



April 2009

Extreme Makeover - Radio Edition

Overhaul of AM/FM Allocations Standards Proposed

Davina Sashkin
sashkin@fhhlaw.com
703-812-0458

In a sweeping notice of proposed rulemaking (NPRM), the FCC has proposed a major re-vamp of the AM and FM allocations process. The wide-ranging NPRM covers a vast array of allotment-related elements, including 307(b) analyses, auction niceties, translator band-hopping and codification of terrain roughness policies, among others. Acting Chairman Copps and Commissioner Adelstein, longtime cheerleaders for small community and rural radio (and equally longtime critics of the process by which rural stations have tended to gravitate into larger markets), both issued gushing statements in support of the proposals. Commissioner McDowell's supporting statement, on the other hand, reflected considerable reservation.

The backstory on this should be familiar.

Section 307(b) of the Communications Act requires that the Commission "provide a fair, efficient, and equitable distribution" of broadcast channels among the "several States and communities." Since 1982 the FCC has used a set of four "priorities" to assay the relative 307(b) merits of various AM and FM proposals. A proposal which would provide the first fulltime reception (a/k/a "white area") service gets the highest priority; a proposal providing the second fulltime reception (a/k/a "gray area") service falls under Priority 2. Because of the proliferation of radio stations across the country, very few current proposals trigger either of those two.

As a result, the majority of new AM and FM proposals end up being assessed under Priority 3 (*i.e.*, whether the station or channel in question would be the first service allotted to the particular community proposed) or Priority 4, a catch-all hodge-podge of "other public interest matters" (including, among others, the total population to be served – the bigger the population, the greater the 307(b) preference).

The last decade or so has seen a trend toward moving stations in from the boonies toward larger, established population centers. Many such proposals have involved allotting a channel or station to a station-less community in or near an already well-served

Urbanized Area – thereby triggering Priority 3. Other proposals lacking such a convenient station-less community have still utilized significant population increases under Priority 4 – because, after all, the bigger the proposed market, the more people there are to serve.

One apparent purpose of the NPRM is to arrest, and reverse, the allocation of channels and stations to larger markets. Another purpose seems to be to tighten up certain aspects of the broadcast auction system to drive contested applications to auction and encourage applicants entitled to “bidding credits” to participate. A third purpose – actually, a combination of the first two – is to facilitate the allocation of broadcast spectrum to Native American Tribal Groups serving tribal lands.

The specific proposals include the following:

307(b) Analysis Modifications

Allotment Priorities

The Commission proposes that:

- no Priority 3 preference should be awarded to proposed AM or FM facilities which would *or could* be modified to place a principal community signal over the majority of an Urbanized Area. Instead, the Commission would adopt a rebuttable presumption that the proposal is for the Urbanized Area, and not for the station-less proposed community of license. This would likely put the kibosh on many “move-ins” of the kind that the Commission has routinely approved up to now. The NPRM solicits comments on what kind of showing might rebut the presumption the FCC is proposing.
- no dispositive Section 307(b) preferences under Priority 4 should be awarded to new or major change AM applications. In the alternative, Priority 4 preferences would normally be denied to AM applications when 75% or more of the population within the proposed city-grade contour (*i.e.*, 5 mV/m) receives more than five aural services *and* the proposed community of license has more than five transmission services. Applications falling under those “floors” might still gain a Priority 4 preference, but only if they have a “service value index differential” (SVI) of at least 50%. (SVI is a relatively arcane and byzantine method, originally utilized in the FM context, of discounting raw population totals based on the number of services received.) Either of these approaches would likely result in fewer dispositive 307(b) awards, meaning that more AM applications would end up in auctions (since an application with a 307(b)

preference otherwise beats out mutually exclusive applications, making an auction unnecessary).

- a new “underserved listeners” priority – which would be co-equal with Priorities 2 and 3 – should be created for any AM auction and FM allotment proposal that would provide a third, fourth, or fifth aural reception service to a substantial portion of the proposed service population. How much is “a substantial portion”? That’s open for comment. The NPRM asks whether this new priority should be limited to proposals providing such service to “at least 15, 25, 35, or 50 percent of the proposed service population”.

Community of License Changes

To address what it sees as the unfettered migration of stations from small communities to metropolitan areas, the FCC proposes an *absolute* prohibition on city-of-license changes that create white or gray areas (*i.e.*, areas with no or one reception service, respectively). Furthermore, consistently with the presumption proposed in connection with the Priorities (discussed above), any move-in application proposing a first local service to a community would be treated as if it were proposing service to the Urbanized Area if the new station would *or could* place a daytime principal community signal over 50% or more of the Urbanized Area. (Note: if that presumption were to be adopted, the traditional *Tuck* analysis used to determine whether a proposed community of license located in an Urbanized Area is or is not really a separate community for 307(b) purposes would be relegated to the scrapheap.)

Native American Tribal Preference

The Commission proposes to establish a new 307(b) priority – to be applied to FM allotments, AM filing window applications, and NCE filing window applications – for federally recognized Tribes. The priority would be sandwiched in between Priority 1 and the co-equal Priorities 2 and 3 – sort of Priority 1.5.

To qualify for that preference:

- the applicant would have to be either a federally recognized Tribe or tribal consortium, a member of a Tribe, or an entity more than 70 percent owned or controlled by members of a Tribe or Tribes; **and**
- at least 50 percent of the daytime principal community contour of the proposed facilities would have to cover tribal lands, in addition to meeting all other Commission technical standards; **and**

- the applicant would have to propose at least first local transmission service to the proposed community of license, which would have to be located on tribal lands.

Any authorization awarded as a result of a dispositive tribal priority would be subject to certain holding period limitations relating both to ownership and technical changes.

No Downgrades for 307(b)-Preferred Facilities

The NPRM proposes an absolute prohibition on any downgrade of AM facilities awarded pursuant to a dispositive 307(b) preference if the downgrade would result in service to a smaller population or would otherwise negate the factors that led to the award of a dispositive preference. In other words, AM licensees or permittees awarded a 307(b) preference will be required to provide service substantially as proposed in their short-form tech boxes. The FCC suggests that that bar should be effective for four years.

Auction Changes

AM Filing Criteria Tightened Up

According to the NPRM, the Commission has encountered an “unacceptably high percentage of defective” AM applications – both new and major mods – in recent years. So no more Mr. Nice Guy: the FCC proposes that applicants in future AM broadcast auctions must *at the time of filing* meet basic technical eligibility criteria, including community of license coverage (day and night), and protection of co- and adjacent-channel stations and prior-filed applications (day and night). The proposal would also prohibit the corrective amendment of any Form 175 or tech box data that rendered the application technically ineligible at the time of filing. This prohibition would also extend to community of license change proposals before a CP is awarded.

Additionally, the Commission suspects that many AM auction applications are lobbed in by speculators looking for a simple singleton grant (thus avoiding actually having to participate in the pricey auction process). Accordingly, it’s looking at possible caps on AM auction applications – perhaps a maximum limit of five applications per applicant.

In addition, the Commission wants to know if it would be a good idea to apply special attribution rules to root out the use of affiliate entities (or stalking horses or fronts, etc.) to avoid the cap limits.

The NPRM would also codify the 2003 *Nelson Enterprises* decision, making explicit that,

under Section 73.182(k), two AM applications are mutually exclusive if either application would enter the 25% limit of the other.

No More FM Translator Band Hopping Across the NCE Border

Historically, FM translator CP holders have been able to snag a permit during an auction window for commercial band translators and then modify that permit to “hop” over to the reserved, noncommercial (NCE) band with ease. This is desirable because of the less restrictive NCE rules regarding satellite and microwave signal delivery. (Hops could also go the other way – from NCE band to commercial – a process which enables applicants to get into the commercial band even though the Commission hasn’t opened a window for commercial translators.) The FCC views all such “hops” as undesirable, and so is proposing to prohibit such trans-band moves unless and until the translator to be moved has been built and operating (either licensed or with a license application pending) for at least two years.

Other Auction Arcana

Non-universal settlements. Applicants filing during auction windows are, of course, subject to very strict anti-collusion rules. However, the Bureau has historically relaxed those rules for the purpose of encouraging and facilitating pre-auction settlements during specially-announced designated windows. The Commission thinks that such relaxations have been useful, so it is proposing to formalize the Bureau’s authority to permit non-universal technical amendments and settlements. But be careful: to be acceptable, a technical amendment would have to resolve all mutual exclusivities between the amending application and all other applications in the MX group.

Deadlines for long-form applications. The rules presently specify that long-form applications from auction winners must be filed within 30 days of the close of bidding. That has caused some heartburn in the past, particularly when the bidding wrapped up in mid- to late-November, since that meant that long-forms had to be filed right in the middle of the December holidays. But the Commission is no Grinch – it cares, it really cares! As a result, it is proposing to soften its rule to allow for some flexibility in the long-form deadline, “as circumstances warrant”.

“New entrant bidding credits” and unjust enrichment. A winning bidder is not eligible for a “new entrant bidding credit” (NEBC) if it, or any party with an attributable interest in the winning bidder, has an attributable interest in any existing mass media facility in the “same area” as the proposed new facility. The existing and proposed facilities are in the “same area” if the principal community contours of the two facilities would overlap. For purposes of the NEBC, the contour of a proposed new FM broadcast facility would

be defined by the maximum class facilities at the allotment site.

The FCC also wants to be clear about unjust enrichment payments when a permit acquired with NEBC is sold. If the buyer would not have been entitled to the same NEBC, then the FCC has to be reimbursed for the credits for which the buyer was not eligible. The Commission now wants to clarify that that policy should also apply to *pro forma* transfers and assignments filed on Form 316. Supposedly the existing rule is already clear as day on this point, but the FCC figures it should clarify because the staff has still received a boatload of questions about it.

And noting yet another supposedly crystal clear policy apparently in need of further clarification, the FCC proposes to amend the rules to state unequivocally that while your maximum NEBC eligibility is set when you file your Form 175, it will be diminished by post-filing changes such as the acquisition of additional attributable interests. The final determination of NEBC eligibility will be made when the post-auction long-form application is processed.

Supplemental Terrain Roughness Showings

The NPRM proposes to codify the terrain roughness standards which the Bureau staff has been informally using since 2001. Those standards come into play when the terrain in one or more directions from a proposed antenna site “departs widely” from the average elevation used by the staff to predict contours; in such cases, applicants may be able to use alternate coverage prediction methods. The trouble is that the Commission has declined to define the term “departs widely” in its rules, leaving applicants (and their engineers) in the dark. The staff has developed some informal parameters governing the use of alternate contour prediction methods. Those parameters are described in a convenient clip-’n’-save sidebar below. The FCC now proposes to formally codify those parameters in the rules.

It is difficult to overstate the extraordinary importance of all the changes which the NPRM proposes to make to the processes by which new radio authorizations are sought and granted. While both AM and FM are mature, widely-dispersed radio services with nationwide reach, interest – both in new stations and in modifications of existing stations – continues to run high. Acting Chairman Copps and Commissioner Adelstein believe that that interest can and should be channeled in particular directions, but one may justifiably wonder whether governmental fiat will be more effective than marketplace forces in assuring fair and efficient deployment of radio service.

The NPRM raises a host of complex technical, regulatory and constitutional issues. Among those is the question of whether the government can constitutionally favor one or

more particular racial or ethnic groups in the licensing process. The newly-proposed “priority” for Native Americans appears to be just the kind of “reverse discrimination” approach – favoring one racial/ethnic group over others – that the Supreme Court has indicated may violate the Equal Protection Clause of the Constitution. (The Commission’s questionable favoritism is not likely to be restricted to Native Americans. As indicated in the article on Page 11 of this issue, the FCC’s proposed revision of its ownership reporting system hints at a much wider race/ethnicity/gender-based approach to licensing.) Look for this point to be litigated if the Commission does indeed move toward race-based (or other constitutionally dubious) licensing preferences.

Anyone with an interest in AM and FM radio would do well to review the NPRM with care and consider filing responsive comments. (The deadlines for comments and reply comments have not yet been established; check back to www.commlawblog.com for updates.)

How the FCC Tells Whether Terrain “Departs Widely”

[Editor’s Note: Are you unclear about when an alternate contour prediction method can be used because the terrain around your transmitter site “departs widely” (to use the FCC’s felicitous phrase)? No problem – here’s the Commission’s own summary (from Paragraph 49 of FCC 09-30, released April 20, 2009). Just clip and save it for future reference!]

First, terrain has been considered to depart widely when the antenna height above average terrain (“HAAT”) along a single radial in the direction of a community’s center, from three to 16 kilometers from the antenna site (*i.e.*, the Commission’s standard measurement methodology), varies by more than 30 percent from the HAAT along the same radial, measured from three kilometers from the antenna site to the community’s outer boundary. Second, when there is line of sight coverage from the antenna to the community of license, the staff has found terrain to depart widely when the actual terrain roughness factor, measured along the radial running from the antenna site to the community center from a distance of 10 to 50 kilometers from the antenna site, is less than or equal to 20 meters or greater than or equal to 100 meters (known as “delta-h”).¹ If one of these two conditions is met, the staff will allow a contour showing using an alternate prediction method, provided that (a) the contour predicted by the alternate method is at least ten percent greater than that predicted by the standard methodology, and (b) for stations in the non-reserved FM band, the 70 dB μ principal community contour predicted by the alternate method is not greater than the 60 dB μ contour predicted by the standard methodology.

¹ [47 C.F.R. § 73.313(e). *See, e.g.*, § 73.313(h)(1), §§ 73.24(i), 73.315(a).] § 73.333 Figure 4.