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## FCC Adopts 307(b) “Tribal Priority” *Overhaul of basic 307(b) analysis deferred*

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As we reported back then, in April, 2009, the Commission issued a sweeping set of proposals designed to re-vamp the AM/FM allotment processes. The overhaul seemed primarily intended to instill order into the chaos that had become (and largely remains) of Section 307(b) analysis. A crucial secondary aim was to stem the seemingly inexorable movement of radio stations out of rural areas and into more densely populated areas. After devoting the first half of its Notice of Proposed Rule Making to those proposals, the Commission used the second half to toss in a laundry list of far less ambitious suggestions.

On February 3, the Commission issued a First Report and Order and Further Notice of Proposed Rule Making in which it grabbed the low-hanging fruit but declined – at least for the time being – to take on the more complex and controversial Section 307(b) issues. The primary beneficiaries of the changes that *were* adopted will be Native American Tribes, for whom the Commission has tried to clear a path toward easier acquisition of radio stations on tribal lands.

### *Changes in Overall Section 307(b) Priorities*

There’s nothing to say here, because the FCC tabled this item in order to “to analyze comments on the [various 307(b)] proposals in depth, to research certain matters brought up in those comments, and to devote the proper time and analysis to those major reforms without delaying action on a number of less complex but also important matters.” (Likely translation: Gosh, this is a complicated and controversial bunch of questions with no easy consensus in sight. Let’s get back to this some other time.) No timetable was provided for future action on the tabled questions – but at the current rate of, maybe, one broadcast-related item out of the full Commission every couple of months, the smart money figures that it’s going to take a while, if it happens at all.

### *“Tribal Priority”, Other Native American Provisions*

Under the longstanding allotment priorities which are *not* being changed for now,

proposals for new AM or NCE-FM stations – and for the allotment of new commercial FM channels – are assigned “priorities” based on their Section 307(b) attributes. An allotment opportunity that will deliver reception service to otherwise unserved areas/populations is assigned the highest priority (Priority 1). If the proposed allotment would deliver such service to areas/populations which receive only one other radio service, it rates Priority 2. And if it would not serve such unserved/underserved areas/populations, but *would* be the first local transmission service (*i.e.*, the only radio station licensed to that particular community), it is Priority 3. Priorities 2 and 3 are treated as “co-equal”. There’s also a Priority 4 (for “other public interest factors”), a catch-all category that brings up the rear.

The Commission is concerned about the dramatic scarcity of radio stations serving Native American populations on tribal lands. Accordingly, the FCC has decided to shoe-horn a new priority – the “Tribal Priority” – between Priorities 1 and co-equal Priorities 2 and 3. That means that proposals (*i.e.*, applications for new AM or NCE-FM stations, or new commercial FM channel drop-in proposals) entitled to a Tribal Priority will garner a preference over competing proposals which claim only Priority 2/3 status. That could mean the avoidance of an auction (for AM applicants) or a “comparative points” analysis (on the NCE-FM side). In other words, a Tribal Priority could be a serious benefit.

Not surprisingly, there are a lot of strings attached. The Tribal Priority is available only if:

- ✘ the proponent/applicant is a federally recognized Tribe, tribal consortium or an entity at least 51% of which is owned or controlled by a Tribe or Tribes (and there’s a further catch to that last option: such entities must be at least 51% owned/controlled by a Tribe or Tribes at least a portion of whose tribal lands lie within the proposed city-grade contour);
- ✘ the proposed community of license is on tribal lands;
- ✘ at least 50% of the daytime city-grade contour of the proposed facilities would cover tribal lands (although those lands need not all belong to the same Tribe); and
- ✘ the proposal/application would otherwise be entitled to either Priority 1 or 2 (*i.e.*, first or second reception service to more than *de minimis* population) *or* slightly modified Priority 3 (*i.e.*, for commercial proposals, first local *tribal-owned* transmission service or, for NCE proposals, first local *NCE tribal-owned* transmission service).

And any applicant/proponent which successfully claims a Tribal Priority has more to think about. There’s a minimum four-year holding period (that’s four years of actual

operation) before an AM or NCE-FM station obtained with a Tribal Priority can be sold (although that doesn't apply if the buyer would itself qualify for the Tribal Priority).

(Gradual changes in an NCE licensee's board would be permitted during the four-year period, as long as the 51% tribal ownership/control threshold is always maintained.)

Further, for AM, NCE-FM *and* commercial FM stations subject to a Tribal Priority, during the four-year holding period the community of license can't be changed and the station's city-grade coverage cannot be modified to cover less than 50% of tribal lands.

Interestingly, the lingering burdens could also affect *non*-tribal licensees. In the context of commercial FM allotments, the Tribal Priority would come into play at the initial allotment state. Once the channel was allotted, it would be subject to auction, and there would be no guarantee that a tribal applicant would be the highest bidder. In such cases, even a non-tribal licensee would have to provide service primarily to tribal lands for at least four years.

This complex carve-out for a specific racial/ethnic category will likely raise eyebrows among constitutional scholars because it raises obvious "equal protection" questions. Normally, the government's ability to engage in decision-making based on race or ethnicity is narrowly limited, as the Supreme Court made clear in its 1995 decision in *Adarand Construction, Inc. v. Peña*. The FCC recognized the potential *Adarand* problem and tried to head it off with an interesting counter. According to the FCC, the Tribal Priority isn't about racial or ethnic preferences at all. Rather, that Priority is based on the "unique legal status of Indian tribes under Federal law". And sure enough, there is considerable authority supporting the proposition that Tribes are "quasi-sovereign" entities which have historically interacted with the federal government "in a unique fashion".

Anytime you see the word "unique" popping up repeatedly in the space of a couple of paragraphs, you know that the FCC is trying to set up what the *cognoscenti* refer to as an anticipatory "purple cow" defense. That is done by describing the case at hand as so distinctive in so many ways (*i.e.*, it's unique) that it's unlike any other case that has gone before or will come after – and therefore will have no precedential effect. While such efforts can often seem strained and unconvincing, that's not the situation here. There *is* a long (and often not happy) history of interaction between the Feds and the Tribes as sovereign entities. And the FCC's new Tribal Priority is set up as a program in which only the *Tribes* themselves (or "tribal entities") – but *not* mere members of Tribes – will be permitted to take advantage of the Priority. By taking that approach, the Commission may have successfully avoided a constitutional "reverse discrimination" attack on the Priority.

### *Other Changes*

By far the lion's share of the decision is devoted to the Tribal Priority. Beyond that, the newly-adopted changes are more in the nature of housekeeping. For example:

- ✓ When an AM application is awarded on the basis of a 307(b) Priority 1, 2 or 4, the station's facilities *may* be modified, but *only* if the modified facilities don't result in a decrease of more than 20% in the factor(s) (*e.g.*, population served) which resulted in the 307(b) preference.
- ✓ AM applicants will be required to demonstrate, in their initial Form 175s, compliance with four eligibility criteria: (a) daytime community of license coverage; (b) nighttime community of license coverage; (c) daytime protection of existing stations and previously-filed proposals; and (d) nighttime protection of existing stations and previously-filed proposals. In a concession to human fallibility (particularly when that fallibility bumps up against the arcane and labyrinthine complexity of the AM allocation rules), though, the Commission plans to provide a single opportunity to amend to correct failures to satisfy any of those criteria.
- ✓ The Commission has now codified the Bureau's authority to: (a) permit partial settlements and/or amendments to help resolve mutual exclusivities; (b) impose caps on the number of AM applications that may be filed during any particular window; and (c) establish more flexible deadlines for post-auction long-form applications.
- ✓ The auction rules have been revised to confirm the current policy that an applicant's maximum "new entrant bidding credit" is set in stone with the Form 175 showing. The credit may be *reduced* by circumstances that occur after the Form 175 is filed – for example, if the applicant acquires more stations – but the credit may *not* be increased beyond what is shown in the Form 175.
- ✓ Also on the topic of "new entrant bidding credits", such credits aren't available to the winning bidder if that bidder (or anyone with an attributable interest in the bidder) has any existing media in the "same area" as the facility up for auction. The Commission has now clarified how that "same area" is to be determined in this context (*e.g.*, for FMs, use the "circular" contour, rather than the "calculated" contour, based on the maximum class facilities at the specified allotment site).

As a follow-up to the creation of the Tribal Priority, the Commission has also proposed (in the "Notice of Proposed Rule Making" portion of its decision) to extend the Tribal

Priority to non-landed tribes, and to implement a Tribal Bidding Credit to assist Native Americans in the auction process. Comments and reply comments on those proposals will be due 60 and 90 days after the NPRM is published in the Federal Register.

The new rules fall far short of what might have been expected from this proceeding when it got started back in April. But that's not necessarily all bad. Many observers saw this proceeding as the beginning of the end of the "move-in" process by which radio stations get moved around – "around" here being kind of a euphemism for "into the Big City and away from the Small Town". That obviously hasn't happened . . . yet – but it remains a possibility.

On the other hand, the new rules open potentially significant new opportunities for Native Americans, while also creating a further strategic wrinkle for those involved in allocations proceedings. How and when all of this will start to play out remains in the Bureau's control. Stay tuned.