assurance. An application specifying an unavailable site per se frustrates the Commission's stated goal of expeditious introduction of service. Such a filing requires an amendment specifying a site change before grant or a further application for construction-permit modification after grant. To avoid vacuous and sequential filings, the Commission has imposed a requirement of site-availability certification which includes the name and address of the site owner or his agent. Failure of an applicant to provide the

requisite certification in the form set forth in Appendix B of the Report and Order in Docket 84-750, supra, will result in the application being deemed not substantially complete.

3. Questions 6 and 8 of Section II, Form 301 deal with matters crucial to multiple-ownership determinations. In response to these questions, applicants are to indicate whether or not they or their relatives (immediate family) have any other pending applications or broadcast interests. If the answer to either question is positive, explanatory exhibits must be provided. Leaving these questions unanswered, as a practical matter, makes it impossible for the processing staff to begin a multiple-ownership analysis. In light of our expressed policy dealing with the filing of multiple applications (see Second Report and Order in Docket 84-231, FCC 85-124, Adopted March 14, 1985 and Released April 12, 1985), failure to respond prevents the staff from beginning its ownership analysis and thus renders the applicant's filing not substantially complete.
4. Compliance with the Commission's technical rules is evaluated in the course of an acceptability study. Certain engineering data must be present for such a technical acceptability study to be made. The absence of one or more elements of those data, listed below, prevents a determination of acceptability and thus renders the application not substantially complete.
 - a. The geographic coordinates, to the nearest second, of the proposed transmitter site must be provided. Absence of these data makes it impossible to determine the distances from the proposed site to other proposed or existing broadcast facilities and to the community of license. In the commercial FM service, spacing determines acceptability of an application where mutual exclusivity exists with respect to a given allocation, see Trend Broadcasting, Inc., 18 FCC 2d 749 (1969), and determines when mutual exclusivity exists between applicants for or permittees of different allocations. The geographic location also determines whether protection must be afforded to Commission monitoring facilities and to radio quiet zones (see 47 C.F.R. §73.1030), marks the center of the "blanketing" area (see 47 C.F.R. §73.315), and is fundamental to analysis of a proposal's environmental effects and electromagnetic effects on other, nearby communications facilities.
 - b. A transmitter site map as described in Form 301, Section V-B, Item 13, and in our Public Notice, Mimeo 3693, released April 5, 1985. Such a map allows the staff to verify the coordinates of the proposed site, the presence of other,

nearby communications facilities and of obstructing terrain features (see 47 C.F.R. §73.315), and the ground elevation of the transmitter site. The last parameter has a key influence on important features of the antenna installation--radiation-center heights above ground and mean sea level, from which, with other data, antenna height above average terrain (HAAT) is derived.

- c. The channel number and community of the allocation must be supplied. Since the commercial FM allocation system is organized on the basis of a Table comprising numbered channels and targeted communities, any evaluation of an application must consider these fundamental items.
- d. Effective Radiated Power must be specified. Our technical rules prescribe minimum and maximum permissible power levels. Application processing includes a determination that proposed operating power falls within the range defined for the particular class of station occupying or intended to occupy the allocation. Certain allocations have limitations imposed on ERP, as do some stations authorized prior to implementation of the Table Method of Allocations. International agreements also influence permissible ERP levels in border areas. The operating power is so basic a parameter of a broadcast facility that it simply must be specified. Accordingly, its absence will render an application not substantially complete.
- e. Also necessary are the antenna heights above average terrain, above ground level, and above mean sea level. These three are interrelated and must be specified consistently, as is the case with all other crucial engineering parameters. Antenna height is as elemental a facility parameter as is ERP. It also is subject to permissible-range values as a function of station class and, with ERP, determines the coverage area of a facility for a given signal strength. Antenna height is also limited in certain cases by international treaty or by allocation constraints. Antenna height and ERP are also used to determine adverse potential to radio quiet zones, adjacent and co-channel "grandfathered" stations, and to FCC monitoring facilities. Antenna height above ground affects the environmental and aerial-navigation aspects of a facility proposal. Clearly, the various antenna heights are employed in a number of processing evaluations by the staff. Their absence, or the absence of any one of them, renders the application not substantially complete.

- f. An answer to Item 7, Section V-B must be provided, as whether or not a directional antenna is proposed is a fundamental issue. If a positive response is given, all data specified in 47 C.F.R. §73.316(d) must be included in an accompanying engineering exhibit. Without this information, the processing staff cannot determine the proper location of signal-strength contours, whether city-grade coverage is provided as required, whether adequate protection to short-spaced stations is to be given, and whether or not the proposed directional response complies with our technical rules and appears to be stable.
- g. A map or maps satisfying the requirements of Item 10, Section V-B and clearly and legibly showing the proposed 60 and 70 dBu contours and the legal boundaries of the community of license must be provided. Such maps permit ascertainment of compliance with city-grade requirements and permit verification of signal-strength contour predictions. They are also employed in determining comparative levels of proposed service.
- h. Section V-G must be provided as part of any Form 301 application proposing construction of a new facility or any change in transmitter site or antenna-structure height to existing facilities. In accord with our existing procedure, for side-mounting proposals involving an existing support structure, Section V-G shall show the application's purpose as, "Alteration of existing antenna structure." The "Facilities Requested" portion shall contain a description of the side-mounting proposal. Section V-G will be accompanied by a tower-sketch exhibit as required by Item 6.

Further, because of the critical importance of the applicant's certification of the correctness of the data contained in the application as of the date of filing, unsigned applications will not be accepted for tender.

If any of the above information is missing, the application will be returned as not sufficient for tender. If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data. In such instances, the defective application will be deemed not sufficient for tender. If the application is returned

during the initial check as not sufficient for tender, we will not permit the applicant to remedy the defect and have its resubmitted application accepted nunc pro tunc in order to be grouped with other applications filed by a window closing date or in order to be considered first filed when a window does not apply.

Where an application is timely filed within and in response to a filing window, at the initial screening we will consider the application as originally filed, together with any amendments filed within the window period. Where "first come, first serve" processing rules apply, the application only as originally filed will be considered. If an applicant discovers that its "first come" application is not sufficient for tender, it must file a new, corrected application (and request return of its earlier application) to cure the tenderability defect. Nunc pro tunc treatment will not be afforded in such cases.

If any of the defects listed above are overlooked during the initial review and are found later in the process, the application will be returned as inadvertently accepted for tender and, if resubmitted, will not be accepted nunc pro tunc. Return of the application will void the application reference number inadvertently assigned and whatever rights of tender might have been associated with it.

An application found to be sufficient for tender will be studied to determine its acceptability for filing, that is, to determine whether it is in compliance with applicable Commission rules. If it is found acceptable for filing, it will be included in a Public Notice of Acceptance. If found to be unacceptable for filing, it will be returned and will not be accepted later on a nunc pro tunc basis.

If an application is accepted for filing but is subsequently found not to be grantable, the applicant, if not mutually exclusive with other applicants, will be given one opportunity to correct the application. If the acceptable but not grantable application is mutually exclusive, an appropriate issue will be specified in the Hearing Designation Order, or a post-designation amendment, if appropriate, will be required.