



# PUBLIC NOTICE

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June 15, 2005

## AM Auction No. 84 Mutually Exclusive Applicants Subject to Auction

**Settlement Period Announced for Certain Mutually Exclusive Application Groups;**

**September 16, 2005 Deadline Established for Section 307(b) Submissions**

**Report No. AUC-05-84-E (Auction No. 84)**

On November 6, 2003, the Media Bureau and the Wireless Telecommunications Bureau (collectively the "Bureaus") announced a five-day period, from January 26, 2004, to January 30, 2004, for the filing of applications for new AM stations and major modifications to authorized AM stations.<sup>1</sup> By this Public Notice, the Bureaus provide, as Attachment 84-MX, a list of all applications received during the filing window that are mutually exclusive with other applications submitted in the filing window.<sup>2</sup> Accordingly, these applications are subject to the Commission's competitive bidding procedures.<sup>3</sup> By

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<sup>1</sup> "AM New Station and Major Modification Auction Filing Window; Minor Modification Application Freeze; Notice and Filing Requirements Regarding January 26 – 30, 2004 Window for Certain AM Construction Permits Applications; Notice Regarding Freeze on the Acceptance of AM Minor Change Construction Permit Applications from January 12 to January 30, 2004," *Public Notice*, 18 FCC Rcd 23016 (2003) ("AM Window Public Notice").

<sup>2</sup> In determining mutual exclusivity the staff applied the following rule sections: 47 C.F.R. §§ 73.37, 73.182, 73.183(b)(1). *See also Review of the Technical Assignment Criteria for the AM Broadcast Service, Report and Order*, 6 FCC Rcd 6273 (1991), *recon granted in part and denied in part*, 8 FCC Rcd 3250 (1993) and *Nelson Enterprises, Inc.*, 18 FCC Rcd 3414 (2003) (clarifying standards to establish mutual exclusivity between window-filed AM applications).

<sup>3</sup> *See* 47 U.S.C. § 309(j); 47 C.F.R. § 73.5000(a); *see generally Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, 13 FCC Rcd 15920 (1998) ("Broadcast First Report and Order"), *on recon.*, *Memorandum Opinion and Order*, 14 FCC Rcd 8724 (1999), *on further recon.*, *Memorandum Opinion and Order*, 14 FCC Rcd 12541 (1999).

this Public Notice, the Bureaus announce a settlement period for certain specified groups of mutually exclusive AM applicants and a deadline for filing 47 U.S.C. § 307(b) supplementary information, if relevant. The deadline for both is **September 16, 2005**.

**Anti-Collusion Rule.** The prohibition of collusion set forth in Section 1.2105(c) of the Commission's rules becomes effective upon the filing of FCC Form 175, Application to Participate in an FCC Auction, and applies to all broadcast service auctions.<sup>4</sup> However, in certain circumstances, the Commission will allow a limited opportunity to settle, or otherwise resolve mutual exclusivities by means of engineering solutions, following filing of the FCC Form 175 applications.<sup>5</sup> Specifically, pursuant to Section 73.5002(d) of the Commission's rules, only applicants in mutually exclusive AM application groups which include either (1) at least one AM major modification application, or (2) at least one noncommercial educational ("NCE") application,<sup>6</sup> will be provided a limited opportunity to resolve their mutual exclusivities and may submit settlement agreements or technical amendments to the Commission during the period that commences with the release of this public notice and ends **September 16, 2005**.<sup>7</sup> Once this settlement period is completed, the anti-collusion restrictions will again take effect for such applicants. Mutually exclusive AM application groups eligible for settlement are listed in Attachment 84-MX under Category I. An AM NCE application must resolve all mutual exclusivities to commercial applications in the same MX group. An AM NCE application which remains in conflict with a commercial application after the close of the settlement window will be returned as unacceptable for filing, and the remaining applications for AM commercial broadcast stations will be processed in accordance with competitive bidding procedures.<sup>8</sup> Mutually exclusive groups consisting of only new commercial AM station applications for the same community will proceed directly to auction.<sup>9</sup>

Applicants that are permitted to resolve their mutual exclusivities through settlement, described *supra*, must ensure that their settlement agreements comply with the provisions of Section 311(c) of the Communications Act of 1934, as amended ("the Act"), and the pertinent requirements of Section 73.3525 of the Commission's rules, including, *inter alia*, reimbursement restrictions.<sup>10</sup> In the interest of expediting new AM service to the public, the Commission will accept both universal – in which all applicants in the particular MX group participate – and non-universal settlements. Universal settlements, however, are encouraged. Applicants must submit a joint request for approval of settlement and a copy of the settlement agreement. Each party to the settlement must submit the affidavits required by 47 C.F.R. Section 73.3525(a). Surviving applicants must also submit a complete FCC Form 301, Application for

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<sup>4</sup> See 47 C.F.R. § 1.2105(c), 73.5002(d).

<sup>5</sup> See *Broadcast First Report and Order*, 13 FCC Rcd at 15927, 15980-81. See also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Second Report and Order*, 18 FCC Rcd 6691 (2003) ("*NCE Second Report and Order*").

<sup>6</sup> NCE applicants checked the box labeled "noncommercial educational" on their FCC Form 175 applications.

<sup>7</sup> See 47 C.F.R. § 73.5002(c) and (d).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* See also *Orion Communications Limited v. FCC*, 213 F.3d 761 (D.C. Cir. 2000).

<sup>10</sup> See 47 U.S.C. § 311(c); 47 C.F.R. § 73.3525.

Construction Permit for Commercial Broadcast Station, for the pertinent application(s).<sup>11</sup> Applicants must simultaneously submit the required Form 301 application fee and a Form 159, Remittance Advice.<sup>12</sup>

Applicants that are permitted to resolve their mutual exclusivities by means of technical amendments, described *supra*, may do so by submitting a complete FCC Form 301, Application for Construction Permit for Commercial Broadcast Station, for the pertinent application(s). Applicants must simultaneously submit the required Form 301 application fee and Form 159, Remittance Advice.<sup>13</sup> The application must resolve all technical conflicts between it and all other applications in the specified MX group. An applicant submitting a Form 301 application to resolve a mutual exclusivity by means of a technical amendment may change the engineering proposal specified in its previously submitted Form 175 application, but such change must be minor, as defined by the applicable AM service rules, and must not create new application conflicts.<sup>14</sup> Form 301 applications that create new application conflicts will be returned. The Commission also will accept non-universal technical amendments.

**Section 307(b) Determination.** In the *Broadcast First Report and Order*, the Commission determined that its competitive bidding authority should be harmonized with its statutory duty under Section 307(b) of the Act to effect an equitable distribution of radio stations throughout the United States. Therefore, the Commission directed the staff to undertake a traditional Section 307(b) analysis prior to conducting an auction for mutually exclusive AM applications proposing to serve different communities.<sup>15</sup> Accordingly, for those mutually exclusive groups listed in Attachment 84-MX proposing to serve different communities, a Section 307(b) analysis is required.

In order to evaluate the Section 307(b) considerations, each applicant within a mutually exclusive group consisting of proposals to serve different communities must submit by **September 16, 2005**, an amendment which includes the following: (1) the area and population within the proposed 2 mV/m and 0.5 mV/m daytime contours, and the nighttime interference-free contour (if fulltime operation is proposed); (2) the number of stations licensed to the proposed community of license; (3) the number of stations providing protected service to the proposed community of license; (4) the population (according to the latest Census data) of the proposed community of license; (5) where relevant to establish the precondition of a licensable community, a description of the civic, cultural, religious, social and commercial attributes of the proposed community of license; and (6) any other information determined relevant by the applicant.<sup>16</sup> Submitted Section 307(b) data must be based on the technical proposal as

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<sup>11</sup> See "Filing Procedures," *infra*.

<sup>12</sup> Effective August 10, 2004, this fee is \$3,310.00. See schedule of charges at 47 C.F.R. § 1.1104. Method and forms of payment are addressed in 47 C.F.R. §§ 1.1109, 1.1110. See also the Media Services Application Fee Filing Guide and the FCC Form 301 instructions.

<sup>13</sup> See *supra* note 11.

<sup>14</sup> See 47 C.F.R. § 73.3571.

<sup>15</sup> See *Broadcast First Report and Order*, 13 FCC Rcd at 15964.

<sup>16</sup> The Commission's service priorities when making a Section 307(b) determination are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service, and (4) other public interest matters. *Second Report and Order, FM Channel Policies/Procedures*, 90 FCC 2d 88, 90-93 (1982); *recon. denied*, 56 RR 2d 448 (1984). Priorities (2) and (3) are given equal weight. These priorities were first applied in Section 307(b) determinations in the AM context by the Review Board in *Alessandro Broadcasting Co.*, 56 RR 2d 1568 (Rev. Bd. 1984). This request for Section 307(b) information offers each applicant the flexibility to advance its application based upon its distinct circumstances. The relevance of each applicant's submission will be assessed during the

specified in the AM Auction No. 84 filing window application. A mutually exclusive AM applicant may not change the technical proposal specified in its AM Auction No. 84 filing window application, except as provided, *supra*.<sup>17</sup> If a mutually exclusive group that is eligible to submit settlements or engineering solutions does not do so by September 16, 2005, and the applications in that group propose to serve different communities of license, each applicant within the group must submit an amendment addressing the Section 307(b) criteria by **September 16, 2005**.<sup>18</sup> The staff will dismiss, without further processing, the previously filed FCC Form 175 application (and Section I and Section III-A Tech Box of the FCC Form 301 submission) of any applicant which fails to file a settlement, technical amendment, or a Section 307(b) amendment by this date.<sup>19</sup>

**Filing Procedures.** Joint requests for approval of settlement agreement must be filed in original and two copies, plus one additional copy for each applicant that is a party to the settlement, **on or before September 16, 2005**, with the Commission's Secretary, Marlene Dortch, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W. Room TW-A325, Washington, D.C. 20054. In addition, it is requested that a courtesy copy of all such filings be delivered to Elizabeth Robinson, Audio Division, Media Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Room 2-B450, Washington, D.C. 20554.

All FCC Form 301 applications must be filed electronically through the Media Bureau's Consolidated Database System (CDBS) online electronic forms filing system. When filing the complete FCC Form 301, applicants must select "Long Form Application for AM Auction No. 84" on the Pre-form for Form 301 (Question 2 – Application Purpose). In addition, the CDBS file number previously issued to the Section I and Section III-A Tech Box Form 301 filed in the AM Auction No. 84 filing window must be entered on the Pre-form in the field "Eng. Proposal File Number."<sup>20</sup> Instructions for use of the electronic filing system are available in the CDBS User's Guide, which can be accessed from the electronic filing web site at:

<http://www.fcc.gov/mb/elecfile.html>

A surviving NCE AM applicant in a settlement agreement, or an NCE AM applicant that proposes to resolve mutual exclusivity through an engineering solution, must also file electronically FCC Form 301. In accordance with Section 1.1114(c) of the Commission's rules, these Form 301 applications are exempt from application filing fees. To establish NCE eligibility,<sup>21</sup> these AM NCE applicants must supplement their Form 301 filings with answers to questions 2 through 5, Section II – Legal and Financial

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staff's Section 307(b) review. It may be the case that certain of this information may not be material to the staff's Section 307(b) determination.

<sup>17</sup> See *Broadcast First Report and Order*, 13 FCC Rcd at 15976.

<sup>18</sup> NCE applicants that failed to successfully resolve mutual exclusivities are returned as unacceptable for filing and therefore do not submit Section 307(b) information. See 47 C.F.R. § 73.5002(c).

<sup>19</sup> See 47 C.F.R. § 73.3568(a)(1).

<sup>20</sup> The CDBS file number issued to the Section I and Section III-A Tech Box Form 301 filed in the AM Auction No. 84 filing window is listed in Attachment A to this public notice.

<sup>21</sup> Section 73.503(a) of the Commission's rules states that an NCE broadcast station "will be licensed only to a nonprofit educational organization and upon showing that the station will be used for the advancement of an educational program." 47 C.F.R. § 73.503.

of FCC Form 340, Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station, March 2001 edition. Responses to questions 2 through 5 of the FCC Form 340, including any requisite exhibits, must be filed as an attachment to the Form 301.

The mutually exclusive applicants' FCC Form 301 Section I and Section III-A Tech Box submissions filed during the AM Auction No. 84 filing window are available for review in CDBS. For assistance with electronic filing, call the Audio Division Help Desk at (202) 418-2662.

An original and two copies of Section 307(b) submissions must be filed **on or before September 16, 2005**, with the Commission's Secretary, Marlene Dortch, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W. Room TW-A325, Washington, D.C. 20054. In addition, it is requested that a courtesy copy of all such Section 307(b) filings be delivered to Elizabeth Robinson, Audio Division, Media Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Room 2-B450, Washington, D.C. 20554.

The staff will withhold further action on the mutually exclusive AM applications listed in Attachment 84-MX, pending submission of settlement agreements or engineering proposals to resolve mutual exclusivity and/or Section 307(b) supplementary information. For additional information, contact Lisa Scanlan, Thomas Nessinger, Susan Crawford or Ann Gallagher of the Audio Division at (202) 418-2700.

***This Public Notice contains the following Attachment:***

**Attachment 84-MX:** AM Mutually Exclusive Applications Subject to Auction

**FCC NOTICE REQUIRED BY THE PAPERWORK REDUCTION ACT**

The public reporting for this collection of information is estimated to range from 0.5 to 3 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the required data, and completing and reviewing the collection of information. If you have any comments on these burden estimates, or on how we can improve the collection(s) and reduce the burden(s) they cause you, please write to Cathy Williams, Federal Communications Commission, AMD-PERM, Room 1-C823, 445 12<sup>th</sup> Street S.W., Washington, DC 20554, Paperwork Reduction Project (3060-0996). We will also accept your comments regarding the Paperwork Reduction Act aspects of the collection(s) via the Internet if sent to [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov). Please do not send completed applications to this address.

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**THE FOREGOING NOTICE IS REQUIRED BY THE PAPERWORK REDUCTION ACT OF 1995, P.L. 104-13, OCTOBER 1, 1995, 44 U.S.C. Section 3507.**

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