Sundays, and holidays, not to exceed three weeks.

ADDRESS: The meeting will be held at the Federal Aviation Administration, conference room 7 A/B, 800 Independence Avenue, S.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: National Airspace Review Program Management Staff, Room 1005, Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, D.C. 20591; (202) 426-3560. Attendance is open to the interested public, but limited to the space available. To insure consideration, persons desiring to make statements at the meeting should submit them in writing to the Executive Director, National Airspace Review Advisory Committee, Air Traffic Service, AAT-1, 800 Independence Avenue, S.W., Washington, D.C. 20591, by June 28, 1983. Time permitting and subject to the approval of the chairman, these individuals may make oral presentations of their previously submitted statements.

Issued in Washington, D.C. on June 6, 1983.

Karl D. Trautmann,

Manager, Special Projects Staff, Air Traffic Service.

[FR Doc. 83-15785 Filed 6-10-83; 8:45 am]

BILLING CODE 4910-13-M

Radio Technical Commission for Aeronautics (RTCA); Executive Committee; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. I) notice is hereby given of a meeting of the RTCA Executive Committee to be held on July 15, 1983, in RTCA Conference Room, 1425 K Street, N.W., Suite 500, Washington, D.C. commencing at 9:30 a.m.

The Agenda for this meeting is as follows: (1) Approval of Minutes of Meeting Held on May 13, 1983; (2) Chairman's Report on RTCA Administration and Activities; (3) Special Committee Activities Report for May and June, 1983; (4) Report of Ad Hoc Study Group on Airborne Thunderstorm Detection Equipment; (5) Consideration of Establishing New Special Committees; and (6) Other Business.

Attendance is open to the interested public but limited to space available. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, 1425 K Street, N.W., Suite 500, Washington, D.C. 20005; (202) 682-0266. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, D.C. on June 3, 1983.

Karl F. Bierach,

Designated Officer.

[FR Doc. 83-15788 Filed 6-10-83; 8:45 am]

BILLING CODE 4910-13-M

Sunshine Act Meetings

Federal Register
Vol. 48, No. 114
Monday, June 13, 1983

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

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Commodity Futures Trading Commission	1
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1

COMMODITY FUTURES TRADING COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT:

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 2 p.m., Thursday, June 16, 1983.

CHANGES IN THE MEETING: Meeting has been changed to Thursday, June 30, 1983 at 2 p.m.

[S-836-83 Filed 6-9-83; 10:43 am]

BILLING CODE 6351-01-M

2

CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: 10 a.m., Wednesday, June 15, 1983.

LOCATION: Third Floor Hearing Room, 1111 18th Street NW., Washington, D.C.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. *Upholstered Furniture; Evaluation of Technology*
The Staff will brief the Commission on investigations of new materials and techniques for improving the cigarette resistance of upholstered furniture and industry's plans for incorporating the most promising of these into production furniture.

STATUS: Closed to the public:

2. *Enforcement Matter OS# 5455*
The staff will brief the Commission on enforcement matter OS# 5455.

For a recorded message containing the latest agenda information: Call 301-492-5709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 5401 Westbard Ave., Bethesda, Md. 20207; 301-492-6800.

[S-838-83 Filed 6-9-83; 1:28 pm]

BILLING CODE 6355-01-M

3

CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: 10 a.m., Thursday , June 16, 1983.

LOCATION: Room 456, Westwood Towers, 5401 Westbard Avenue, Bethesda, Maryland.

STATUS: Closed to the public.

MATTERS TO BE CONSIDERED:

Compliance Status Report
The staff will brief the Commission on the status of various compliance matters.

For a recorded message containing the latest agenda information: call 301-492-5709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 5401 Westbard Ave., Bethesda, Md. 20207; 301-492-6800.

[S-839-83 Filed 6-9-83; 1:28 pm]

BILLING CODE 6355-01-M

4

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DATE AND TIME: Tuesday, June 14, 1983, 9:30 a.m. (eastern time).

PLACE: Commission Conference Room No. 200, 2nd floor, Columbia Plaza Office Building, 2401 E Street NW., Washington, DC 20506.

STATUS: Part will be open to the public and part will be closed to the public.

MATTERS TO BE CONSIDERED:

1. Ratification of Notation Vote/s.
2. A Report on Commission Operations (Optional).
3. Freedom of Information Act Appeal No. 83-4-FOIA-13-PX, concerning a request for a copy of a Title VII file.
4. Freedom of Information Act Appeal No. 83-03-FOIA-51-PA, concerning a request for records in an EPA charge file.
5. Freedom of Information Act Appeal No. 83-2-FOIA-4-LA, concerning a request for personnel records.
6. Exemption from Executive Order 12372; Publication in **Federal Register.**
7. Proposed section 624, Reproductive and Fetal Hazards, Volume II of the Compliance Manual.
8. Amendment to Commission Regulations 29 CFR 1601.75, Certification of Designated 706 Agencies.

Closed:

1. Litigation Authorization; General Counsel Recommendations.

Note.—Any matter not discussed or concluded may be carried over to a later meeting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides recorded announcements a full week in advance on future Commission sessions. Please telephone (202) 634-6748 at all times for information on these meetings).

CONTACT PERSON FOR MORE INFORMATION: Treva McCall, Executive Secretary to the Commission at (202) 634-6748.

This Notice Issued June 7, 1983.

[S-835-83 Filed 6-9-83; 10:29 am]

BILLING CODE 6750-06-M

5

FEDERAL HOME LOAN BANK BOARD

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 48 FR 26582, Wednesday, June 8, 1983.

PLACE: Board room, sixth floor, 1700 G Street NW., Washington, D.C.

STATUS: Open meeting.

CONTACT PERSON FOR MORE INFORMATION: Ms. Gravlee (202-377-6970).

CHANGES IN THE MEETING: The Bank Board meeting previously scheduled for Thursday, June 9, 1983, at 10 a.m., has been changed to 2 p.m.

[No. 43, June 9, 1983]

[S-837-83 Filed 6-9-83; 10:45 am]

BILLING CODE 6720-01-M

6

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

June 8, 1983.

TIME AND DATE: 10 a.m., Wednesday, June 15, 1983.

PLACE: Room 600, 1730 K Street NW., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:.

1. United States Steel Corporation, Docket Nos. West 80-366-RM, WEST 81-58-M, WEST 80-160-M. (Issues include whether the

judge erred in concluding that the operator violated 30 CFR 55.12–14, a safety standard dealing with movement of power cables.)

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen (202) 653–5632.

[S-840-83 Filed 6-9-83; 2:21 pm]

BILLING CODE 6735-01-M

7

FEDERAL RESERVE SYSTEM

Board of Governors

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 48 FR 25047, Friday, June 3, 1983.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 10 a.m., Wednesday, June 8, 1983.

CHANGES IN THE MEETING: One of the items announced for inclusion at this meeting was consideration of any agenda items carried forward from a previous meeting; the following such closed item(s) was added:

Federal Reserve Bank and Branch director appointments. (This item was previously announced for a meeting on June 6, 1983.)

CONTACT PERSON FOR MORE INFORMATION: Joseph R. Coyne, Assistant to the Board (202) 452–3204.

Dated: June 8, 1983.

James McAfee,

Associate Secretary of the Board.

[S-834-83 Filed 6-9-83; 10:28 am]

BILLING CODE 6210-01-M

8

NUCLEAR REGULATORY COMMISSION

DATE: Thursday, June 9, 1983 (revised), Friday, June 10, 1983 (revised) and Week of June 13, 1983.

PLACE: Commissioners' Conference Room, 1717 H Street NW., Washington, D.C.

STATUS: Open and closed.

MATTERS TO BE DISCUSSED: *Thursday, June 9:*

2:00 p.m.:
Discussion of Possible Courses of Action on Indian Point (Closed—Exemption 5) (New Item)

3:30 p.m.:
Discussion and Vote on Indian Point (Public Meeting) (Time Change)

Friday, June 10:

9:00 a.m.:
Discussion/Possible Vote on Full Power Operating License for St. Lucie-2 (Public Meeting) (New Item)

Wednesday, June 15:

10:00 a.m.:
Briefing on Status of Staff Certification in TMI–1 Restart Proceeding (Public Meeting)

Thursday, June 16:

10:00 a.m.:
Discussion of TMI–1 Restart (Open/Closed to be determined)

2:00 p.m.:
Discussion of Management-Organization and Internal Personnel Matters (Closed—Exemption 2 and 6)

Friday, June 17:

2:30 p.m.:
Discussion of Regulatory Reform Task Force—Administrative Proposals—Backfit Rule (Public Meeting)

ADDITIONAL INFORMATION: On May 31, 1983 the Commission voted 3–0 (Chairman Palladino and Commissioner Gilinsky not present) to hold Affirmation of Hearing Requests for Renewal of Special Nuclear Materials License of Rockwell International's Energy Systems Group, held that day.

AUTOMATIC TELEPHONE ANSWERING SERVICE FOR SCHEDULE UPDATE: (202) 634–1498. Those planning to attend a meeting should reverify the status on the day of the meeting.

CONTACT PERSON FOR MORE INFORMATION: Walter Magee (202) 634–1410.

June 8, 1983.

Walter Magee,

Office of the Secretary.

[S-842-83 Filed 6-9-83; 3:52 pm]

BILLING CODE 7590-01-M

9

PAROLE COMMISSION

[OP0401]

TIME AND DATE: 10:30 a.m.–3:30 p.m., Monday, June 13, 1983.

PLACE: Room 420–F, One North Park Building, 5550 Friendship Boulevard, Chevy Chase, Maryland 20815.

STATUS: Closed pursuant to a vote to be taken at the beginning of the meeting.

CHANGES IN THE MEETING: On June 6, 1983, the Commission determined that the above meeting be started at 9 a.m., for consideration of case referrals. The above change is being announced at the earliest practicable time.

CONTACT PERSON FOR MORE INFORMATION: Linda Wines Marble, Chief Case Analyst, National Appeals Board, U.S. Parole Commission (301) 492–5968.

[S-841-83 Filed 6-9-83; 3:39 p.m.]

BILLING CODE 4410-01-M

federal register

Monday
June 13, 1983

Part II

Federal Communications Commission

Selection From Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings; Final Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 22, 73, 81, 87, 90, and 94

[Gen. Docket No. 81-768; FCC 83-114]

Selection From Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document adopts final rules that will permit the use of a random selection system or lotteries to select initial licensees where there is more than one applicant for a communications facility. The lottery selection system will apply to certain Mass Media, Common Carrier and Private Radio Services. These rules are being promulgated to implement a new statutory provision contained in the Communications Amendments Act of 1982. The use of lotteries to select licensees will reduce the cost and delay associated with traditional comparative hearings and speed new service to the public.

DATES: These rules are effective July 13, 1983 except for Form 346 which is under review for approval at the Office of Management and Budget. Form 346 will not become effective until OMB approval has been obtained.

FOR FURTHER INFORMATION: General Information—Randy W. Thomas, 202-632-6990; Mass Media Information—Barbara Kreisman, 202-632-3894; Common Carrier Information—Michael Menius, 202-632-6450, Private Radio Information—John B. Richards, 202-634-2443.

List of Subjects

47 CFR Part 1

Administrative practice and procedure.

47 CFR Part 22

Mobile radio service.

47 CFR Part 73

Radio broadcasting.

47 CFR Part 81

Coast stations, Radio.

47 CFR Part 87

Aeronautical stations, General aviation, Radio.

47 CFR Part 90

Industrial radio services, Land transportation radio services, Public safety radio services, Radio.

47 CFR Part 94

Operational-fixed microwave, Radio.

Second Report and Order

In the matter of amendment of the Commission's rules to allow the selection from among certain competing applications using random selection or lotteries instead of comparative hearings; Gen. Docket No. 81-768.

Adopted: March 31, 1983.
Released: May 27, 1983.

By the Commission. Chairman Fowler issuing a separate statement; Commissioner Jones concurring and issuing a statement; Commissioner Dawson concurring and issuing a statement; Commissioner Rivera dissenting in part and issuing a statement; Commissioner Sharp concurring in the result.

I. Introduction and Overview

1. *Introduction.* In this proceeding, the Commission is adopting rules to implement a system of random selection or lotteries to choose licensees from among certain competing applicants. The Commission released a *Second Notice of Proposed Rule Making* ("*Notice*") in this matter on October 7, 1982. 47 FR 45046, (October 13, 1982). Numerous comments and reply comments have been received in response to our proposals.[1] We have carefully analyzed the lottery statue, the accompanying *Conference Report*,[2] the *Notice* and the comments (initial and reply). It is our view that the best interest of the public will be served by adopting regulations to implement a lottery system for issuing licenses in certain enumerated services. The specific framework for implementing the lottery authority is set forth below. Particular emphasis is given to the Low Power Television and Television Translator Service ("LPTV") because of the complexity involved in using a lottery in that Mass Media service.[3]

2. In the *Notice*, the Commission proposed to use a lottery to select licensees in LPTV, as well as certain private radio and common carrier services. The proposed lottery rules for LPTV differed significantly from the proposals for the other services due to the statutory mandate that "significant preferences" be incorporated into any mass media lottery selection system. In addition to the low power service, a lottery will also be available for use in Private Land Mobile, Operational Fixed Microwave, Aviation and Maritime Services in the Private Radio Bureau and in the Public Land Mobile Service (except cellular) in the Common Carrier Bureau.

3. Lotteries will be used across the board in LPTV and in the public land mobile services. In the Private Radio area, however, lotteries will be used on a case-by-case basis. This result is warranted in Private Radio because in some cases expedition does not outweigh consideration of other public interest factors, *e.g.*, public safety and more efficient uses of the spectrum.

4. *LPTV Issues.* The new lottery statute requires that minority and diversity preferences be given to certain mass media applicants. The preference scheme adopted herein is essentially the same as described in the *Conference Report* and the *Notice*. Preferences will be available for:

(a) Applicants more than 50% controlled by minorities (a 2:1 preference);

(b) Applicants whose owners control no other media of mass communications (a 2:1 preference); and

(c) Applicants whose owners control 1, 2 or 3 other media of mass communications (a 1.5:1 preference).

5. The latter two preferences, termed the "diversity" preference, reflect the applicant's other ownership interests in any media of mass communications. Applicants may qualify for both the minority and diversity preference.

6. *LPTV Pre-Hearing Lottery Procedure.* Acceptability for filing and cut-off procedures will basically operate as they do now in LPTV. A strict multiple application rule is adopted that bars the filing of any LPTV application that would be directly mutually exclusive with any pending application filed by the same applicant or by any applicant where there is *any* direct or indirect interest of one per cent or more.

7. A two-track approach for filing Petitions to Deny is adopted for use in LPTV. The first approach will require that Petitions to Deny be filed after a "tentative selectee" is chosen. The second approach requires a two-step process. First, a preliminary notice of Petition to Deny will be filed prior to conductng a specific lottery. Then, after a successful applicant is chosen, those parties that preserved their objections may file formal Petitions to Deny; other parties may participate in the formal post-lottery petition process only if good

[1] *See* Appendix A for a list of participants in this proceeding. A brief summary of the comments filed in this proceeding is included in the text; a more thorough comment summary appears in Appendix B.

[2] H.R. Rep. No. 765, 97th Cong., 2d Sess. (1982).

[3] All references to "LPTV" or "low power" include television translators except when otherwise stated.

cause is shown. Conversely, in the Common Carrier and the Private Radio Services, Petitions to Deny, where they properly lie, will be filed prior to the lottery and will be considered post-lottery only with respect to the "tentative selectee." [4]

8. After consideration of any Petitions to Deny and staff examination of the application, the Commission will determine whether a grant can be made or whether a hearing is required.

9. Hearings ordinarily will be conducted on paper before the Commission. In those cases where a paper proceeding cannot resolve certain questions of fact, oral testimony will be heard by an Administrative Law Judge ("ALJ") who will issue an Initial Decision. Exceptions to the Initial Decision may be filed with the Commission. Ordinarily, Bureau counsel will participate only where the Commission refers an issue to an ALJ. Following a paper hearing, the Bureau staff will prepare an Order for Commission approval. In the case of an oral hearing, this action will be taken by the Adjudication Division of the Office of General Counsel. If the "tentative selectee" is found unqualified, a second applicant from the same pool will be selected.

II. Background and Statutory Authority

10. For several years, the Commission has considered in different contexts the possibility of using lotteries as a means of allocating licenses to use the electromagnetic spectrum. *Notice of Proposed Rule Making (LPTV)*, BC Docket No. 78–253, 82 FCC 2d 47 (1980); *Notice of Inquiry and Proposed Rule Making*, CC Docket No. 80–116 45 FR 29335 (May 2, 1980); *Alexander S. Klein, Jr.*, FCC 79–401 (released August 3, 1979). In none of these cases did the Commission make a legal conclusion that it, in fact, possessed adequate legal authority to use lotteries in lieu of a comparative process.

11. The Commission first received explicit statutory authority to use a lottery in Public Law No. 97–35, the Omnibus Budget Reconciliation Act of 1981, 95 Stat. 736–37, which added section 309(i) to the Communications Act of 1934, 47 U.S.C. 309(i). On November 17, 1981, we issued a first *Notice of Proposed Rule Making* requesting comments on a proposed implementation plan for the lottery statute 46 FR 58110, November 30, 1981. 88 FCC 2d 476 (1981). In our first *Report and Order* in this proceeding we declined to implement our authority to establish a lottery system because of our inability to structure a workable lottery system within the constraints of the statute. 89 FCC 2d 257 (1982). New lottery legislation was subsequently enacted in the second session of the 97th Congress.

12. The revised lottery statute provides:

(1) If there is more than one application for any initial license or construction permit which will involve any use of the electromagnetic spectrum, then the Commission, after determining that each such application is acceptable for filing, shall have authority to grant such license or permit to a qualified applicant through the use of a system of random selection.

(2) No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) Unless the Commission determines the qualifications of such applicant pursuant to subsection (a) and section 308(b). When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purpose of making such determinations, the Commission may, by rule, and notwithstanding any other provision of law—

(A) adopt procedures for the submission of all or part of the evidence in written form;

(B) delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges; and

(C) omit the determination required by subsection (a) with respect to any application other than the one selected pursuant to paragraph (1).

(3)(A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

(3)(B) The Commission shall have authority to require each qualified applicant seeking a significant preference under subparagraph (A) to submit to the Commission such information as may be necessary to enable the Commission to make a determination regarding whether such applicant shall be granted such preference. Such information shall be submitted in such form, at such times, and in accordance with such procedures, as the Commission may require.

(C) For purposes of this paragraph:

(i) The term "media of mass communications" includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

(ii) The term "minority group" includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

(4)(A) The Commission, not later than 180 days after the date of the enactment of the Communications Technical Amendments Act of 1982, shall, after notice and opportunity for hearing, prescribe rules establishing a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion, determines that such use is appropriate for the granting of any license or permit in accordance with paragraph (1).

(4)(B) The Commission shall have authority to amend such rules from time to time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.

(47 U.S.C. 309(i))

13. The Commission's new lottery authority contains four significant provisions. First, the Commission is expressly empowered to use a lottery to grant initial construction permits or licenses among competing applicants if the public interest would thereby be served. Next the Commission's administrative burden in conducting the lottery is reduced because it is only required to determine that the applications are acceptable for filing prior to the lottery. A full qualifications check of *only* the successful applicant need be made *after* the lottery is conducted. Third, when lotteries are used for allocating "mass media" licenses, *i.e.*, those broadcast-type services where the licensee retains editorial control over the medium, the lottery must be weighted with "significant preferences" allocated to minority group applicants and those who own few or no other media of mass communications. In non-mass media services, however, the lottery will be conducted strictly on a random basis. Finally, the Commission is authorized to use lotteries "in any instance," in its discretion, where it is determined appropriate after promulgating rules in a formal rule making proceeding.

III. Mass Media Comments

14. In the *Second Notice*, the Commission proposed that as to services within the jurisdiction of the Mass Media Bureau, lotteries be used in contested cases in the low power television and television translator service (hereinafter "LPTV") and in other services on an *ad hoc* basis when the parties' qualifications are such that no material difference between their ability to serve the public interest can

[4] In many PRB services, Petitions to Deny are not authorized; the Bureau considers oppositions to applications as informal complaints.

be distinguished. The *Notice* proposed a comprehensive scheme for the conduct of lotteries, including the use of preferences designed to increase minority ownership and enhance ownership diversity generally.

15. Comments received in response to the *Second Notice* cover such matters as whether use of lotteries is consistent with the Commission's public interest obligations, whether the preferences proposed are large enought to be "significant," as the statute requires, and how various ownership interests, such as limited partnerships, will be treated in the preference scheme. A complete summary of the comments is found in Appendix B.

IV. Mass Media Discussion

16. *Decisional Criteria for Employing Lotteries.* The *Conference Report* accompanying the new legislation sets forth a number of factors Congress suggests that the Commission consider in determining whether the public interest would be served by utilization of lotteries in particular services or instances. These include:

> [W]hether there is a large number of licenses available in the particular service under consideration; whether there is a large number of mutually exclusive applications for each license, for example, when a new service is initiated; whether there is a significant backlog of applications; whether employing a lottery would significantly speed up the process of getting service to the public; and whether selection of the licensee will significantly improve the level [of] diversity of information available in the community versus the use of the traditional comparative hearing process.
>
> (*Conference Report* at 37)

The *Report* emphasizes that the commission must, having considered all relevant factors, find that a significant public interest benefit would flow from use of lotteries in the specified circumstances. To do otherwise, the Conferees state, would "disserve the Commission's ultimate statutory goal of obtaining the best practicable information service from diverse sources." *Id.*, at 38. Moreover, the Conferees also state that the factors described above are not to be applied mechanically or without regard to other relevant considerations. *Id.*

17. The *Conference Report* concludes that under the criteria suggested, the Commission would be justified in using, and is in fact encouraged to use, a lottery system in LPTV licensing. LPTV is described by the Conferees as:

> [T]he ideal service for which to use a lottery, given the large number of licenses available, the large number of mutually exclusive applications for each license, the substantial backlog of applications on file with the Commission, the likelihood that use of lottery is essential to expediting the process of getting low power television service to the public, and the likelihood that bringing low power television service to the public quickly, through the use of a lottery, will result in a significant increase in the diversity of information sources available in many communities throughout the country.
>
> (*Conference Report* at 38–39)

18. Thus, it is clear that Congress amended the Communications Act to permit lotteries based on the belief that in certain circumstances the public interest is best served by the rapid commencement of new station operations which a lottery makes possible. Those commenters who claim that any Commission implementation of licensing by lottery would violate our public interest obligations under the Act fail to confront this fact. The Commission concurs in the Conferees' judgment that in the Mass Media services, LPTV is a particularly appropriate candidate for utilization of lotteries in the initial licensing process. Using lotteries is virtually the only method by which the Commission can process expeditiously the 12,000 LPTV applications currently on file, and the thousands more that will be submitted as pending applications are placed on "cut-off" lists. Without lottery processing, initiation of this new broadcast service will be delayed for many years, precluding the expansion of the diversity of broadcast voices that introduction of LPTV can achieve.

19. In the LPTV *Report and Order*, at para. 80, the Commission concluded after a thorough review of the issues that the only traditional comparative criteria to be considered in the LPTV context would be diversity and minority ownership. We found that the other criteria normally considered in full service comparative hearings were not relevant to the initial licensing process in this new, minimally-regulated secondary service. Finally, we viewed use of the comparative process as the "second best" option, to be engaged in only until a system of random selection could be instituted.[5]

20. The factors that the Commission had determined were relevant in comparative considerations in LPTV—diversity and minority ownership—also have been designated by Congress as deserving of special preferences in licensing proceedings conducted by lottery. Commenters Henry Geller and Donna Lampert ("Geller/Lampert") suggest that the public interest would be best served by adoption of a "middle ground" approach to LPTV licensing. Under this approach, the Commission, applying standards similar to traditional comparative criteria, would "take an initial 'hard look' " at mutually exclusive applications and see whether it is possible and desirable to make an immediate public interest judgment on them—for example, to grant one and deny the others, or to exclude from the lottery one or several and then to hold the lottery among the remaining applicants. A similar scheme is suggested by Community Television Network, Inc. ("CTN"). It argues that the Commission should use a paper hearing process adopted in the LPTV *Report and Order* to separate proceedings in which there is a "clear winner" under traditional comparative criteria from those situations in which there is "considerable doubt" as to the ultimate winner. We have rejected these alternatives. The minimal public interest benefit that might be obtained from use of the Geller/Lampert approach or the CTN scheme does not outweigh the substantial detriment inherent in use of either option. Both plans involve devoting the resources of the Commission and the parties to consideration of issues that we and the Congress have found to to be largely extraneous to the LPTV licensing process. The result would be additional delay in introduction of service, and additional cost to the parties, without a meaningful public interest gain.

21. Therefore, after full consideration of the analytic factors identified in the *Conference Report*, and having considered the record developed herein, the Commission finds that the public interest would be served by implementation of a random selection system for initial LPTV licensing. However, we acknowledge that at some future time circumstances may have so changed that use of a lottery to process low power applications would no longer be appropriate.

22. *Lotteries as Tiebreakers in Mass Media Comparative Proceedings.* In the *Notice*, the Commission proposed to use basis in those instances where the lotteries in mass media services other than LPTV "on and *ad hoc* qualifications of competing applicants are so close that no material difference between the parties' ability to serve the public interest can be distinguished." Numerous commenters opposed this proposal, contending that inadequate legal authority exists to conduct *ad hoc* lotteries; the *Conference Report* discourages such use; lotteries were intended to be a substitute, not a

[5] *Low Power Television Broadcasting*, 47 FR 21468 (May 18, 1982), at paras. 21–22.

supplement, for comparative hearings; and sufficient guidance regarding services and standards was not provided. We have analyzed the arguments that have been raised and conclude that the language of both the statute and the *Conference Report* permits the use of *ad hoc* lotteries in "tied" cases. It does appear, however, that the process by which we might identify such instances, and the particulars of the procedure we would utilize in such cases deserve greater consideration than was given in or generated in response to our *Notice* proposal. We have therefore decided not to implement that proposal at this time.

23. *LPTV Applications Subject to Lottery.* Some parties assert that LPTV licensing proceedings cannot be conducted by lottery as to applications already pending because of inadequate notice to applicants as to procedures and preferences. These claims are without merit. We observed in the LPTV *NPRM*, at 78, that we would not process mutually exclusive applications through to grant until comparative criteria and procedures were finally established. *Low Power Television Broadcasting*, 82 FCC 2d 47, 78 (1980). Any grants made during the conduct of that rule making proceeding, including permits to construct conventional translators, were conditioned on its outcome.[6] Additionally, we proposed in the LPTV *NPRM*, at 75, that if a winning applicant could not be selected through paper hearing on the basis of proposed comparative preferences, "the case would be referred for lottery," with each party to have an equal chance of receiving the authorization. Thus, it has been clear since the commencement of the LPTV rule making proceeding that lotteries might be implemented in LPTV licensing, and that applicants proceeded at their own risk as to the criteria by which their applications might finally be processed.

24. While we did not implement the lottery authority as initially enacted in the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, we made clear in the LPTV *Report and Order*, at para. 65, that "it remains our intention to utilize a random selection process when and if that becomes practicable." Applicants were placed on notice that "their applications, if mutually exclusive with other applications, may be subject to revised processing procedures, standards and qualifications in connection with implementation of a system of random selection." *Id.* Because a number of timely-filed petitions for reconsideration of the LPTV *Report and Order* were subsequently submitted, applicants have been on notice that the rules and processes adopted in the *Report and Order* remain subject to modification by the Commission if proper cause is found.

25. In Pub. L. No. 97–259, Congress amended the lottery authority it earlier granted. Subsequently, the Commission issued the *Notice* presently under consideration. Although the diversity and minority preferences adopted by Congress for lottery use will differ somewhat in application from the preferences we had initially contemplated using in LPTV comparative hearings, they reflect similar concerns and are directed to similar objectives. Further, since no cases have been designated for hearing under the procedures initally adopted in the LPTV *Report and Order*, all applicants in contested LPTV cases will be judged by exactly the same standards, regardless of their filing date. In light of all these factors, we do not believe that any LPTV applicant can fairly claim to have been harmed by our determination to apply the lottery scheme adopted herein to pending LPTV applications.

26 *LPTV Processing Framework.* In the *Notice*, we proposed a comprehensive processing blueprint for mass media applications subject to lottery, contemplating that these procedures would initially be applied in LPTV. Under the initial filing procedures, described in para. 16 of the *Notice*, after an application is tendered and found acceptable for filing, it will be listed in a Public Notice (the "A" list) inviting competing applications until the specified cut-off date approximately thirty to sixty days later.[7] Applications filed after that date will not be eligible for consideration or grant as part of that particular proceeding.[7A] All competing applications found acceptable for filing will be included in a subsequent Public Notice (the "B" cut-off list), which will also announce the date on which the lottery will be conducted. Additionally, that list will show the preferences for which the applicants have certified that they are eligible, and their selection probabilities. Applicants will be obliged to bring any clerical or mathematical errors in the selection probabilities to the Commission's attention immediately. The lottery will then be conducted and the "tentative selectee" named in a Public Notice providing an opportunity for filing of Petitions to Deny.

27. The proposed use of "A" and "B" cut-off lists described above is similar to present practices in the Mass Media services.[8] This aspect of our proposal was essentially noncontroversial, but for an expression of concern by NLMC that the cut-off period "be long enough to permit a reasonable opportunity for resubmission of applications rejected by FCC staff." The Commission notes that § 73.3572(c) of the Rules presently sets the time for filing of mutually exclusive applications at a date "not less than 30 days" after release of the "A" list Public Notice. Our experience is that the thirty-day period allows sufficient time for the filing of competing applications.

28. We believe that the system we have described, utilizing "A" and "B" lists, will be a satisfactory method by which to commence processing of applications, and will adopt that procedure, with one minor modification. We observe that our initial proposal did not specify what notice, if any, would be given of changes in selection probabilities necessitated by corrections submitted in response to the "B" list. We conclude that a corrected "B" list should issue, indicating both the changes in selection probabilities and any change in the lottery date.[9] [10]

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[6] In *Interim Processing Procedures*, 45 FR 62004, (September 17, 1980), we reaffirmed this action.

[7] Under the procedures being adopted, all pending mutually exclusive applications will be named in the "A" list, and will be served with copies of that list.

[7A] Prior to the adoption of the June 17, 1982, LPTV Rules, engineering judgment was used to prescreen applications for cut-off lists. Since promulgation of the new rules a contour overlap standard has been used in screening applications for such cut-off lists. As a result of using the engineering judgment method, some applicants previously cut-off are mutually exclusive with those that have been assigned later cut-off dates. In order to avoid prejudice to any applicant because of changes in the screening process, all mutually exclusive applications filed prior to the later cut-off date will be considered in a consolidated lottery.

[8] *See* Section 73.3572 of the Commission's Rules.

[9] No lottery will be held less than thirty days following release of a "B" list. This period will permit negotiation of settlement agreements. Additionally, parties who may have erroneously been omitted from the "B" list will have the opportunity to so inform the Commission during that period. Later appeals on this issue will not be entertained. Applications which are not mutually exclusive with others will not appear on a "B" list, but only on a proposed grant list which will provide for filing of Petitions to Deny within a fifteen day period.

[10] Placement of the name of an applicant on an "A" list will require the filing by the cut-off date of the applications of those who wish their applications to be considered with that application or with any other application on file by the cut-off date which involves a conflict necessitating being joined in a lottery with that application (or any other application on the list). This is similar to the practice followed in AM and noncommerical FM broadcasting, which are also services in which licensing is done on a noninterference demand basis. *See Kittyhawk Broadcasting Corp.*, 7 FCC 2d 153 (1967), *recon. denied*, 10 FCC 2d 160 (1967), *appeal dismissed, Cook, Inc. v. United States*, 394 F.2d 84 (7th Cir. 1968). *But see*, as to full service television and commercial FM, *Sterling Recreation*

29. We will also adopt the process we had initially set forth in para. 21 of the *Notice* for actual lottery selection. Applicants will be assigned a portion of the numerical spectrum between .000 and .999 in accordance with their selection probabilities. Although we contemplate that, for ease and consistency of processing, numerical spectrum will normally be allocated in the order in which applications joined in a given lottery group were accepted and given a file number, no applicant has anything in the nature of a "right" to any part of the numerical spectrum. The portion of numerical spectrum allocated to each applicant will be announced at the time the lottery is to be conducted.

30. A random number in the range of .000 to .999 will be generated in a lottery selection session. It is our expectation that mass media lotteries will be conducted on a limited number of specified dates each month. As we proposed in the *Notice*, at para. 22, Public Notice of all drawings will be given no less than seven days in advance. This Notice will normally be given on the "B" list, but may be modified if necessary.[11]

31. *Petitions to Deny.* In the first *Report and Order* in this proceeding, 89 F.C.C. 2d 257 (1982), we observed, at 277–79, that a fundamental difficulty inherent in our Section 309(i) lottery authority as initially enacted was the requirement that the qualifications of all applicants under Section 308(b) and Section 309(a) be determined prior to lottery selection. Our amended lottery authority provides that determinations under Section 308(b) and 309(a) need be made only as to the applicant who has been selected by lottery. The Conferees note that "[i]t is only at this latter, post-lottery stage that Petitions to Deny the application need be considered and that the right to a hearing may arise."

32. We continue to believe that in the LPTV context, where expedition is an overriding public interest factor, the public interest will best be served if we consider Petitions to Deny only against the "tentative selectee". However, we are also sympathetic to the concerns of those commenters who believe that allowing the filing of post-lottery petitions may encourage submission of essentially frivolous pleadings which would not be the case if pre-lottery filing were required. Thus, we are adopting two alternative petition processes. As to any given lottery group, the method to be used will be announced no later than the "B" list release date. Experience should indicate which system will best advance our purposes.

33. One petition approach, as proposed in the *Notice*, will be to invite Petitions to Deny after a "tentative selectee" is chosen by lottery. The second method will require a notice of Petition to Deny to be filed no more than 30 days after publication of the "B" list. Under this second approach, ordinarily only those parties who preserved their rights by filing a notice of Petition to Deny will be allowed to participate in the formal post-lottery Petition to Deny process. Additionally, however, the Commission will consider for good cause shown [12] Petitions to Deny by other parties who did not file the preliminary notice of Petition to Deny. *See* paras. 40–42 *infra*.

34. The law firm of Daly, Joyce and Borsari ("DJB") contends that by allowing petitions to be filed only against the "tentative selectee," the Commission is essentially nullifying the petition rights provided by Section 309(d)(1). That section allows the submission of petitions designed to show that grant of a license or permit to a particular applicant would be inconsistent with the public interest requirements of Section 309(a). However, Section 309(i) states that in a lottery situation those findings only need be made with regard to the "tentative selectee." Therefore, consideration of petitions against other applicants would have no purpose.

35. It shall be our practice to issue a post-lottery Public Notice identifying the "tentative selectee." A period of fifteen days from issuance of the Public Notice will be provided for the filing of Petitions to Deny. Notice of proposed grant will also be given, and fifteen days provided for filing petitions, with regard to those uncontested applications not subject to lottery.[13] If no petitions are filed against the "tentative selectee," the staff will review the application to determine whether the applicant is fully qualified. If so, a construction permit will be granted. If not, a hearing designation order will issue.

36. We believe it appropriate to provide the "tentative selectee" fifteen days from the date on which petitions are due for the filing of an opposition. Replies by petitioners will not be allowed. Although we had initially proposed twenty day periods for oppositions and replies, the limited number and scope of issues involved indicate that shorter periods will provide adequate time for preparation and submission of the relevant pleadings and that replies are unnecessary.

37. *Two Step Petition to Deny Process.* There will be a two-page limit on the notice of Petition to Deny. The Notice will be filed with the Commission and served upon the applicant against which it is directed within 30 days after publication of the "B" list. Responses to the notice will not be entertained. The notice will make specific allegations that concisely state and explain with particularity the reasons why the applicant lacks qualifications or why a grant of the application would *prima facie* be inconsistent with the public interest. *See, e.g.*, Fed. R. Civ. P. 8. The purpose of the notice is to inform applicants and the Commission of petitioner's contentions; subsequent post-lottery procedures will allow full ventilation of the issues.

38. It is expected that only legitimate and truthful issues will be raised in the notice of Petition process. The notice will be subscribed to and certified by

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Organization Co., 80 FCC 2d 319 (1980), *recon. denied*, 86 FCC 2d 804 (1981). This process may in some cases require that those interested in securing construction permits for Tier II of Tier III locations file against Tier I applications on "A" lists or against other applications filed in response to or otherwise in conflict with those applications. Those interested in applying for stations in Tiers II or III should be aware that they may be precluded from doing so if they do not stay alert to ongoing processing and submit competing applications within prescribed time periods.

[11] The system for selecting the random numbers will be available for public review and inspection. Additional details regarding the mechanics of the lottery selection process will be included in a "lottery processing manual" which we expect to release prior to the date of the first lottery. In Appendix B of the *Notice*, we proposed in Section 1.1623(a) to compute probabilities to three significant digits. Having reviewed this matter, we now believe that use of three significant digits will be sufficient in lotteries with no more than twenty applicants. However, four significant digits should be used with larger lottery groups in order to provide a sufficient degree of precision with respect to probabilities. To accommodate this procedure, the rule as adopted will require computation to "no less than" three significant digits. Probabilities will be truncated to the number of significant digits used in a particular lottery. For example, a probability of .2347 in a three digit lottery would be truncated to .234. This approach will not substantially disadvantage any applicant and will prevent the occurrence of the problem related to use of a rounding procedure, in which the sum of all applicant probabilities might be greater than 1.000.

[12] "Good cause" includes newly discovered evidence, evidence that could not be discovered before the diligence, and fraud or suppression of evidence by the "tentative selectee." The Commission will adopt a strict standard with regard to "good cause" Petitions to Deny.

[13] We reject the proposal of the National Latino Media Coalition ("NLMC") that the "tentative selectee" be required to publish local notice of its status. We believe that the notice that an application has been filed, which is required, is sufficient to inform interested persons in the community of the applicant's activities before the Commission. This is the same process that is followed with regard to regular broadcast applications. We see no need to impose heavier burdens on applicants in this secondary service.

the petitioner and signed by his representative, if any.[14] Moreover, untruthful statements or intentional misrepresentations in one proceeding could be the subject of inquiry in other proceedings as well.[15]

39. In the two-step approach, the formal Petition to Deny process will begin after a "tentative selectee" is chosen by lottery. When the Public Notice announcing the "tentative selectee" is issued, petitioners will have the opportunity to detail their objections to the apparent winner's qualifications in a formal Petition to Deny. Only those parties that preserved their right to object by filing a notice of Petition to Deny may participate in the post lottery proceedings, absent a good cause showing. *See* n. 10, *supra*. The formal Petition to Deny will be limited strictly to only those issues raised in the initial notice of Petition to Deny. Petitioners will have fifteen days after the Public Notice announcing the "tentative selectee" to present their case in chief. The "tentative selectee" will have fifteen days to respond.

40. In providing alternative approaches for handling Petitions to Deny in low power television lottery proceedings, we are taking a different approach than that to be applied to similar filings in the Common Carrier and Private Radio Services that will be subject to lotteries. As explained in paras. 103–105 and 126 *infra*, in the latter services Petitions to Deny and other objections must be filed before the actual lottery. Prelottery filing of Petitions to Deny in these services will result in the most efficient conduct of these proceedings. With regard to the low power television lotteries, however, other considerations not material to the non-mass media lotteries recommend the advisability of the alternative two-step Petition to Deny process. Specifically, the sheer number of applications involved as well as the nature of the issues that could be raised in low power proceedings, including those arising from the preference system, suggests that it would economize the efforts of interested parties to defer the preparation and filing of full Petitions to Deny until after the lottery. In this regard, we are particularly aware that participation by individuals, informal citizens' groups, and nonprofit organizations is likely to be much more common in low power lottery proceedings than in Common Carrier or Private Radio proceedings. Deferred filing of full Petitions to Deny will enable such individuals and groups to utilize their limited resources more efficiently and effectively. We will, of course, closely monitor the workings of the mass media and non-mass media Petition to Deny procedures. Should it become apparent that the public interest would be better served by revisiting any of the procedures adopted herein, we will not hesitate to make the necessary changes.

41. *Qualifications of "Tentative Selectee."* We note that we will only consider the merits of petitions that concern the qualifications of the "tentative selectee." We have considered the comments of such parties as Spanish International Network ("SIN") and CTN arguing that challenges to the preference claims of all applicants must be considered before a lottery is conducted. We have determined that we will not consider such issues pre-lottery, and that they will generally only be in order against the "tentative selectee" post-lottery. To consider all such claims against applicants other than the "tentative selectee" potentially could mire lotteries in pleadings equal in volume and complexity of disposition to those associated with traditional comparative hearings, with no corollary public interest benefit. In most instances, improper preference claims would affect the selection probabilities of all other applicants proportionately.

42. However, we have determined that in cases in which the provision of the Rules (§ 1.1623) requiring computation of a minimum forty per cent diversity preference is used, all other applicants are not equally disadvantaged by an improper diversity claim. Therefore, to make certain that all applicants are treated equitably, we will entertain post-lottery challenges to the diversity status of applicants benefiting from the minimum diversity preference provision. We will announce, at the time of release of a "B" list, whether the minimum diversity preference was applied. The post-lottery filing deadlines for "objections to diversity claim", and objections thereto, will be the same as those adopted for Petitions to Deny. No other claims regarding preferences will be considered as to any applicant other than the "tentative selectee."[16]

43. All applicants should be aware that improper preference claims violate Federal law. 18 U.S.C. 1001. Additionally, evidence of such claims could place in jeopardy all Commission authorizations then held by the wrongdoer, as well as adversely affecting the grant of any further authorizations.

44. *Hearing Procedures: Paper and Oral.* As observed in the *Notice*, we believe that we may be able to abbreviate the time consumed by the administrative process through the use of a modified paper proceeding directly adminstered by the Commission. In paper proceedings, the Commission *en banc* or one or more Commissioners will receive the evidence and issue the decision awarding construction permits to applicants.[16A] The Mass Media Bureau will serve as advisor to the Commission in the paper proceeding process.[17] As such, the Bureau will be responsible for reviewing and analyzing pleadings, and preparing a draft to the decision.[18]

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[14] A suggested certification form follows:

STATE OF

COUNTY OF

Jane Z. Doe hereby certifies and states that she resides at ———; that she is the petitioner herein; and that she has read the foregoing petition and knows the contents thereof and that the same are true of her personal knowledge.

/s/

Jane Z. Doe

[15] Frivolous, fraudulent or false allegations will be viewed with extreme disfavor. Intentional and material misstatements could lead to prosecution by the Justice Department under 18 U.S.C. 1001 which provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, or fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[16] Due to the early difficulties experienced by the Commission in establishing its LPTV recordkeeping system, we are concerned that some Petitions and informal objections previously submitted may not have been associated with the correct applications file. Additionally, many of the matters raised in pending Petitions have been rendered moot by actions taken in this *Report and Order* and in the *LPTV Reconsideration Order*, FCC 83–129, also adopted this date. Therefore, we have determined that in order to provide equitable and expeditious treatment to all parties, all Petitions to Deny and informal objections now on file against LPTV applicants will be considered dismissed. Parties may wish to refile Petitions and file notices in accordance with the procedures outlined herein.

[16A] The flexibility for an individual Commissioner or panels of Commissioners to rule on such matters is provided in Section 5(d)(1) of the Communications Act and Section 556(b) of the Administrative Procedure Act. We will in future actions determine the circumstances under which such decisionmaking will be delegated.

[17] In the event that the Mass Media Bureau may be required to perform any investigative or prosecutorial functions prior to designation in a particular proceeding, such tasks shall be conducted by separated Bureau personnel who will not include or be subject to the direct supervision of the Bureau personnel who advise the Commission in the adjudication of proceedings. *See* 5 U.S.C. 554. In addition, Bureau personnel who authorize, directly supervise or direct investigative or prosecutorial functions will not participate or advise in the Commission's adjudicative decisions. The taking of oral evidence will not be delegated to Commission employees other than Administrative Law Judges.

[18] Of course, the Bureau personnel who participate as a party through a separated trial staff

45. The Commission will issue a *Memorandum Opinion and Order* disposing of any allegations presented in Petitions to Deny which do not raise substantial and material questions of fact. This document will also specify any remaining issues for either a paper or oral hearing. If Petitions to Deny do not raise new or novel issues, action upon them may be taken by delegated authority, and similiarly, Designation Orders may be issued by delegated authority. The Designation Order will specify the procedures for a paper hearing, set forth the pleading schedule to be followed by the parties, specify the party with the burden of proceeding and order any petitioner who directly raises an issue specified in the order to participate as a party.

46. In the case of a paper hearing, the Designation Order will direct the applicant or the party with the burden of proceeding to submit its direct case in writing on or before the date set in the order. This will be approximately 30 days from the date of the Order. The direct written case must set forth all the facts and circumstances related to the issues in the Designation Order. Documentary evidence upon which the applicant or the party relies must be attached in exhibit form. Each exhibit must be numbered, paginated and accompanied by a certification by a person with personal knowledge of the facts therein. The Designation Order will also specify that the other parties may submit a written rebuttal case within twenty days after the direct case is due. As with the direct case, documentary evidence submitted with the rebuttal case must be placed in a numbered exhibit and accompanined by an appropriate certification by a person or persons with personal knowledge of the facts recited therein.

47. Within ten days after the rebuttal case is due, any party to a paper proceeding also may submit a request for oral hearings and cross-examination, stating the subject matter of the desired oral presentation or cross-examination and the basis for it. Included therein shall be the evidence to be presented, the reason why the evidence is material to the outcome of the proceeding, the reason why an oral presentation or cross-examination is necessary to bring out this evidence, and the evidence in the record which would be contradicted by the cross-examination or oral presentation. In sum, the moving party must demonstrate that an oral hearing is required for a full and true disclosure of the facts in issue. Finally, the Designation Order will specify a date for the submission of proposed findings of fact and conclusions of law that conform with § 1.264 of our Rules, requests for the admission of facts and genuineness of documents in accordance with § 1.264, written objections to the admission of proffered evidence and requests for deposition allowed by Section 409(h) of the Communications Act. In paper proceedings, the Commission *en banc* or one or more Commissioners will issue subpoenas, rule upon questions of evidence, require the filing of memoranda of law upon any issue which the Commission is required to rule upon during the course of the hearing, dispose of routine procedural requests, act on motions to enlarge or modify issues, and take actions and enter procedural orders in conformance with the Administrative Procedure Act.

48. The Commission intends to dispose of as many post-lottery hearings as possible pursuant to the paper procedures described above. When reviewing each case, the Commission also will consider any requests for oral hearings.[19] However, as we had determined in the LPTV *Report and Order, supra,* at para. 71, we will order oral hearings only in limited circumstances, *i.e.,* where it is shown that the party will be prejudiced by a paper proceeding without oral testimony, where a substantial and material question of fact which would affect the outcome cannot be resolved without oral testimony or where oral testimony would otherwise be required by the public interest. If the Commission makes a decision on the basis of the written affirmative and rebuttal cases and any other authorized pleadings, the request for oral testimony will be deemed denied, but reasons for the action will be articulated.[20]

49. *Disposition of Competing Applications.* Due to the virtually simultaneous filing of thousands of LPTV applications, we are in some cases faced with the need to process "daisy chains" consisting of numerous applications interconnected by their mutual exclusivity. We will not take further action on other applications in the chain until the status of the "tentative selectee" is finalized. Thus, a Petition to Deny the grant to the "tentative selectee" would freeze the status of all other applications in that lottery group. If the "tentative selectee" is found qualified, remaining applications will be processed as appropriate. That is, those applications which are no longer mutually exclusive with others will be placed on a proposed grant list allowing for filing of Petitions to Deny, groups of mutually exclusive applicants will be designated for lottery, and applications which are not grantable due to their mutual exclusivity with the selectee will be dismissed. If the "tentative selectee" is found unqualified, all remaining applicants will participate in a lottery, unless the elimination of the application of the "tentative selectee" has broken the mutual exclusivity of the applicants. In that case, the applications shall be broken into groups, and the lotteries conducted. In either situation, the process will be repeated until all applications have been disposed of.

50. *Acceptability Standard for LPTV Applications.* We reaffirm our decision in the LPTV *Report and Order,* at para. 51, that an LPTV application must be "complete and sufficient" in order to be acceptable for filing. The Conference Report calls for use of the "substantially complete" acceptance standard set forth in *James River Broadcasting Corp.* v. *FCC,* 399 F.2d 581 (D.C. Cir. 1968), unless another standard has been established by rule. The LPTV standard has been so established. It differs from the "substantially complete" requirement in that applications which are incomplete or have blatant defects are summarily returned.[21]

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will not advise the Commission regarding any aspect of that case.

[19] However, as we have noted in Paragraph 45, the Commission may in the first instance on its own motion designate a matter for oral rather than paper hearing.

[20] If the Commission concludes that an oral proceeding is necessary, it will issue a Designation Order or an interlocutory order referring the proceeding to the Chief Administrative Law Judge for hearing on the unresolved issue or issues. The Chief Administrative Law Judge will assign an Administrative Law Judge to preside over the hearing and set a prehearing conference to establish a discovery and trial schedule. The Mass Media Bureau will be made a party to the proceeding. The Presiding Judge may request proposed findings of fact and conclusions of law to be filed within thirty days after the record is closed. The Presiding Judge shall conduct the hearing, make all evidentiary rulings, and issue an Initial Decision. *See* § 1.201 *et seq.* and, particularly, § 1.243. All appeals, taken by exceptions to the Initial Decision, will go directly to the Commission. The Adjudication Division of the General Counsel's Office will serve as an advisor to the Commission in such appeals. Our action herein constitutes the determination required under § 0.365 of the Rules that Initial Decisions will not be appealed to the Review Board. The Commission, after consideration of a written appeal, and oral argument if necessary, shall determine whether the "tentative selectee" is qualified. If so, a grant shall issue. If not, another lottery shall be held from among the remaining applicants in the initial lottery group. If the Initial Decision is not appealed, either a grant will issue or a new lottery will be held subsequent to this action.

[21] Applications which are later refiled will be treated in accordance with the practices described in the *LPTV Report and Order,* para. 51.

51. *LPTV Application Form.* The preference system being adopted in this *Report and Order* requires the submission of additional information on ownership characteristics and various other certifications by those who have already filed LPTV applications. Form 346, the application for LPTV construction permits, is being amended to reflect the new information requirements. *See* Appendix D. When an application now on file is placed on an "A" cut-off list, the applicant will be permitted to amend to provide only the newly required information, as requested on the new Form 346, until the "A" cut-off date.[22] New mutually exclusive applications filed in response to the "A" list will be required to comply with all rules and policies in effect, as reflected in the new form.[23] In those instances where an "A" list has already been issued, mutually exclusive applications have been filed in response, and the cut-off date has passed prior to the effective date of this *Report and Order,* the Commission will release a "B" list, allow all applicants on that list thirty days to amend with the additional information, and then issue a corrected "B" list indicating preferences to be applied and setting a lottery date.

52. The Commission's application forms currently require the submission of information that, in the ordinary case, is sufficient for the Commission to be able to determine that an applicant is qualified under Section 308(b). The Commission previously has found that it is in the public interest to acquire much of this type of information by certification.[24] The Commission staff has had, and retains, the ability to inquire of applicants if additional information is necessary to resolve matters at issue. To require that all applicants submit the specific factual information underlying their certifications, as proposed by such parties as Youth News, would impose a mammoth paperwork burden upon applicants and the Commission, without balancing public interest benefit. Applicants who submit false information will, as we have indicated above with regard to preference claims, be subject to substantial penalties.

53. *Multiple Applications.* We concur in the views of such parties as Local Power Television, Inc. ("LPTI") and International Broadcasting Network ("IBN") regarding the need for Commission clarification of the manner in which multiple applications for the same facilities by applicants with some common interests will be treated. It appears that some applicants have filed identical or substantially identical multiple applications, perhaps for the purpose of improving the chances of winning in a specific lottery. Permitting such "stuffing of the ballot box" would seriously jeopardize the integrity of the Commission's processes. Additionally, allowing such actions might effectively nullify the program of diversity and minority preferences mandated by Congress.

54. We are therefore adopting a strict multiple application rule, that bars the filing of any application for a new station, or for major changes in an existing station, that would be "directly mutually exclusive" with any pending application filed by the same applicant or by any applicant in which any party common to both applications is an officer, director, or has any interest, direct or indirect.[25] The phrase "directly mutually exclusive" takes into account the possibilities inherent in a "daisy chain," a long or otherwise complex series of applications that are connected by their mutual exclusivity for a particular lottery or lotteries. For example, an applicant may file several applications specifying the same channel but different, non-overlapping, though geographically nearby, coverage areas. While these applications may be involved in the same lottery because each is mutually exclusive with other applications that link them together, they would not be "directly mutually exclusive" because the facilities that each specifies do not conflict with one another. Theoretically, each could be granted. Conversely, those applications filed by the same applicant specifying facilities which, by themselves, would be mutually exclusive with each other, are barred.[26] Those who have filed applications that violate this rule should withdraw such applications no later than thirty days following the effective date of this *Report and Order.*[27] Our revised LPTV construction permit application includes a certification of compliance with this requirement. Existing applicants will be obliged to make this certification at the time relevant applications are covered by an "A" cut off list or when they are otherwise notified of the need to amend.

55. *Real Party in Interest Certification.* In the *Notice,* at para. 30, the Commission proposed (consistent with the *Conference Report,* at 45–46), that all applicants in the Mass Media services certify, as part of their application for any service in which random selection may be used, "that the applicant is the real party in interest and that no agreement, either explicit or implicit, has been made to transfer or assign the license at a later date to any other party." [28] We suggested that this certification be added to Form 346 for LPTV applicants, and that it be appended to applications in other relevant services. At this time, we shall adopt this noncontroversial proposal for the LPTV service only. As to existing LPTV applicants, we shall require that they complete this certification at the time they are covered by an "A" cut off list or otherwise notified of the need to amend.

56. *License Holding Period.* NLMC asserts that the certification only will be sufficient to inhibit abuse of the minority and diversity preferences in LPTV if the recently-abolished three year anti-trafficking rule is applied to LPTV proceedings. However, we continue to be of the view, as we observed in para. 31 of the *Notice,* that application of a one year holding period, as adopted in the LPTV *Report and Order,* will be sufficient to preclude the "rapid re-assignment or transfer of stations, construction permits, or

[22] Applications which are not amended with the requisite information will be dismissed. In the future, we will further revise the format of Form 346 to facilitate computerized processing.

[23] In some situations, the filing of new applications against the "A" list will cause additional pending applications to be joined in mutually exclusive status. The Commission will notify those applicants of this occurrence and they will be given thirty days to amend with the newly required information, prior to release of the "B" list for their lottery group.

[24] *See, e.g., Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301),* 50 R.R. 2d 381 (1981).

[25] However, the proposed 1% benchmark for cognizable ownership interests will apply.

[26] Two low power television or television translator construction permit applications will be considered mutually exclusive whenever the facilities associated with one of the applications would cause interference within the protected signal contour of the other as defined in the low power television rules (47 CFR 74.707). Applicants that are unsuccessful in the lottery and whose facilities would not cause interference to those of other co-pending applications, including those of the lottery winner, may also receive a construction permit. Such permits will be accompanied by a notification that the permittee may expect to receive interference from the facilities of the lottery winners. If permittees deem such interference intolerable, the construction permit shall be surrendered to the Commission within 30 days of the grant date.

[27] Should such applications not be withdrawn, it is the Commission's intent, in the course of proceeding, to retain the application filed first in time and dismiss all other applications conflicting with this rule.

[28] Although the *Conference Report,* at 46, mandates that this certification only be required from the new permit grantee, we proposed that it be included in all applications and completed when filed. No comments contrary to this approach appear to have been received. We believe that both to safeguard the Commission's processes, and to facilitate applications processing, it would be appropriate to adopt the proposal as made.

licenses granted by lottery" that the Conferees believe would undermine the intent of the preference scheme. In the *Report and Order* deleting the "three-year rule" and the underlying "trafficking" policy, we adopted a one year holding period in situations in which the permit to construct a new facility resulted from a hearing grant made on the basis of comparative criteria.[29] Both the holding period adopted in the *LPTV Report and Order* and the period established in our proceeding eliminating the "three-year rule" apply only in cases where the construction permit was awarded by virtue of a comparative preference. We believe that continuing this procedure in the lottery context is consistent with the intent of Congress that a holding period be imposed to protect the integrity of the lottery preference scheme. Thus, the one year post-lottery holding period will apply only when the permit holder was the beneficiary of a diversity or minority preference. The one year period begins with initiation of on-air operation. The rules will be amended to reflect this decision.

57. *Changes in Preference Eligibility.* We also shall adopt the proposal in para. 32 of the *Notice* requiring that an applicant inform the Commission of changes in preference status within seven days of the completion of any such changes, up until publication of a "B" list on which the applicant appears, or, as to unopposed applications, the proposed grant list. Changes in diversity status for subsequent lotteries would be reported after the construction permit is granted. This treatment in some cases may result in an applicant receiving an extra diversity preference in a lottery held subsequent to a tentative selection which has not been processed through to grant. However, we are of the view that it is a reasonable method by which to modify the status of LPTV applicants while limiting the delay entailed by such a requirement.

58. Thus, if an applicant is a "tentative selectee" and a petition has been filed against the grant of the application, the "tentative selectee" status will not affect the diversity preference to which that applicant may be entitled in a subsequent proceeding. However, any subsequent grant will be conditioned on the outcome of the first proceeding. Further, the grant in the second proceeding, and all further grants, will be included for purposes of adjusting the diversity preference in subsequent proceedings. We believe this process represents an equitable compromise. While applicants remain under a continuing obligation to make certain that the information on file is correct, amendments will not improve the preference standing of any applicant once that applicant appears on the "B" cut-off list.

59. *Preference Framework for Mass Media Services.* As we have indicated, substantial attention was drawn to the preference scheme that the Commission proposed at paras. 35–44 of the *Notice*, and the related rule proposals set forth as Sections 1.1621–1.1623 in Appendix B of the *Notice*. The proposals made track the *Conference Report* accompanying the amendatory language of the statue. Having fully considered all of the comments submitted regarding the various aspects of the preference scheme, we adopt the preference generally as proposed, but with a number of clarifying and perfecting modifications.

60. Initially, we find that the minority preferences enacted by Congress are constitutional under the holdings of the Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). As we observed in the first Notice in this proceeding, 88 F.C.C. 2d at 491, those cases make clear that the award of special preference to remedy the effects of past discrimination does not offend the equal protection component or the due process clause of the Fifth Amendment.[30] We noted that although a remedial preference scheme "may result in grants of licenses of minority applicants which might otherwise have gone to others," under *Fullilove* that result is an appropriate consequence of the remedial preference. We remarked that the medical school admissions program overturned in *Bakke* set aside a specific number of places for minorities, utilized a different admissions standard for minorities than for whites, and did not involve any finding of past discrimination by an appropriate governmental body.

61. The program adopted herein does not share the attributes of the scheme rejected in *Bakke*, and comports with the teachings of *Fullilove*. The Conferees have, at 43–44 of the *Report*, found that past discrimination has resulted in severe underrepresentation of minorities in media ownership. They have therefore established a program in which race is one of two factors to be awarded fixed relative preferences.[31] As SIN correctly points out, a 2:1 fixed relative preference does not guarantee that minorities will receive double the number of licenses as would non-minority applicants. Further, the Conferees have instructed that we report annually on the effect of the preference system and whether it is serving the purposes intended. Congress will be able to further tailor the program based on that information, and may eliminate the preferences when appropriate. All of these factors lead to the conclusion that the preference system as adopted passes constitutional muster.[32]

62. The proposed rules contained in Appendix B of the *Notice* represent the preference scheme described in the *Conference Report*. The Conferees stated, at 44, that the minority ownership preference "must be no less than a fixed relative preference of 2:1." Members of different minority groups are to "be allowed to aggregate their ownership interests to achieve a majority interest in any given application." The contention of a number of parties that a 2:1 fixed relative preference is not "significant" within the meaning of the statute is contradicted by the findings of the Conferees that such a preference fulfills the "significance" test. Further, the alternative preferences proposed by Frontier Broadcasting Companies ("Frontier") and others are so exclusionary in nature as to be constitutionally suspect. If the "dilution effect" complained of by some parties appears with experience to be detrimental to achieving the result intended, the Congress or the Commission may wish to revisit this area. We believe, however, that the minority preference designated in the *Conference Report* should first be applied for a reasonable period.

63. The diversity preferences in the proposed rules of the *Notice's* Appendix "B" reflect the *Conference Report's* multilevel approach to the diversity issue. There is proposed a 2:1 fixed

[29] *Amendment of § 73.3597 of the Commission's Rules [Applications for Voluntary Assignments or Transfers of Control]*, 47 FR 55924 (December 14, 1982).

[30] The process of analysis under the equal protection component of the due process clause of the Fifth Amendment, applicable to the Federal government, is essentially the same as that conducted under the equal protection clause of the Fourteenth Amendment.

[31] In fact, the diversity preference has an intermediate "floor" for each lottery that is not applied to the minority preference.

[32] This conclusion is buttressed by the recent judicial action rejecting a challenge of Commission use of minority ownership status as one of the acceptance criteria for applications to use frequencies made available by our clear channel rule making proceedings. *Bunkfeldt Broadcasting Corporation v. FCC*, No. 82-1212 (D.C. Cir. January 6, 1983). Our action resolving the clear channel proceeding was affirmed in *Loyola University v. FCC*, 670 F. 2d 1222 (D.C. Cir. 1982).

relative preference for those with no other mass media ownership interests, a 1.5:1 preference for those holding interests in one, two or three properties, no preference for those with more than three interests, and no preference for those with media properties that essentially would be co-located with the proposed new station. A number of commenters object to this scheme because it does not take account of the details of media ownership, failing, for example, to distinguish between a major market VHF station and a low power station. Upon review of the *Conference Report* and the comments of the parties, we have determined to reject the modifications suggested by the commenting parties.

64. In taking this action, we agree with the view expressed by SIN that "should the Commission have to expend substantial resources to investigate and resolve such subjective issues . . . it might as well hold a traditional comparative hearing." SIN correctly notes that the premise of the lottery proposal is that in the secondary, basically unregulated LPTV service, "most distinctions between applicants are not significant enough to warrant detailed Commission inquiry." [33]

65. An important aspect of the preference system is the manner in which various ownership interests are defined. The *Conference Report* states, at 45, that with respect to both the diversity and minority preferences, "the Conferees expect that the Commission shall evaluate ownership in terms of the beneficial owners of the corporation, or the partners in the case of a partnership. Similarly, trusts will be evaluated in terms of the identity of the beneficiary.

66. In light of our further review of the *Conference Report*, and having reflected upon the comments of the parties, we will adopt our initial proposal that both general and limited partnership interests be considered in determining the ownership of a partnership. We believe that the *Conference Report's* focus on "individuals who are participants in a . . . partnership," at 44, coupled with its intention that we consider "the partners," commends this result. Additionally, the emphasis on beneficial ownership interests in other entities suggests the similar inclusion of limited partners.

67. There is no doubt of the Conferees' intent that "a majority interest" be held in order for a minority preference to be awarded. Including limited partnership interests in this computation should increase the frequency with which such ownership can be achieved.[34] We believe that profit shares should be determinant of ownership of partnership interests. Thus, a five percent share of annual profits will be viewed as a five percent partnership interest. Use of this single measure will facilitate our ability to process applications with ease, and is consistent with the Conferees' emphasis on beneficial ownership. We will adopt the apparently noncontroversial proposal in para. 38 of the *Notice*, that in computing diversity preference eligibility the media holdings of the partnership itself be considered together with the combined cognizable holdings of the partners. In considering ownership interests, we will utilize the proposed 1% benchmark for cognizable ownership interests. This action will eliminate any *de minimis* ownership interests from consideration while remaining true to the intent of the Conferees.[35]

68. In the *Notice*, we proposed that non-stock corporations and unincorporated associations be treated "in a manner similar to partnerships in which each member holds an equal share." We agree with IBN and the Corporation for Public Broadcasting ("CPB") that nonstock corporations, as well as licensees operated by commissions, boards, or other governmental bodies should be judged as to minority status on the basis of the composition of the board. We believe this treatment also should apply, for diversity purposes, to the holdings of board members. The same treatment should be afforded both nonprofit and for-profit nonstock corporations. We do not concur, however, with CPB's opposition to our consideration of the membership of nonprofit corporations or unincorporated associations when such entities are membership organizations. Action consistent with the thrust of the *Conference Report* suggests consideration of the composition of the membership as to minority and diversity preferences. In order to minimize costs, we will authorize appropriate recognized sampling methods to be used in organizations with more than fifty members.

69. Upon further consideration of our *Notice* proposal, at paras. 39–40, regarding treatment of trusts, we believe that as to the minority ownership preference, the percentage each beneficiary derives as a portion of the whole should be considered, with more than fifty percent total minority share being required in order for preference to be awarded. This is consistent with the qualitative manner in which partnership interests are being treated, and appears more appropriate than our initial proposal to base this computation on mere numbers of minority beneficiaries. We will adopt as proposed our plan for the treatment of trusts for diversity purposes. Thus, if either the trust or its beneficiaries, or the trust and beneficiaries combined hold more than fifty percent of any medium of mass communications, these interests will be attributed to the trust applicant. An exclusion of interests of beneficiaries receiving less than 1% of trust income will be applied.

70. We also will adopt the *Notice* proposals regarding treatment of corporate ownership interests, as presented at paras. 41–42 of that document. The corporate applicant, by its officers, will be required to certify both as to the minority status of the holders of beneficial interest in a majority of the corporation's voting stock, if claiming such a preference, and as to any diversity preference claims. To derive this data, corporations with more than fifty shareholders will be permitted to use appropriate sampling procedures, if necessary. Such sampling methods are presently used in ascertaining alien ownership interests. A one per cent attribution benchmark will be applied in the diversity context, as proposed.[36]

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[33] Given the absense of any local programming obligations, we do not find Press' proposal for an "undeserved communities" preference to be in the public interest. Further, it appears that utilizing preferences other than those specified in the statute and *Conference Report* would be contrary to law. Press' proposal that "Tier III" applications for such communities be processed at an early date might have an unfair impact upon other applicants, and would, due to the interrelated mutually exclusive status of many applications, also require us to process numerous applications that do not have "underrepresented" status out of normal order. We do not believe this proposal should be adopted.

[34] Conversely, however, considering the ownership interests of limited partners may have a negative impact on the ability of minority entrepreneurs to benefit from the diversity preference.

[35] The rule tracks, but is not identical to, the Commission's current "attribution" rules. Its function is to exclude minor interests from consideration in calculating eligibility for lottery diversity preferences. Revision of this rule may be undertaken consistent with the outcome of our determinations in MM Docket No. 83-46, *Corporate Ownership Reporting and Disclosure by Broadcasting Licensees*, 48 FR 10082 (March 10, 1983).

[36] As to spousal ownership interests, we will, in computing the lottery diversity preference, treat such holdings in the same fashion as other family relationships. That is, spousal relationship, standing alone, will not be presumed to create common control over a mass media entity in which one spouse has an interest. Thus, we will, in the lottery context, look for diversity purposes to the general view of family relationships found in such cases as *KTRB Broadcasting Co., Inc.*, 46 FCC 2d 605, 607 (1974), and not to the presumption regarding spousal ownership interests stated in cases such as *Lady Sarah McKinney-Smith*, 59 FCC 2d 398, 401–402

71. *Definition of Mass Media.* In the *Notice,* we proposed to include daily newspapers in the definition of "media of mass communications" for calculating the diversity preference. American Newspaper Publishers Association ("ANPA") asserts in its comments, however, that it would be erroneous to consider newspapers as media in the lottery context since print media is not mentioned in the statutory definition. Although newspapers are not included in the open-ended statutory definition, the Conference Report, at 43, indicates that newspapers should be so included.[37] Moreover, we believe that newspapers should be included in the definition to further the Commission's long-recognized public interest goal of promoting diversity of viewpoints. *See, e.g., FCC v. National Citizens Comm. for Broadcasting,* 436 U.S. 775, 795 (1978); *Associated Press v. United States,* 326 U.S. 1, 20 (1945).

72. By including daily newspapers[38] in the statutory definition of mass media, we are not precluding newspapers from applying for LPTV licenses. The effect of our action, which is meant to increase the diversity of voices, is to make a newspaper owner applicant ineligible for an LPTV diversity preference in the community in which it publishes. Thus, all other things being equal, it is more likely that a non-media owning applicant will be more successful in a LPTV lottery than an applicant who owns no other print or electronic media.

73. We concur in Microband's view that Congress did not intend MDS to be considered as a mass communications medium so long as it is regulated as a Common Carrier Service in which the MDS licensee lacks direct editorial control over the programming. The statutory language includes in the "media of mass communications" MDS "and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee." The *Conference Report* adds clarity to this definition by observing that in services such as MDS, "which may be neither clearly common carrier nor broadcast entities," preferences need be used in lotteries when licensees have the ability to exercise direct editorial control over a substantial proportion of the programming or information services offered. It appears appropriate to treat MDS ownership in the same manner when MDS permittees or licensees participate in lotteries in other services, such as LPTV. Thus, present MDS licensees will be eligible for diversity preferences in LPTV without regard to their MDS holdings. However, this matter will be revisited if MDS is at some future time treated as a broadcast type service.

74. *Translators as Mass Media.* We do not agree with Comments to the effect that translators should not be considered mass communications media. Under section 74.732(e) of the Commission's Rules, an existing translator station immediately may commence low power operation upon notification to the Commission. It would raise serious questions regarding the legitimacy of the Commission's processes were we to award diversity preferences to translator operators who subsequently could convert their operations to LPTV status by letter.

75. *Local Ownership and the Diversity Preference.* The *Conference Report* states, at 43, that "the avoidance of local ownership concentration should continue to be a factor of major significance in promoting diversity in the licensing process." The Conferees observe that when a lottery applicant for a mass media license or permit has more than 50 percent interest "in any other medium of mass communications which would be co-located with the licensed facility sought, it would not promote the public interest to give such applicant a preferred status relative to other applicants." Thus, in any mass media lottery, no diversity preference will be awarded to an applicant whose owners, when aggregated, have controlling interest (over 50 percent) in any medium of mass communications in the community for which the grant is sought The *Conference Report* states that the Commission should require certification as to whether an applicant holds such an interest "a prerequisite for an acceptable application."

76. In the *Notice,* at para. 44, the Commission proposed to "make ineligible for a diversity preference, those applicants the owners of which essentially own more than 50% of a local medium of mass communications." We further proposed to require applicants to certify that they did not hold a controlling interest in media of mass communications serving "the community wherein the license or permit is sought." It is clear that the essence of the concerns evidenced in the *Conference Report* and reflected in our *Notice,* is that no diversity preference be provided those applicants who already control a medium of mass communications in the same locality in which the new facility is sought. Difficulty in implementation arises, however, when attempting to equate "locality" with the term of art "community of license." The notion of a "community of license" is not particularly relevant in this context, because LPTV licensees are not required to serve a given "community" as such.[39] Therefore, in order to implement the proposed restriction with appropriate regard to concerns about local media concentration, we will, in LPTV, adopt contour encompassment standards modeled on our "one to a market" restrictions. Diversity preferences will not be awarded to applicants whose owners, when aggregated, have a controlling interest in stations whose stated contours wholly encompass or are encompassed by the protected predicted contour of the LPTV station for which the license or permit is sought. Similar restrictions will be applied to co-located cable television systems and daily newpapers. Certification as to this status will be included in the revised LPTV application. Existing applicants must complete the certification at the time their applications appear on an "A" cut off list or when they are otherwise notified of the need to amend.[40]

(1976), and *Alexander S. Klein,* 86 FCC 2d 423, 426 (1981). The action taken here is consistent with the *Conference Report's* view, at 45, that women, which it states to be "significantly underrepresented" in telecommunications ownership, should "substantially benefit" from the lottery preference scheme.

[37] A statutory definition that specifies "include" is a term of enlargement and not of limitation. *Highway & City Freight Drivers v. Gordon Transports, Inc.,* 576 F. 2d 1285, 1289 (8th Cir. 1978).

[38] A daily newspaper is one that is published four or more days per week in the English language and is circulated generally in the community of publication. A college newspaper is not considered as being generally circulated.

[39] *See* LPTV *Report and Order, supra,* at paras. 14–15, 62. However, in order to effectuate the Conferees' intent that no diversity preference be given to those owning other media of mass communications in the same locality, it will be necessary to take cognizance of those service areas known as the cable television system's "franchise area" and the daily newspaper's "community of publication," and to utilize these as the areas to which the contour of the proposed LPTV station is related.

[40] The standards to be applied in LPTV will provide that no diversity preference be granted to any applicant whose owners, when aggregated, have a controlling interest in the following media of mass communications, if the service area of those media as described herein wholly encompass or are encompassed by the protected predicted contour, computed in accordance with Section 74.707(a), of the low power TV or TV translator station for which the license or permit is sought:

(a) AM broadcast station—predicted or measured 2 mV/m groundwave contour, computed in accordance with §§ 73.183 or 73.186;

(b) FM broadcast station—predicted 1 mV/m contour, computed in accordance with § 73.313;

(c) TV broadcast station—Grade A contour, computed in accordance with § 73.684;

(d) Low power TV or TV translator station—protected predicted contour, computed in accordance with § 74.707(a);

77. *Ex Parte Rules.* Low power television proceedings will become "restricted" for *ex parte* purposes from the time that a "B" list is published. Under the current *ex parte* rules, adjudicative proceedings generally become restricted at the time that a hearing designation order is issued. Adjudicative proceedings can become restricted, however, prior to issuance of the hearing designation order, for example, where public notice is given or actual notice is obtained that mutually exclusive applications have been filed. *See* 47 CFR 1.1203(b)(2). However, this rule goes beyond the requirements of the Administrative Procedure Act, which requires the imposition of *ex parte* restrictions no later than "the time at which a proceeding is noticed (*i.e.*, designated) for hearing" unless actual notice is acquired beforehand. 5 U.S.C. 557(d)(1)(E). Thus, to comply with our *ex parte* rules, LPTV proceedings will become restricted when the "B" cut off list is published or actual knowledge of mutual exclusivity is acquired, whichever occurs first. This result is justified due to the unusual circumstances of LPTV, *viz.*, the voluminous number of applications and the fact that it is practically impossible to determine, with precision, which applications are mutually exclusive prior to issuance of the "B" list.

78. *Major Changes.* A subidiary area raised in the *Section Notice* was the treatment of "major change" applications under a lottery system. We are persuaded that the proposal to subject "major change" applications in the traditional broadcast services to processing by lottery should not be adopted now. No basis has been established in this proceeding upon which to apply lottery processing to traditional service "major change" applications separate and apart from the treatment of all other applications in those services.

79. As to "major change" requests in LPTV, we continue to believe that the processing of such applications as initial filings is justified. "Major change" status does not, as CTN erroneously contends, open up the underlying authorization of an existing licensee to competitive challenge. However, the modifications that are treated as "major changes" are considered to be so significant that it would be inequitable to confer any protected status upon them. In our *LPTV Reconsideration Order*, FCC 83-129, adopted separately this date, we are adopting a proposal that modifications of facilities that would not increase the signal range of the station in any horizontal direction be treated as "minor." We believe this will facilitate maintenance-type facilities changes without creating new interference or preclusion. For the reasons stated in the LPTV document, additional adjustment in the handling of major technical changes does appear appropriate at this time.

80. Pending applications for new facilities and for "major changes" in existing facilities are assigned a new file number when they are amended in such manner that the amendments themselves constitute a "major change." When "major change" amendments are filed after the initial application appears on a cut off list, the application is no longer considered a part of that cut off group, and loses the protection the cut-off list affords. We do not concur in SIN's view that amendments reflecting site changes and similar matters should be treated as "minor," whether or not that would otherwise be the case, prior to issuance of a "B" cut-off list.[41] We observe that the standard for acceptance of LPTV applications is that they be "complete and sufficient." Additionally, under Section 1.65 of the Commission's Rules, applicants are under a continuing obligation to inform the Commission of significant changes in the information they have provided. Thus, all the information on file with the Commission should be current and complete. Allowing amendment of applications as is requested by SIN would add a substantial burden to the already Herculean processing task that the Commission faces in LPTV. It is the responsibility of the applicant to keep the necessary information on file with the Commission so that its rights are not jeopardized.[42]

81. *Channels 70-83 Issue.* We have also determined not to grant KIRO's request that translators wishing to move from channels 70 through 83 be exempt from consideration as "major change" applicants subject to lottery. Channels 70 through 83 were reallocated from broadcast to land mobile use in 1970.[43] Shortly thereafter, we concluded that translators operating on those channels would be afforded protection from the land mobile services only for the balance of their existing license terms, "after which renewals would be granted only on a secondary basis." We noted that while licensees on those channels were not being required to move, "they should be aware of the secondary nature of their authorizations and the possibility of changes to lower channels becoming necessary."[44] More than 800 television translators were in operation on channels 70 through 83 at the time of reallocation. Roughly 600 stations remain in operation on those frequencies today.[45] Applications from such licensees seeking a channel change are exempt from the LPTV applications freeze.[46] However, it may well be that in a number of cases, such applications will be mutually exclusive with others and will not be granted.[47] We believe the Commission's proper concern in such situations is that service is provided to the public. The nature of this service should be responsive to market demands. It is not the Commission's role to maintain an existing service in perpetuity. Thus, while we will not protect channel 70-83 operators from other applicants for lower channels, we will grant special temporary authority (STA) to such licensees, if a lower channel is available and a move is immediately required by land mobile interference problems.[48]

(e) Cable television system franchise area;

(f) Daily newspaper community of publication.

Additionally, the diversity preference will not be available to applicants whose proposed transmitter site is located within the franchise area of a cable system owned by the applicant and/or its owners or the community of publication of a daily newspaper owned by the applicant and/or its owners. Failure to consider the location of the transmitter site in the community of publication or the franchise area could easily lead to the diversity preference being awarded to existing media owners in a manner contrary to the Conferees' intent. Given this focus on localism, it is clear that the Conferees did not intent that we consider direct broadcast satellite ("DBS") operators as owners of "local" media for purposes of this restriction. See *Conference Report*, at 43.

[41] As we have noted above, under our newly revised definition of "major change," a site change is in fact treated as "minor" so long as there is no corresponding change in coverage area.

[42] Applicants should note that in the LPTV *Reconsideration*, we are revising our procedures and will henceforth treat LPTV transfers of control as "major changes" in the same circumstances in which this would ordinarily be the case in the broadcast services. Individuals interested in the LPTV applications process should read the *Reconsideration* document.

[43] *Spectrum Space for Land Mobile Services*, 19 RR 2d 1663 (1970).

[44] *Amendment of Part 74, Subpart G (Television Broadcast Translator Stations)*, 23 RR 2d 1504, 1509 (1971). Our policy regarding the secondary status of low power stations on channels 70-83 currently is codified as Section 74.702(a)(3) of the rules.

[45] *Improvements to UHF Television Reception*, 90 FCC 2d 1121, 1127 (1982). We determined in the UHF proceeding that new television sets no longer need to be equipped to receive channels 70-83. This will make it possible to manufacture sets which perform better on the remaining UHF channels. Manufacturers are not, however, precluded from producing sets which receive channels 70-83.

[46] *LPTV Report and Order, supra*, Appendix E, para. 3.

[47] Only approximately 40 channel change applications are now pending. We expect this level to increase in the near future, as Cellular Land Mobile Communications Systems are licensed to operate on the spectrum in question.

[48] Section 309(f) of the Communications Act requires a party to have pending an application for

However, these licensees must compete equally with all other applicants for regular low power or translator service on that lower channel and they will be required to cease their STA operation if another party is assigned the channel and is prepared to commence operation. This resolution will maintain the level of service to a community, while removing the Commission from considerations regarding the content of that service. For similar reasons, we will grant STA to translators forced to move by the start of operations of full service stations.

V. Private Radio Comment Summary

82. Most of those commenting on our proposals to use lotteries in the Private Radio Services addressed the appropriateness of lotteries in the Private Land Mobile Radio Services ("PLMRS"). Only a few commenters addressed the use of lotteries in the Aviation, Maritime and Private Operational-Fixed Services.

83. Many commenters maintained that lotteries would be inappropriate in any Private Land Mobile Service because the qualifications of competing applicants could always differ. Some commenters recognized, however, that lotteries could expedite the licensing process and be beneficial in certain cases, particularly when the licenses would be used strictly for entrepreneurial commercial purposes.

84. Some commenters were concerned that the use of lotteries in the PLMRS might jeopardize the frequency coordination process. Another argument advanced by several commenters was that the use of lotteries in the Private Land Mobile Services would be contrary to the spectrum management principles set forth in revised Section 331(a) of the Act. 47 U.S.C. § 331(a). Finally, others raised concerns about public safety, spectrum "trafficking" and the need for expert licensees.

VI. Private Radio Services Discussion

85. *Proposals.* In the *Notice*, we recognized that licensees do not receive exclusive use of frequencies in most of the Private Radio Services. Indeed, most frequencies are shared, and the need for comparative hearings or lotteries usually does not arise. The *Notice* did, however, set forth several proposals for implementing lotteries in certain Private Radio Services. In summary, we proposed to use lotteries in the Aviation, Maritime, Private Land Mobile and Private Operational-Fixed Microwave Radio Services. In essence, we proposed to have the option of utilizing the random selection technique in any Private Radio Service where mutually exclusive applications could be filed or where more applications for initial licenses might be received than could be accommodated on available frequencies. Additionally, we requested comments on whether selection by lottery should apply to applications in all the different classes of Private Land Mobile Services.

86. We explained that our overriding concern in making these proposals was to ensure that the public received the benefits of private radio service in the most expeditious manner possible, at the least cost to applicants, with no significant reduction in the qualifications of licensees. Our proposals were based on the premise that in any particular private radio lottery the qualifications of competing applicants to serve the public interest would be without substantial material differences. Under these circumstances, comparative hearings would serve no useful purpose and in large part would result in artificial distinctions without significant differences in licensees' qualifications to serve the public.

87. In the *Notice*, we recognized that under the Communications Act and our Rules, Petitions to Deny may not be filed against applications for Private Land Mobile licenses. We noted, therefore, that formal filings involving oppositions and replies would not be entertained in these services. In the other Private Radio Services where we proposed to select licensees by lottery (e.g. Aviation, Maritime, and Operational-Fixed Services), Petitions to Deny could be filed under our proposed rules in accordance with statutory requirements. 47 U.S.C. § 309. We proposed to streamline the lottery in these services, however, by requiring that Petitions to Deny be filed against applicants before the lottery and only those that were filed against the tentative selectees would be reviewed after the lottery. We noted that this would enable us to eliminate the necessity of a second time-consuming Public Notice inviting Petitions to Deny. Also, because the Private Radio Services do not currently involve "media of mass communications," we proposed to conduct all Private Radio Bureau lotteries without awarding significant preferences to any applicants. We believed that these proposals would ensure that lotteries were "extremely simple" in the Private Radio Services, as Congress had prescribed. *Conference Report* at 46.

88. *Lotteries in Private Land Mobile Radio Services.* Many of those commenting in response to the *Notice* took issue with these proposals. In particular, they questioned our proposal to use lotteries to select licensees in the Private Land Mobile Radio Services (Part 90). Some commenters referred to Section 120 of the Communications Amendments Act of 1982, the same legislation that authorizes the Commission to use lotteries to select licensees. That section establishes guidelines for the Commission's management of the Private Land Mobile spectrum. It directs the Commission to consider certain principles such as public safety, spectrum efficiency, competitive markets and interservice sharing. 47 U.S.C. 331.

89. Some commenters argued that our proposed use of lotteries in these services was inconsistent with these new statutory guidelines, particularly those relating to public safety. They stated that there are significant differences in the abilities of many applicants to serve the public interest. They pointed to the legislative history of the new private land mobile legislation, which stresses the Commission's obligation to promote the private land mobile spectrum needs of police departments and other public agencies using the spectrum to protect the American public. This concern was also expressed by some of those commenting in regard to the use of lotteries in the Operational Fixed Microwave Service (Part 94), where eligibility is based on Part 90 of the Rules (Private Land Mobile Services).

90. Many of these commenters were concerned about the use of lotteries in particular cases. For instance, the American Association of State Highway and Transportation Officials (AASHTO) opposed the use of lotteries in the Highway Maintenance Radio Service. Forest Industries Telecommunications (FIT) opposed lotteries in the Forest Products Radio Service. The Association of Public Safety Communications Officers, Inc. (APCO) and the Los Angeles County Sheriff's Department were against lotteries for public safety frequencies. UTC, the Utilities Communications Council, opposed the use of lotteries in the Power Radio Service and Operational Fixed Service. In essence, these parties and others argued that the Commission should rely on comparative hearing procedures to select the "better qualified" licensee. They also emphasized the importance of frequency coordination in accommodating the maximum number of

authorization of service before the Commission is permitted to grant STA. Thus, a translator licensee seeking STA must first apply for regular authority to broadcast on the channel in question.

licensees in a limited amount of spectrum.

91. We are convinced, however, that the new statutory guidelines for managing the Private Land Mobile spectrum—promoting safety, improving spectrum efficiency, reducing regulatory burdens, encouraging competition, providing services to large numbers of users, and increasing interservice sharing opportunities—are consistent with our proposal to use lotteries in the Private Land Mobile Services. The *Conference Report* makes it clear that these guiding principles, all of which were recognized as important goals, were *not* intended to be exclusive and that the Commission may consider any other relevant factors in the public interest. Moreover, not all of these guidelines need be considered by the Commission in each individual case. *Conference Report* at 52.

92. The *Conference Report*, we believe, encourages us to use lotteries in these services if it is done in a manner consistent with these new statutory guidelines. The *Conference Report* discourages the use of "auctions or similar economic methods" to assign this portion of the spectrum, but does state that this should *"not be construed to limit the ability of the Commission to use lottery procedures for purposes of granting private land mobile licenses. . . ." Conference Report* at 53, (emphasis added). This makes it apparent that Congress did not exclude private land mobile applications from the range of possible candidates for a lottery.

93. In certain areas of the country, we expect lotteries to be absolutely essential in some Private Land Mobile Radio Services. In particular, as some of the commenters noted, applications for base station licenses in the Commercial or SMRS pool of frequencies at 800 MHz are prime candidates for selection by lottery.[48] As a result of our recent decision in Docket No. 79-191, 250 new private land mobile channels in the 800 MHz band were released, with eighty channels earmarked for the SMRS pool. *Amendment of Part 90*, 90 FCC 2d 1281, 1299 (1982). Unlike the other pools, SMRS base station licensees were authorized to provide a communications service to eligibles for profit. We have already received far more applications for SMRS frequencies in some geographic areas than can be accommodated in the available spectrum. *See* FCC Public Notice, 2459, February 17, 1983. For instance, in the SMRS pool in the Los Angeles area alone, we have received approximately 250 applications requesting 1200 frequencies. Only 80 frequencies are available for assignment in that pool and in all likelihood only 16 applications will be granted. A comparative hearing of this scope, even a "paper" proceeding, would be unworkable for all practical purposes unless coupled with a lottery. We believe that traditional comparative hearings in these circumstances would undoubtedly delay service to the public and would not result in the selection of significantly more qualified licensees. This would clearly be inconsistent with our public interest responsibilities and the new statutory guidelines. Other major urban areas are faced with similar demand for these frequencies.

94. This is precisely the type of situation described in the *Conference Report* as appropriate for selection by lottery. There are large numbers of licenses available; there are large numbers of applications because new frequencies have been made available; there would be a significant backlog of applications without a lottery; and a lottery would speed up the process of getting service to the public. *Conference Report* at 37.

95. *Case-by-Case Use of Lotteries.* We interpret the *Conference Report* as encouraging the Commission to utilize lotteries in the Private Land Mobile Services, where necessary, on a case-by-case basis consistent with the new statutory guidelines for managing these services. In the *Conference Report*, Congress made it clear that the lottery authority was discretionary in nature and that a service should not be subject to a lottery if the traditional comparative process would provide a superior means of diversifying media ownership in particular instances. *Id.* at 37-38. It is apparent that Congress' main concern in preserving comparative hearings in these circumstances and in developing a significant preference scheme in the lottery procedure was to ensure diversification in the Mass Media Services. These concerns are not relevant at this time in the Private Radio Services, where licensees do not engage in mass media programming or the distribution of video entertainment to the public.[50]

96. We do not intend to apply the lottery selection process automatically or mechanically in these services. As some commenters suggested, expedited hearing proceedings may be used initially to apply comparative criteria in specified radio services to determine which applications will be granted, denied or subject to random selection. This will ensure that in any particular Private Land Mobile lottery there will be no substantial material differences in the applicants' abilities to serve the public interest.[51] Lotteries will not be utilized if the proposed uses of the spectrum would serve the public in materially differently ways. We would not, for example, utilize the same lottery to select between applicants proposing to use the spectrum for public safety purposes and those proposing non-public safety use. We expect this to minimize the concerns expressed by APCO, UTC, the Los Angeles County Sheriff's Department and others about the use of lotteries to select from among competing applicants proposing signifcantly different uses of the spectrum.

97. Some commenters have expressed their concerns that the use of a lottery will somehow adversely affect the frequency coordination process used so effectively in these services. They reference the new legislation, which specifically authorizes the Commission to accept the services of non-Federal Government advisory committees in coordinating the assignment of these frequencies.[52] They are concerned that lotteries will prevent the coordinators from using good engineering practices to arrive at solutions to difficult assignment problems.

98. We do not expect any lottery in these services to affect the coordinators adversely. We have not proposed in this proceeding any changes in the rules regarding frequency recommendations by coordinators, nor have we intended to create the impression that assignments will not be based upon good engineering practices. We will continue to utilize the services of the coordinating committees, as authorized in the new legislation, and we will continue to follow the guidelines delineated in the new legislation for managing these services, including efficient spectrum utilization and good engineering practices.

[48] FIT, SIRSA, and AAR suggested that lotteries would be appropriate for SMRS licenses.

[50] Parallel Communications Corp., the AAR and SIRSA recommended that lotteries be used to select from among competing applicants in the Private Operational Fixed Microwave Service who filed for the use of multi-directional systems as a result of Docket No. 19671, *First Report and Order*, 86 FCC 2d 299 (1981), *reconsideration pending*. As stated in the *Notice*, we will grant appropriate significant preferences if any applications involving mass distribution of video entertainment are processed in the future by lottery.

[51] The comparative criteria to be applied to particular groups of applications to determine if they should be subject to a lottery will be established in subsequent service-specific proceedings. *See, e.g., Amendment of Part 90*, 90 FCC 2d 1281 (1982).

[52] 47 U.S.C. 331(b).

99. Questions have also been raised concerning the applicability of the Commission's "anti-trafficking" rules to lotteries in the Private Land Mobile Services in light of current loading and construction requirements. *See, e.g.*, 47 CFR 90.358, 90.609. We wish to make it clear that we have not altered the transfer and assignment rules in these services, nor have we seen any reason in the record of this proceeding to change the loading and construction requirements in any way as a result of a lottery.

100. *Aviation, Maritime and OFS Services.* We received few comments on our proposals to use lotteries in the Aviation Services (Part 87), the Maritime Services (Part 81) and the Operational-Fixed Microwave Radio Service (Part 94). Some commenters claimed that lotteries were inappropriate in these services because some types of these stations are expensive to construct and the qualifications of competing applicants could differ greatly. Others argued that lotteries would be beneficial in these services.

101. In light of these comments, we will use comparative hearing procedures in these services when it appears upon initial analysis that there are significant differences in the abilities of competing applicants to serve the public. On the other hand, when it appears upon initial analysis that there are no substantial material differences in the qualifications of competing applicants, we will select licensees by lottery. In this way, lotteries will be used to resolve "tied cases" when comparative hearings would serve no useful purpose. In making this public interest determination whether applications in these services should be subject to a comparative hearing or lottery, we may consider such factors as public safety, service coverage area, operator experience and spectrum efficiency. Other relevant factors may also be taken into account. Our reasons for using lotteries or comparative hearings will be specified in public documents in each individual case. By using lotteries selectively in these services, we expect to expedite service to the public in appropriate cases while ensuring that licensees always remain fully qualified. This is one of the four factors specifically referenced in the *Conference Report* for our consideration in determining whether to utilize our lottery authority. In any instance where we select licensees by lottery in these services, we will make the affirmative finding, required by the Conferees, that the public interest will be significantly benefited. *Id.* at 37–38.

102. In the Private Radio Services, therefore, we are adopting the rules essentially as proposed. We will utilize lotteries only when it appears that there are no substantial and material differences in the qualifications of competing applicants to serve the public interest. Prior to the lottery, applications will be reviewed to determine that they are acceptable for filing and comparative criteria may be applied. This will ensure that lotteries will occur in these services only when comparative hearings would serve no useful purpose. Only qualified applicants will receive license grants. If it is determined that an initial tentative selectee is not qualified to receive the license grant, another tentative selectee chosen from among the same applicant pool during the same random selection will be designated until a qualified applicant is selected. It will not be necessary to conduct a separate second lottery in the Private Radio Services.[53] The selective use of lotteries will allow us to address the concerns of the commenters on a case-by-case basis and, we feel, will result in significant public interest benefits. It will enable us to ensure that the public receives private radio service in the quickest way possible, at the least cost to applicants, with no significant reduction in the qualifications of licensees. Based on our review of the *Conference Report*, we are convinced that Congress expected us to maintain the option of utilizing lotteries under these circumstances.

103. We are persuaded, in light of the comments favoring the use of comparative criteria in the Private Land Mobile Radio Services (Part 90), that licensees should be selected by lottery in these services only after expedited paper proceedings have shown that the qualifications of the competing applicants are without substantial and material differences. As a procedural matter, Petitions to Deny are not authorized in these services (47 U.S.C. 309; 47 CFR 1.962). Prior to the lottery, therefore, we will review informal complaints against applicants and will use "paper" hearing procedures to apply comparative criteria developed in separate proceedings (*e.g.*, Docket 79–191, *supra*). After the paper proceeding, and in light of the number of frequencies available for assignment, those applications that are clearly superior will be granted. Those that are clearly inferior will be denied. Those that are without substantial and material differences will be designated for random selection if frequencies remain available for assignment.

104. After the random selection, having already determined through the paper proceeding that the applicants are qualified to become licensees, any new allegations that the applicants are not qualified to be licensees will be handled through the Petition for Reconsideration process or through license revocation proceedings under 47 U.S.C. 312.

105. In the other Private Radio Services where licensee may be selected by lottery (Maritime, Aviation and Operational Fixed Microwave Radio Services; Parts 81, 87, and 94), Petitions to Deny may be filed against applicants. The paper proceeding, if any is necessary, will therefore occur after the lottery selection process has been completed. It will be based upon the Petitions to Deny that were filed against the tentative selectee prior to the lottery.

106. In short, the paper proceedings in the Private Land Mobile Services will occur before the lottery and will be used to ensure that only those applications without substantial and material differences are designated for lottery selection. On the other hand, in those Private Radio Services where Petitions to Deny are authorized, we will require that the Petitions be filed before the lottery and only those that have been filed against the tentative selectee will be reviewed after the lottery is conducted. Paper proceedings, if necessary in light of the Petitions to Deny, will be held at that point. In both situations, only qualified applicants will receive license grants. In the Private Land Mobile Services, this will be determined by paper proceedings held before the lottery. In the other Private Radio Services, it will be guaranteed by the Petition to Deny process.

107. Any paper proceeding in the Private Radio Services will be administered by the Commission. The Commission will receive the evidence and issue the final decision awarding licenses to applicants and/or designating applications for random selection. The Private Radio Bureau will serve as advisor to the Commission and will be responsible for reviewing pleadings and preparing a draft of the final decision. The Bureau will not appear as a party unless the Commission orders it to do so in a particular case. If the Bureau participates as a party, it will do so through separated counsel.

108. A public notice will start the paper proceedings. The notice will identify the applications involved and

[53] The *Conference Report* indicates that a second lottery is necessary only after an initial tentative selectee has been determined to be unqualified in the mass media services because selection probabilities in those cases will have to be recomputed. *Conference Report* at 39–40.

will include the hearing designation order, the issues, and the pleading schedule and procedures to be followed by the parties in the paper proceedings. Because of the Private Radio Bureau's role as advisor to the Commission regarding these applications, the Chief, Private Radio Bureau and his staff will be considered to be decision-making Commission personnel for purposes of *ex parte* contacts regarding any hearing conducted pursuant to these procedures. However, should any of his staff be designated as separated counsel for the purpose of participation as a party in any hearing, they will be non-decision-making personnel.

109. If the Commission concludes that an oral proceeding is necessary, it will issue an interlocutory order directing an Administrative Law Judge to hear a particular issue or issues. The order will specify the issue or issues and will establish the procedures to be followed.

110. At the conclusion of the paper proceedings for Private Land Mobile licenses, applications will be granted, denied or designated for random selection. In the other Private Radio Services, at the conclusion of the paper proceeding tentative selectee will receive license grants or will be determined to be unqualified. If it is determined that a tentative selectee in any of the Private Radio Services is unqualified after a lottery has been conducted, the license will be awarded to the next tentative selectee selected from the same lottery.

111. As stated in the *Conference Report* at 46, we expect the lottery procedures for these non-media services to be "extremely simple." Public Notices will specify the date, time, location of, and additional procedures for lotteries in the Private Radio Services.

VII. Common Carrier Comments

112. All of the comments addressing the issue of lotteries in the Cellular Radio Service supported the exclusion of cellular service from lottery procedures. Many parties opposed using lotteries in the rural radio and offshore radio services. Some parties also suggested that some or all of the public land mobile services be excluded, particularly in cases where an applicant proposes to expand an existing system, either by adding a frequency or by proposing a wide-area system. Some parties questioned whether a lottery would expedite application processing and suggested higher threshold financial and technical standards. Concerns were raised by some commenters regarding trafficking and spectrum warehousing. One party requested that preferences be awarded for local ownership and non-profit cooperatives. Finally, one party opposed lotteries on the grounds that they may be inconsistent with State certification procedures.

VIII. Common Carrier Services Discussion

113. *Lotteries in the Public Mobile Service.* In the *Notice*, we proposed to conduct lotteries for mutually exclusive applications in all of the public mobile land services except for the Cellular Radio Service.[54] In our discussion, we referred to new allocations for 35 MHz paging (CC Docket No. 80–189) and 900 MHz paging (Gen. Docket No. 80–183) and to the extremely large number of applications which were expected for these new frequencies. Thus far we have received nearly 6,500 applications for the frequencies. A substantial number of these applications involve mutually exclusive ("MX") situations. We also expressed our skepticism that existing criteria will provide a meaningful mechanism for selecting among MX applicants and cited the overwhelming administrative burden of comparative proceedings for all the anticipated MX applications.

114. Some of the comments suggest that a lottery is inappropriate in the public land mobile services and that, in making its common carrier proposal, the Commission failed to consider the four factors listed in the *Conference Report*. We discuss these factors and findings related to them at this point. First, there is a large number of licenses available (including licenses for systems operating on previously allocated frequencies). Second, there is a potentially large number of mutually exclusive applications.[55] Third, there is a significant back-log which a lottery will reduce. The fourth criterion, diversity of information sources, does not apply to these services. Our decision to apply a lottery to the public land mobile services is based instead on the strong applicability of the other three tests.[56] We conclude, therefore, that a lottery is appropriate for the public land mobile service.

115. Some of the comments (Telocator's, for example), while not objecting to the use of a lottery in these services, oppose its application to all frequency bands. The comments suggest that the Commission distinguish between the newly allocated frequencies (for which, in limited cases, they support a lottery) and the rest of the land mobile frequencies (for which the comments oppose a lottery). The parties refer to the following language in the *Conference Report:* "Relevant factors for the Commission's consideration . . . include . . . whether there is a large number of mutually exclusive applications for each license, for example, *when a new service is initiated." Conference Report* at 37 (emphasis added).

116. In our view, the above position is based on a confusion of the term "newly allocated frequency band" and the term "new service". While the *Conference Report* uses "new service," it did so only as an example of a situation where a back-log of applications might occur. The pertinent legislation was written in the context of, but was not confined to, the initiation of low-power television, which clearly is a new service. The allocation of additional frequencies for public land mobile service is not, strictly speaking, the initiation of a new service. Therefore, in implementing a lottery, we seek not simply to expedite low band and 900 MHz applications, but all public land mobile applications. While the bulk of our back-log of applications will be for newly allocated frequencies, all applications are processed similarly and are of equal priority. All land mobile applications will therefore be expedited by a lottery, not just those for newly allocated frequencies.

117. *New and Existing Systems.* Telocator further opposes the use of a lottery in cases where an applicant requests an additional frequency to develop a wide-area system or to relieve congestion on a trunked mobile telephone system. Initially, we note that paging systems do not use trunking, so the argument as to congestion relief is of limited applicability to this discussion. The newly-allocated frequencies are for paging. The bulk of the anticipated back-log is related to these new frequencies, and not to situations where existing licensees seek additional two-way frequencies to relieve congestion on mobile telephone systems. The Commission is nevertheless mindful of the competing interests of new applicants seeking a first channel and established carriers who seek to enhance their existing systems. In our view, the solution to this problem is to make additional frequencies available, so that all parties, whether new entrants or established carriers, may have access to frequencies. Our recent allocation for

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[54] The public mobile services include paging, two-way land mobile telephone service, two-way air-ground service, offshore telecommunications service, rural radio service, and cellular radio service. The cellular radio service is not included in this proposal for implementing lottery rules.

[55] The precise number of mutually exclusive applications will not be determined until the 900 MHz applications are loaded into the automated data base and analyzed.

[56] See below, however, our discussion of the rural radio and offshore services.

cellular radio has responded to this problem, as have the low-band and 900 MHz allocations for paging. The lottery, on the other hand, is not designed to relieve frequency shortages but rather to expedite the licensing process, so that all applicants, whether new entrants or existing carriers seeking another frequency, may have their applications expedited. We also note that, even under the present rules, established carriers receive no preference over new entrants in a comparative proceeding, so a lottery does not place established carriers in a less advantageous position *vis a vis* new entrants.

118. The Commission is also aware of the desire of carriers to obtain additional frequencies to provide wide-area service. In the 900 MHz allocation, we recognized the need for wide-area public mobile service and specified frequencies for network and regional paging systems. *First Report and Order*, 89 FCC 2d 1337 (1982). In describing how these applications would be processed, the Commission stressed that its purpose was to employ the most expeditious way to equitably process applications and make assignments. *Id.* at para. 49. To accommodate these applicants interested in establishing wide-area systems, we would apply a liberal assignment and transfer policy when licensees wish to trade their 900 MHz frequencies. For example, applicant "A" wishes to construct a wide-area system operating on frequency "1". If in one site, however, applicant "B" obtains frequency "1", and "A" proposes to purchase the constructed facilities from "B" in order to provide service on frequency "1" throughout the entire area, the Commission would give liberal consideration to the assignment application. We propose a similar approach in the case of the lottery procedure, thereby remaining consistent with the Commission's goal of expediting the licensing process while also taking into account the interests of those carriers providing wide-area service.[57]

119. *State Certification and Other Concerns.* In its comments NARUC opposes the lottery on the ground that it may undermine the state certification process for radio common carriers. We reject this view, however, since § 22.13 will remain in effect, requiring all licensees to comply with all applicable state certification requirements. 47 CFR 22.13.

120. TDS expresses the concern that lottery winners will engage in trafficking and thus frustrate the lottery's purpose of expediting service to the public. TDS requests that a two-year anti-trafficking provision be applied to lottery winners in the public mobile services. We reject this suggestion. The language discussing the trafficking issue in the *Conference Report* (pp. 45–46) is confined to the mass communications media service and is clearly related to the Conferees' concerns as to preferences awarded in lotteries and the diversity of ownership in those services. No preferences are awarded in the public mobile services and diversity of ownership is not at issue in lotteries involving these carriers. The trafficking issue as it affects the public mobile services is discussed in detail in CC Docket No. 80–57, 47 FR 43842, and goes beyond the scope of the lottery proceeding.

121. TDS requests that proposed rule § 22.32(g) be amended to explicitly state that no preferences will be awarded in lotteries involving these services. This request is consistent with the intent of the Act (*see Conference Report*, p. 41), and we will revise the rule accordingly.

122. *Offshore and Rural Radio Services.* In the *Notice*, the Commission proposed to include the offshore telecommunications service and the rural radio service in the common carrier lottery. This proposal was widely opposed in the comments, basically on the ground that, using the four factors listed in the *Conference Report*, neither service is appropriate for a lottery. Upon consideration of the four factors, the language in the statute, and the comments, we have concluded that these two services should not presently be included in the lottery proceeding. Neither service involves a large number of licensees or mutually exclusive applications, and neither service has a significant back-log. Moreover, we can perceive no other "salient consideration" that would compel us to use lotteries in these services. *See Conference Report* at 38. We reserve, however, the option of reexaming the applicability of a lottery to either of these services if, in the future, any of the above factors should significantly change. We note in particular that the Commission has recently proposed to allocate additional frequencies in the Offshore telecommunications service. *See Notice of Proposed Rule Making*, Gen. Docket No. 83–45, FCC 83–35, released February 22, 1983. If in the future, the number of mutually exclusive applications in this service should increase substantially, we may at that point propose to implement a lottery to more expeditiously process the applications.

123. *Telephone Cooperatives.* The Bledsoe Telephone Cooperative, Inc., ("Bledsoe") opposes a lottery in common carrier services on the grounds that the procedure would be counterproductive to the provision of quality service needed in rural areas. Bledsoe suggests that preferences be awarded for local ownership and non-profit cooperatives. The Commission is cognizant of the high quality of service provided by non-profit cooperatives, particularly in rural areas where high quality service may not otherwise be available. We have decided above not to use lotteries in the Rural Radio Service; accordingly, our decision implementing lotteries is not likely to affect telephone cooperatives at all.

124. *Pre-Lottery Screening.* Tymnet, Inc., urges the commission to screen applicants carefully prior to the lottery. We will not engage in such comparative consideration at the pre-lottery stage, nor will we attempt to distinquish between superior and marginally qualified applicants in these common carrier services, as Tymnet suggests. In our many years of regulating these services, we have found the overwhelming majority of carriers to be fully qualified in all respects. Even when a marginal operator is licensed, there is little potential for harm to the public interest because there are many operators in most markets from which customers may choose. Furthermore, most states regulate the market entry or rates, or both, of the radio common carriers and telephone companies providing mobile services. This serves as an additional, important check on their qualifications. Accordingly, we will not adopt the Tymnet proposal because it would impose time and resource burdens on Bureau staff without achieving significant public interest benefits in the common carrier area.

125. *Common Carrier Procedures.* The Appendix includes rules in Part I and Part 22 outlining procedures to be used for lotteries in the Common Carrier Bureau in general and in the Public Land Mobile Service in particular. Other common carrier services which may in the future use lotteries will be added to the list, after appropriate proceedings, in § 1.821 ("Scope").[58]

[57] The Commission's 900 MHz proceeding makes provision for nationwide paging systems, a technological advance with which the Commission has not had previous experience. Although in this *Second Report and Order* we implement lottery proceedings for 900 MHz applications in general, we reserve the option to decide in the 900 MHz proceeding whether lotteries are appropriate for applicants proposing network paging systems. *See First Report and Order*, Gen. Docket No. 80–183, 89 FCC 2d 1337 (1982).

[58] As we noted above, we have reserved the option of deciding in the 900 MHz proceeding (Gen. Docket No. 80–183), whether to include network paging applications in the lottery proceeding.

126. Under the common carrier lottery, the same procedures currently set forth in our rules will be followed as to application filing, acceptance or dismissal, public notice, and as to filing of petitions to deny.[59] Where it is determined that properly filed applications are mutually exclusive, a lottery will be held under the direction of the Bureau Chief. No preference will be awarded to common carrier lottery participants, consistent with the language in the Conference Report (p. 41). Pleadings filed against mutually exclusive applications will not be reviewed prior to conducting the lottery. The Commission will hold the lottery and then will review only the pleadings filed against the tentative selectee. This approach conserves staff time ordinarily spent reviewing pleadings filed against non-selected mutually exclusive applications. We believe the filing of Petitions to Deny prelottery, although at variance with that to be applied to low power television applications, best suits the individual demands of the common carrier processing function. Compare our discussion at para. 31 *et seq., supra.*

127. The staff will review the selectee's application and related pleadings. If the applicant is qualified, the staff will grant the application. If, however, a substantial and material question of fact remains, the application will be designated for hearing. We retain the option of sending the case to an Administrative Law Judge or to the Commission *en banc* or one or more Commissioners, and our rules reflect that option. Whether the proceedings are conducted by the ALJs or the Commission, they will be based primarily on written submissions. We intend to reduce the expense and delay associated with unlimited discovery, extensive cross-examination and motions to enlarge, and we will specify how those limitations are to apply in each designation order. In those cases referred to ALJs, all appeals taken by exception to the Initial Decision will go directly to the Commission and will not be subject to intermediate review by the Review Board. *See* note 20, *supra.* If the selectee's application is denied, the Commission will proceed to review the application of, and any pleadings filed against, a second selectee. In the public mobile radio services, the lottery will not only identify a tentative selectee but will also rank the applicants so that, if the first selectee is ultimately disqualified, the second (and third, and so on) selectee will have already been identified.

[59] In general, our rules for conducting a common carrier lottery are inserted in the Part 1 and other applicable rules parts. General rules for processing applications have been retained and will apply to all situations except those in which a lottery is conducted.

VIII. Conclusion

128. We believe that the actions we have taken in this proceeding represent a prudent exercise of our administrative discretion. We have attempted to implement the lottery statute in a manner that best serves the public interest. This is the Commission's first experience with lotteries; we plan to use our random selection authority cautiously.

129. Lottery processing may be used in those services enumerated above where the lead application was filed on or after August 14, 1981 (the effective date of the first lottery statute). In addition, all pending applications in the low power television and television translator service will be subject to a lottery, including those filed prior to August 14, 1981. *See* paras. 23–25 *supra.*

130. Some of the rules as initially proposed in the *Notice* have been modified after careful consideration of the statute, legislative history and numerous comments. Further rule makings may be necessary to fully develop the Commission's lottery program.

131. Although this Commission is always chary of imposing new regulations on the communications industry, we believe in this case that the benefits of the lottery regulations far outweigh their costs. Lotteries will help speed provision of service to the public by eliminating the costly and time consuming comparative hearings while still maintaining some relative advantage for minorities and others underrepresented in the ownership of mass media facilities. The Commission holds great hope for lotteries, particularly in implementing new services such as LPTV and 800 MHz.

132. *Paperwork Reduction Act.* In accordance with 44 U.S.C. 3501 *et seq.* and Executive Order No. 12291, the Commission submitted a copy of the *Notice* to OMB for review and comment. OMB's comments were necessary because the NPRM postulated that the rule making could result in additional paper work requirements on applicants for communications licenses. OMB expressed general support for the lottery proposal and made no specific objection to the proposal for applicant certification of preference eligibility. OMB did, however, request the Commission to submit for review any additional information requirements such as new or revised forms that may result from this proceeding. In accordance with that request, we will seek OMB comment on revised FCC Form 346.

X. Regulatory Flexibility Act—Final Analysis

133. *Need for and Purpose of Rules.* The Commission proposed the subject lottery rules to implement its recently amended random selection authority. The use of lotteries to select licensees from among competing applicants, it is expected, will serve the public interest by significantly decreasing the cost and delay of traditional comparative hearings. Moreover, safeguards are built into the random selection system so that only fully-qualified applicants receive licenses through the lottery process.

134. *Comments.* Apparently, no comments were received that directly addressed the initial regulatory flexibility analysis.

135. *Alternatives Considered.* As noted in our initial flexibility analysis, there are two alternatives to the lottery proposal. One is to retain traditional comparative hearings; the other is to employ auction techniques. In view of the Congressional direction to implement a licensing lottery, we concluded that there was no practical alternative to establishing lottery procedures.

XI. Other Matters.

136. In view of the foregoing and pursuant to Sections 1, 3, 4(i) and (j), 303, 309 and 403 of the Communications Act of 1934, as amended (47 U.S.C. 151–609), it is hereby ordered that the action taken herein is effective July 13, 1983.

137. It is further ordered that revised FCC Form 346 is amended, as set forth in Appendix D, effective upon receipt of approval from the Office of Management and Budget.

138. It is further ordered that all Petitions to Deny and informal objections pending against any application in the low power television and television translator service are hereby dismissed.

139. It is further ordered, that all applicants who have filed multiple applications inconsistent with Section 73.3521, adopted herein, shall withdraw such applications as are necessary to remedy the conflict no later than thirty days following the effective date of the action taken herein.

140. For general information regarding this proceeding contact Randy Thomas, Office of General Counsel (202) 632–6990. For specific information relating to the use of lotteries in the Common Carrier Service contact Michael Menius (202) 632–6450; Mass Media Service

contact Barbara Kreisman (202) 632-3894; or Private Radio Service contact John Richards (202) 634-2443.

(Secs. 4, 303, 48 Stat., as amended 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendices A, B, and C

Note.—Appendices A and B (Commenters and Comments) and the full text of Appendix D of this document are filed as a part of the original document and will not be printed herein due to the continuing effort to minimize publishing costs. However, copies of this document in its entirety are available from the Downtown Copy Center, 1413 K Street, N.W., Washington, D.C. 20005; Telephone: (202) 289-4140. In addition, a copy is available for public inspection in the FCC Dockets Branch, Rm. 239 and the FCC Library, Rm. 639, both located at 1919 M St., N.W., Washington, D.C. 20554. A summary of Appendix D is set forth herein.

Appendix C—New Rules

PART 1—PRACTICE AND PROCEDURE

Subpart A—General Rules of Practice and Procedure

1. Section 1.65 is revised to read as follows:

§ 1.65 Substantial and significant changes in information furnished by applicants to the Commission.

(a) Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Except where paragraph (b) of this section applies, whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Except where paragraph (b) of this section applies, whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47. Where the matter is before any court for review, statements and requests to amend shall in addition be served upon the Commission's General Counsel. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

(b) Changes in information relating to § 1.1622, lottery preferences, must be furnished to the Commission no more than 7 days after the changes occur until (1) in the case of a non-mutually exclusive application, the Commission releases the Public Notice proposing the application for grant; or (2) in the case of a mutually exclusive application, the Commission releases the final Public Notice announcing the acceptance of the last-filed mutually exclusive application.

2. Section 1.227 (a)(2), (b)(1), (b)(3) and (b)(4) is revised to read as follows:

§ 1.227 Consolidations.

(a) * * *

(2) Any applications which present conflicting claims, except where a random selection process is used.

(b)(1) In broadcast cases, except as provided in subparagraph (5) of this paragraph, and except as otherwise provided in § 1.1601, *et seq.*, no application will be consolidated for hearing with a previously filed application or applications unless such application, or such application as amended, if amended so as to require a new file number, is substantially complete and tendered for filing by the close of business on the day preceding the day designated by Public Notice published in the **Federal Register** as the day any one of the previously filed applications is available and ready for processing.

* * * * *

(3) Common carrier cases: (i) General rule. Where an application is mutually exclusive with a previously filed application, the second application will be entitled to comparative consideration with the first or entitled to be included in a random selection process, only if the second has been properly filed at least one day before the Commission takes action on the first application. Specifically, the later filed application must have been received by the Commission, in a condition acceptable for filing, before the close of business on the day prior to the grant date or designation date of the earlier filed application.

(ii) Domestic public fixed and public mobile. See Rule §§ 21.31 and 22.31 for the requirements as to mutually exclusive applications. See also Rule §§ 21.23 and 22.23 for the requirements as to amendments of applications.

(iii) Public coast stations (Maritime mobile service). See paragraph (b)(4) of this section.

(4) In cases of applications filed in the Private Radio Services, except as otherwise provided in § 1.972, any application that is mutually exclusive with another application or applications will be consolidated for hearing with such other application or applications only if the later application in question is substantially complete and tendered for filing by whichever date is earlier: (i) Not later than the close of business 1 business day before the Commission adopted an order which first designated for hearing the prior application or applications with which such application is in conflict; or (ii) within 60 days after the date of public notice listing the first prior filed application (with which subsequent applications are in conflict) as having been accepted for filing. An application which is substantially amended by a major change (*i.e.*, substantial change as defined by § 1.962(c)) will, for the purpose of this section, be considered to be a newly filed application.

* * * * *

3. In Part 1, § 1.821 is added to read as follows:

§ 1.821 Scope.

Where action on applications is permitted by the Chief, Common Carrier Bureau, under delegated authority, the provisions of this section, and the provisions referenced herein, shall apply to applications for initial licenses for stations in the Public Land Mobile Service (See Subpart G, Part 22).

4. In Part 1, § 1.822 is added to read as follows:

§ 1.822 Grants by random selection.

(a) Applications in the common carrier services specified in § 1.821 ("Scope") shall be filed, accepted or dismissed, place on public notice, and subject to Petitions to Deny according to the rules established for the specific service.

(b) If there are mutually exclusive applications for an initial license, the Commission may use a random selection process. Each such random selection shall be conducted under the direction of the Chief of the Common Carrier Bureau. The random selection shall pick a tentative selectee and then repeat the random selection process with the remaining applicants, so that, in the event that the tentative selectee's application is denied, the other applicants will be ranked in order as

alternative selectees. Pleadings filed against these applications will not be reviewed prior to conducting the random selection. No preferences shall be awarded to participants. Following the random selection, the Commission shall announce the tentative selectee and determine whether this applicant is qualified to receive the license. Petitions to Deny and other pleadings properly filed against the selectee's application will be reviewed. If the Commission determines that the tentative selectee is qualified, it shall grant the application. Parties shall not file petitions for reconsideration, motions to stay or applications for review at the time that a tentative selectee is announced. Instead, such pleadings may be submitted at the time when the Commission grants or denies the application. The filing periods specified in the rules shall apply for such pleadings.

5. In Part 1, § 1.823 is added to read as follows:

§ 1.823 Post-selection hearings.

(a) If, after reviewing the selectee's application and pleadings properly filed against it, the Commission determines that a substantial and material question of fact exists, it shall designate the qualifying issue(s) for an expedited hearing.

(b) Expedited hearing procedures. (1) Hearings may be conducted by the Commission or an Administrative Law Judge. In the case of a question which requires oral testimony for its resolution, the hearing will be conducted by an Administrative Law Judge.

(2) Parties have ten (10) days from publication in the **Federal Register** of the hearing designation order to file notices of appearance.

(3) When the Commission, under § 1.221, issues an order stating the time, place, and nature of the hearing, this order shall instruct the applicant to submit its direct case in writing within thirty (30) days from the order's release date, or as otherwise specified in the order. The direct written case must set forth all those facts and circumstances related to the issues in the designation order. Documentary evidence upon which the applicant relies must be attached. Each exhibit must be numbered and must be accompanied by an affidavit from someone who has personal knowledge of the facts in the submission and who attests to the truth of the submission.

(4) The order will also specify those petitioners that directly raised an issue which was designated and will inform these parties of their opportunity to submit a written rebuttal case within twenty (20) days after the direct case is due. The procedures in paragraph (b)(3) of this section will apply as to documentary evidence, exhibits, and affidavits.

(5) Appeal of initial decisions rendered by an Administrative Law Judge shall lie with the Commission.

Subpart F—Private Radio Services Applications and Proceedings

6. In § 1.918, a new paragraph (d) is added, and present paragraph (d) is redesignated as (e), to read as follows:

§ 1.918 Amendment of applications.

* * * * *

(d) A request to amend an application after it has been designated for random selection pursuant to § 1.972 will be considered only upon written petition addressed to the Chief, Private Radio Bureau and will be granted only for good cause shown. A petition which requests a substantial change in the application or which affects the lottery probabilities of other applicants must be accompanied by a signed statement of a person with knowledge of the relevant facts and must specify with particularity why such change is necessary and whether or not consideration has been promised to or received by the petitioner, directly or indirectly, in connection with the filing of such petition for amendment. If consideration has been promised or received, the statement shall set forth all the relevant facts with sufficient detail to enable the Chief, Private Radio Bureau to determine whether and to what extent, if any, the consideration represents only the reasonable costs of prosecuting the petitioner's application.

(e) * * *

7. In § 1.953, paragraph (a) is revised to read as follows:

§ 1.953 How applications are processed.

(a) Applications are processed in sequence according to date of filing, or pursuant to the system of random selection prescribed in § 1.972 of this part. Applications which are in accordance with the provisions of this chapter and established policies of the Commission may be processed to completion in accordance with the applicable delegations of authority as set forth in Part 0 of this chapter.

* * * * *

8. A new § 1.972 is added to read as follows:

§ 1.972 Grants by random selection.

(a) The provisions of this section, including provisions incorporated by reference, may apply to applications for initial licenses:

(1) For stations in the following Private Radio Services:

Part 81—Stations on Land in the Maritime Services
Part 87—Aviation Services
Part 90—Private Land Mobile Services
Part 94—Private Operational-Fixed Microwave Service.

(2) In any other proceedings in the Private Radio Services in which the Commission determines that there is no material difference in competing applicants' abilities to serve the public interest.

(b) Applications in the services specified above shall be tendered, filed, accepted or dismissed, publicly noted, and subject to Petitions to Deny in accordance with § 1.962 and the rules and policies established for each respective service.

(c) If there are mutually exclusive applications for an initial license for stations subject to Part 81 or Part 87, or if there are more applications for initial licenses in Part 90 or Part 94 than can be accommodated on available frequencies, the Commission may process the applications pursuant to a system of random selection.

Expedited hearing proceedings may be used to apply comparative criteria in specified radio services to determine which applications will be granted, denied or subject to the random selection. Each such random selection shall be conducted under the direction of the Chief of the Private Radio Bureau. The selection percentages, preferences, and probability calculations prescribed in § 1.1621 *et seq.* of this part shall not be applicable to any system of random selection conducted in the Private Radio Bureau. Following the random selection, the Commission shall announce the tentative selectee and determine whether the tentative selectee is qualified to receive the license under the rules applicable to the respective service. Where authorized under § 1.962, Petitions to Deny which have been filed against the tentative selectee before the random selection will be reviewed and processed prior to grant, in accordance with § 1.962 and those rules applicable to each respective service. If the Commission determines that the tentative selectee has satisfied all requirements, it shall grant the application. If it is determined that an initial tentative selectee is not qualified to receive the license grant, another tentative selectee chosen from among the same applicant pool during the same random selection will be designated until a qualified applicant is selected. If the Commission determines that a substantial and material question of fact

exists, it shall designate the question for hearing. Hearings may be conducted by the Commission or the Chief of the Private Radio Bureau, or, in the case of a question which requires oral testimony for its resolution, an Administrative Law Judge.

9. Section 1.973 is revised to read as follows:

§ 1.973 Designation for hearing.

(a) If the Commission is unable to make the findings prescribed in § 1.971(a) and does not utilize the system of random selection prescribed in § 1.972 of this part, it will formally designate the application for hearing on the grounds or reasons then obtaining and will notify the applicant and all other known parties in interest of such action.

(b) Orders designating applications for hearing will specify with particularity the matters in issue.

(c) Parties in interest, if any, who are not notified by the Commission of its action in designating a particular application for hearing may acquire the status of a party to the proceeding by filing a petition for intervention showing the basis of their interest not more than 30 days after publication in the **Federal Register** of the hearing issues or any substantial amendment thereto.

(d) The applicant and all other parties in interest shall be permitted to participate in any hearing subsequently held upon such applications. Hearings may be conducted by the Commission or by the Chief of the Private Radio Bureau, or, in the case of a question which requires oral testimony for its resolution, an Administrative Law Judge. The burden of proceeding with the introduction of evidence and burden of proof shall be upon the applicant, except that with respect to any issue presented by a Petition to Deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission or the Chief of the Private Radio Bureau.

* * * * *

10. Subpart L is added to 47 CFR Part 1 to read as follows:

Subpart L—Random Selection Procedures for Mass Media Services

General Procedures

Sec.

1.1601 Scope.
1.1602 Designation for random selection.
1.1603 Conduct of random selection.
1.1604 Post-selection hearings.
1.1621 Definitions.
1.1622 Preferences.
1.1623 Probability calculation.

Authority. 47 U.S.C. 309(i).

General Procedures

§ 1.1601 Scope.

The provisions of this subpart, and the provisions referenced herein, shall apply to applications for initial licenses or construction permits or for major changes in the facilities of authorized stations in the following services:

(a) Low Power Television and Television Translator Broadcasting.

§ 1.1602 Designation for random selection.

Applications in the services specified in Section 1.1601 shall be tendered, accepted or dismissed, filed, publicly noted and subject to random selection and hearing in accordance with any relevant rules. Competing applications for an initial license or construction permit shall be designated for random selection and hearing in accordance with the procedures set forth in §§ 1.1603 through 1.1623 and 73.3572 of this chapter.

§ 1.1603 Conduct of random selection.

(a) Each random selection shall be conducted under the direction of the Chief of the Mass Media Bureau, or his designee.

(b) The random selection probabilities will be calculated in accordance with the formula set out in rules §§ 1.1621 through 1.1623.

§ 1.1604 Post-selection hearings.

(a) Following the random selection, the Commission shall announce the "tentative selectee" and, where permitted by § 73.3584 invite Petitions to Deny its application. Following the responsive pleadings thereto, the Commission shall:

(1) In the case of low power television stations, take action pursuant to either § 73.3591, 73.3592 or 73.3593.

(b) If, after such hearing as may be necessary, the Commission determines that the "tentative selectee" has met the requirements of § 73.3591(a) it will make the appropriate grant. If the Commission is unable to make such a determination, it shall order that another random selection be conducted from among the remaining mutually exclusive applicants, in accordance with the provisions of this subpart.

(c) If, on the basis of the papers before it, the Commission determines that a substantial and material question of fact exists, it shall designate that question for hearing. Hearings may be conducted by the Commission or, in the case of a matter which requires oral testimony for its resolution, an Administrative Law Judge.

§ 1.1621 Definitions.

(a) Medium of mass communications means

(1) A daily newspaper; and a license or construction permit for

(2) A television (including low power TV or TV translator) station,

(3) A standard (AM) radio station,

(4) An FM radio station,

(5) A direct broadcast satellite transponder under the editorial control of the licensee, and

(6) A cable television system.

(b) Minority group means

(1) Blacks,

(2) Hispanics

(3) American Indians,

(4) Alaska Natives,

(5) Asians, and

(6) Pacific Islanders.

(c) Owner means the applicant and any individual, partnership, trust, unincorporated association, or corporation which

(1) If the applicant is a proprietorship, is the proprietor,

(2) If the applicant is a partnership, holds any partnership interest,

(3) If the applicant is a trust, is the beneficiary thereof,

(4) If the applicant is an unincorporated association or non-stock corporation, is a member, or, in the case of a nonmembership association or corporation, a director,

(5) If the applicant is a stock corporation, is the beneficial owner of voting shares.

Note 1.—For purposes of applying the diversity preference to such entities only the other ownership interests of those with a 1% or more beneficial interest in the entity will be cognizable.

Note 2.—For the purposes of this section, a daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

Note 3.—For the purposes of applying the diversity preference, the ownership interests of the spouse of an applicant's principal will not presumptively be attributed to the applicant.

§ 1.1622 Preferences.

(a) Any applicant desiring a perference in the random selection shall so indicate as part of its application. Such an applicant shall list any owner who owns all or part of a medium of mass communications or who is a member of a minority group, together with a precise identification of the ownership interest held in such medium of mass communications or name of the minority group, respectively. Such an applicant shall also state whether more

than 50% of the ownership interests in it are held by members of minority groups and the number of media of mass communications more than 50% of whose ownership interests are held by the applicant and/or its owners.

(b) Preference factors as incorporated in the percentage calculations in § 1.1623, shall be granted as follows:

(1) Applicants, more than 50% of whose ownership interests are held by members of minority groups—2:1.

(2) Applicants whose owners in the aggregate hold more than 50% of the ownership interests in no other media of mass communications—2:1.

(3) Applicants whose owners in the aggregate hold more than 50% of the ownership interest in one, two or three other media of mass communications—1.5:1.

(c) Applicants may receive preferences pursuant to § 1.1622(b)(1) and either § 1.1622 (b)(2) or (b)(3).

(d) Preferences will be determined on the basis of ownership interests as of the date of release of the latest Public Notice announcing the acceptance of the last-filed mutually exclusive application.

(e) No preferences pursuant to § 1.1622 (b)(2) or (b)(3) shall be granted to any LPTV applicant whose owners, when aggregated, have an ownership interest of more than 50 percent in the following media of mass communications, if the service areas of those media as described herein wholly encompass or are encompassed by the protected predicted contour, computed in accordance with § 74.707(a), of the low power TV or TV translator station for which the license or permit is sought:

(1) AM broadcast station—predicted or measured 2 mV/m groundwave contour, computed in accordance with §§ 73.183 or 73.186;

(2) FM broadcast station—predicted 1 mV/m contour, computed in accordance with § 73.313;

(3) TV broadcast station—Grade A contour, computed in accordance with § 73.684;

(4) Low power TV or TV translator station—protected predicted contour, computed in accordance with § 74.707(a);

(5) Cable television system franchise area, nor will the diversity preference be available to applicants whose proposed transmitter site is located within the franchise area of a cable system in which its owners, in the aggregate, have an ownership interest of more than 50 percent.

(6) Daily newspaper community of publication, nor will the diversity preference be available to applicants whose proposed transmitter site is located within the community of publication of a daily newspaper in which its owners, in the aggregate, have an ownership interest of more than 50 percent.

§ 1.1623 Probability calculation.

(a) All calculations shall be computed to no less than three significant digits. Probabilities will be truncated to the number of significant digits used in a particular lottery.

(b) Divide the total number of applicants into 1.00 to determine pre-preference probabilities.

(c) Multiply each applicant's pre-preference probability by the applicable preference from § 1.1622 (b)(2) or (b)(3).

(d) Divide each applicant's probability pursuant to paragraph (c) of this section by the sum of such probabilities to determine intermediate probabilities.

(e) Add the intermediate probabilities of all applicants who received a preference pursuant to § 1.1622 (b)(2) or (b)(3).

(f)(1) If the sum pursuant to paragraph (e) of this section is .40 or greater, proceed to paragraph (g) of this section.

(2) If the sum pursuant to paragraph (e) of this section is less than .40, then multiply each such intermediate probability by the ratio of .40 to such sum. Divide .60 by the number of applicants who did not receive a preference pursuant to § 1.1622 (b)(2) or (b)(3) to determine their new intermediate probabilities.

(g) Multiply each applicant's probability pursuant to paragraph (f) of this section by the applicable preference ratio from § 1.1622(b)(1).

(h) Divide each applicant's probability pursuant to paragraph (g) of this section by the sum of such probabilities to determine the final selection percentage.

PART 22—PUBLIC MOBILE RADIO SERVICES

Subpart B—Applications and Licenses

Common Carrier Mobile Service Rules

11. In § 22.23, paragraphs (a) and (b) are revised to read as follows:

§ 22.23 Amendment of applications.

(a) *Amendments as of right.* A pending application may be amended as a matter of right within 90 days from the filing date of the application, provided that:

(1) Amendments shall comply with § 22.29, as applicable; and

(2) No amendment to an application will be permitted after a Petition to Deny has been filed unless the amendment responds to all objections raised in all petitions such that any petitions may be dismissed.

(b) The Commission or the presiding officer may grant requests to amend an application designated for hearing or selected under the random selection process only if a written petition demonstrating good cause is submitted and properly served upon the parties of record.

* * * * *

12. In § 22.28, paragraphs (a), (b) introductory text; (b) (1) and (2), and (c) are revised to read as follows:

§ 22.28 Dismissal and return of applications.

(a) Except as provided under § 22.29, any application may be dismissed without prejudice as a matter of right if the applicant requests its dismissal prior to designation for hearing. An applicant's request for the return of his application after it has been accepted for filing will be considered to be a request for dismissal without prejudice. Requests for dismissal shall comply with the provisions of § 22.29 as appropriate.

(b) A request to dismiss an application without prejudice will be considered after designation for hearing only if:

(1) A written petition is submitted to the Commission and is properly served upon all parties of record, and

(2) The petition complies with the provisions of § 22.29 (whenever applicable) and demonstrates good cause.

* * * * *

(c) The Commission will dismiss an application for failure to prosecute or for failure to respond substantially within a specified time period to official correspondence or requests for additional information. Dismissal shall be without prejudice if made prior to designation for hearing or prior to selection under the random selection process, but dismissal may be made with prejudice for unsatisfactory compliance with § 22.29 or after designation for hearing or after selection under the random selection process.

13. In § 22.31, paragraphs (b) introductory text, (c), (e)(1) and (e)(4) are revised to read as follows:

§ 22.31 Mutually exclusive applications.

* * * * *

(b) An application will be entitled to comparative consideration with one or more conflicting applications (and, in specified services in this Rules Part, included in a random selection process) only if:

* * * * *

(c) Whenever three or more applications are mutually exclusive, but not uniformly so, the earliest filed

application establishes the date prescribed in paragraph (b)(2) of this section, regardless of whether or not subsequently filed applications are directly mutually exclusive with the first filed application. (For example, applications A, B and C are filed in that order. A and B are directly mutually exclusive, B and C are directly mutually exclusive. In order to be considered comparatively with B (or, where applicable, included in the random selection process), C must be filed within the "cut-off" period established by A even though C is not directly mutually exclusive with A.)

* * * * *

(e) * * *

(1) The application has been designated for hearing under the random selection process, or for comparative hearing, or for comparative evaluation pursuant to § 22.35, and the Commission or the presiding officer accepts the amendment pursuant to § 22.23(b);

* * * * *

(4) The amendment reflects only a change in ownership or control which results from an agreement under § 22.29 whereby two or more applicants entitled to participate in a random selection process join in one or more of the existing applications and request dismissal of their other application(s) to avoid the random selection process.

* * * * *

14. In § 22.32, paragraphs (b) (1) and (2), (e) introductory text, (e) (1) and (2), (f) and (g) introductory text are revised to read as follows:

§ 22.32 Consideration of applications.

* * * * *

(b) The grant shall be without a formal hearing if, upon consideration of the application, any pleadings or objections filed, or other matters which may be officially noticed, the Commission finds that:

(1) The application is acceptable for filing, and is in accordance with the Commission's rules, regulations, and other requirements;

(2) The application is not subject to a post-random selection hearing or to comparative consideration pursuant to § 22.31 with another application(s), except where the competing applicants have chosen the comparative evaluation procedure of § 22.35 and a grant may be made under that procedure;

* * * * *

(e) The Commission will designate an application for a formal hearing, specifying with particularity the matters and things in issue, if, upon consideration of the aplication, any pleadings or objections filed, or other matters which may be officially noticed, the Commission determines that:

(1) A substantial and material question of fact is presented;

(2) The Commission is unable for any reason to make the findings specified in paragraph (a) of this section and the application is acceptable for filing, complete, and in accordance with the Commission's rules, regulations, and other requirements.

* * * * *

(f) The Commission may grant, deny or take other action with respect to an application designated for a formal hearing pursuant to paragraph (e) or Part I of this chapter.

(g) Whenever the public interest would be served, the Commission may grant one or more mutually exclusive applications expressly conditioned upon final action on the applications, and then either conduct a random selection process (in specified services under this Rules Part), or designate all mutually exclusive applications for a formal evidentiary hearing or (whenever so requested) follow the comparative evaluation procedures of § 22.35, as appropriate, if it appears:

* * * * *

15. In Part 22, § 22.33 is added to read as follows:

§ 22.33 Grants by random selection.

If a properly filed application for an initial license in the Public Land Mobile Service is mutually exclusive with another such application, the applicants shall be included in the random selection process set forth in Part I, § 1.821 *et seq.* No preferences shall be awarded. Renewal applications shall not be included in a random selection process.

16. In § 22.35, paragraph (a) introductory text is revised to read as follows:

§ 22.35 Comparative evaluation of mutually exclusive applications.

(a) In order to expedite action on mutually exclusive applications, in services under this Rules Part where the random selection process does not apply, the applicants may request the Commission to consider their applications without a formal hearing in accordance with the summary procedure outline in paragraph (b) of this section, if:

* * * * *

PART 73—RADIO BROADCAST SERVICES

Subpart H—Rules Applicable in Common to Broadcast Stations

17. Part 73 is amended by adding a new § 73.3521 to read as follows:

§ 73.3521 Mutually exclusive applications for low power television and television translator stations.

When there is a pending application for a new low power television or television translator stations, or for major changes in an existing station, no other application which would be directly mutually exclusive with the pending application may be filed by the same applicant or by any applicant in which any individual in common with the pending application has any interest, direct or indirect, except that interests of less than 1% will not be considered.

18. In § 73.3522, paragraph (a) is revised 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 (2) of this paragraph, any application, other than an application for a low power TV or TV translator station, may be amended as a matter of right prior to the adoption date of an order designating such applications for hearing, 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 or TV translator stations, mutually exclusive broadcast applications may be amended as a matter of right by the date specified (not less than 90 days after publication) in FCC's public notice announcing the acceptance for filing of the last-filed mutually exclusive application. Subsequent applications 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) Subject to the provisions of §§ 74.3525, 73.3572, and 73.3580, and except as provided in (4) of this paragraph, any application for low power TV and TV translators may be amended at any time.

(4) No applicant for low power TV and TV translator station which is mutually exclusive can improve its status with respect to § 1.1622 by amendment of its application subsequent to the release of the initial Public Notice announcing the public lottery that will resolve the applicant's mutual exclusivity pursuant to § 1.1601 *et seq.*, notwithstanding the requirements of § 1.65.

(5) Paragraph (b) and (c) of this section are not applicable to applications for low power TV and TV translator stations.

* * * * *

19. In § 73.3564, paragraph (c) is revised to read as follows:

§ 73.3564 Acceptance of applications.

* * * * *

(c) At regular intervals the FCC will issue a Public Notice listing all applications and major amendments thereto which have been accepted for filing. 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, except in the case of low power TV and TV translator applications, Petitions to Deny. However, no application will be accepted for filing until a statement establishing compliance with the local notice requirements of § 73.3580 has been received by the FCC.

20. In §73.3572, paragraph (c), (d) and (e) are revised and a new (f) is added to read as follows:

§ 73.3572 Processing of TV broadcast, low power TV, and TV translator station applications.

* * * * *

(c) Applications for TV stations, other than low power TV and TV translator stations, will be processed as nearly as possible in the order in which they are filed. Such application 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 petitions to deny the listed applications must be filed.

(d) Except for applications for low power TV and TV translator stations, regardless of the number of applications filed for channels in a city or the number of assignments available in that city, those applications which are mutually exclusive, *i.e.*, which request the same channel, will be designated for hearing. All other applications for channels will, if the applicants are duly qualified, receive grants. For example, if channels 6, 13, 47 and 53 have been assigned to City X and there are pending two applications for Channel 6 and one application for each of the remaining channels, the latter three applications will be considered grants without hearing and the two mutually exclusive applications requesting Channel 6 will be designated for hearing. If there are two pending applications for Channel 6 and two applications for Channel 13, separate hearings will be held.

(e) Where applications, other than applications for low power TV and TV translators stations, are mutually exclusive because the distance between the respective proposed transmitter sites is contrary to the station separation requirements set forth in § 73.610, 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 of applications for low power TV and TV translator stations.

(1) Applications for low power TV and TV translator 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 must be filed.

(2) Subsequently, the FCC will release a Public Notice: (i) Establishing a date, time, and place for a public lottery; (ii) accepting for filing previously unaccepted applications which are mutually exclusive with those applications accepted on the previous Public Notice; (iii) designating the listed mutually exclusive applications for public lottery pursuant to the procedures set forth in § 1.1601 *et seq.*; and (iv) describing each applicant's certified preferences and selection probabilities and assigning to each applicant a number block. (It will be the applicant's responsibility to notify the Commission, within 30 days of the release of the Public Notice, of any omissions of applications or clerical or mathematical errors in preferences or probabilities. The Commission will not entertain appeals involving these matters if timely notification to the Commission has not been made.) If necessary, the FCC will release subsequent (not less than 30 days after the release of the Public Notice initially announcing the lottery) Public Notices correcting any clerical or mathematical errors and including any previously omitted mutually exclusive applications. The public lottery pursuant to the procedures set forth in § 1.1601 *et seq.*, will be held no less than 30 days subsequent to the last released Public Notice, whether initial or corrected, announcing the lottery. Subsequent to the lottery, the FCC will release a Public Notice announcing the selection of a tentative selectee resulting from the lottery and providing an opportunity for the filing of Petitions to Deny pursuant to the requirements of § 73.3584(c). If, upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of a tentative selectee's application, the same will be granted. Those applications which, due to the lottery, are no longer mutually exclusive with other applications will be announced in a Public Notice proposing the grant of those applications and providing an opportunity for the filing of Petitions to Deny pursuant to § 73.3584(c). Groups of mutually exclusive applicants remaining after a lottery will be designated for lottery. Applications which are not grantable due to mutual exclusivity with the permittee selected by lottery will be dismissed.

(3) If, upon examination, the FCC is unable to find that the public interest, convenience and necessity will be served by the granting of a lottery tentative selectee's applications, and it appears that a hearing may be required, the procedure set forth in § 73.3593 will be followed. No further action will be taken with reference to the other applications in the lottery group from which the tentative selectee was selected until the tentative selectee's qualifications to be a permittee are resolved. If the tentative selectee is

ultimately found to be unqualified to be a permittee, the procedure set forth in paragraph (f)(2) of this section will be followed.

(4) The FCC will periodically release a Public Notice proposing for grant those applications which have previously appeared on a Public Notice, but which are not mutually exclusive with any other application, and providing an opportunity for the filing of Petitions to Deny pursuant to § 73.3584.

Note 1.—Notwithstanding paragraph (f)(1) and § 73.3522(a)(3), applications for low power TV and TV translator stations will be processed within the tiered processing framework as set forth in *Notice on Interim Processing*, 45 FR 82004 (published September 17, 1980), *Order Imposing Freeze*, 46 FR 26062 (published May 11, 1981), and *Report and Order in the Matter of Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 47 FR 21468 (published May 18, 1982).

Note 2.—Pursuant to § 73.3584(c), the Commission may announce, by the Public Notice designating the applications for public lottery, that a Notice of Petition to Deny will be required to be filed no later than 30 days after issuance of the Public Notice.

21. Section 73.3584 is revised to read as follows:

§ 73.3584 Petitions to deny.

(a) Except in the case of applications for new low power TV or TV translator stations or for major changes in the existing facilities of such stations, any party in interest may file with the Commission a Petition to Deny any application (whether as originally filed or if amended so as to require a new file number pursuant to § 73.3571(j), 73.3572(b), 73.3573(b), 73.3574(b) or 73.3578) for which local notice pursuant to § 73.3580 is required, provided such petitions are filed prior to the day such applications are granted or designated for hearing; but where the FCC issues a public notice pursuant to the provisions of § 73.3571(c), 73.3572(c) or § 73.3573(d), establishing a "cut-off" date such petitions must be filed by the date specified. In the case of applications for transfers and assignments of construction permits or station licenses, Petitions to Deny must be filed not later than 30 days after issuance of a public notice of the acceptance for filing of the applications. In the case of applications for renewal of license, Petitions to Deny may be filed at any time up to the last day for filing mutually exclusive applications under § 73.3516(e). Requests for extension of time to file Petitions to Deny applications for new broadcast stations or major change in the facilities of existing stations or applications for renewal of license will not be granted unless all parties concerned, including the applicant, consent to such requests, or unless a compelling showing can be made that unusual circumstances make the filing of a timely petition impossible and the granting of an extension warranted.

(b) Except in the case of applications for new low power TV or TV translator stations, or for major changes in the existing facilities of such stations, the applicant may file an opposition to any Petition to Deny, and the petitioner a reply to such opposition in which allegations of fact or denials thereof shall be supported by affidavit of a person or person with personal knowledge thereof. The times for filing such oppositions and replies shall be those provided in § 1.45 except that as to a Petition to Deny an application for renewal of license, an opposition thereto may be filed within 30 days after the Petition to Deny is filed, and the party that filed the Petition to Deny may reply to the opposition within 20 days after opposition is filed, whichever is longer. The failure to file an oppositon or a reply will not necessarily be construed as an admisssion of any fact or argument contained in a pleading.

(c) In the case of applications for new low power TV or TV translator stations, or for major changes in the existing facilities of such stations, any party in interest may file with the Commission a Petition to Deny any application (whether as originally filed or if amended so as to require a new file number pursuant to § 73.3572(b)) for which local notice pursuant to § 73.3580 is required, provided such petitions are filed within 15 days of the FCC Public Notice proposing the applicants for grant (applicants may file oppositions within 15 days after the Petition to Deny is filed); but where the Commission selects a tentative permittee pursuant to § 1.1601 *et seq.*, Petitions to Deny shall be accepted only if directed against the tentative selectee and filed after issuance of and within fifteen days of FCC Public Notice announcing the tentative selectee. The applicant may file an opposition within 15 days after the Petition to Deny is filed. In cases in which the minimum diversity preference provided for in § 1.1623(f)(1) has been applied, an "objection to diversity claim," and oppositions thereto, may be filed against any applicant receiving a diversity preference, within the same time period provided herein for Petitions and oppositions. In all pleadings, allegations of fact or denials thereof shall be support by appropriate certification. However, the Commission may announce, by the Public Notice announcing the acceptance of the last-filed mutually exclusive application, that a notice of Petition to Deny will be required to be filed no later than 30 days after issuance of the Public Notice.

(1) If so announced, a Petition to Deny filed against an applicant will not be accepted if filed by a party which failed to timely file a notice of petition, and make service of the notice of petition pursuant to § 1.47, unless good cause is shown for the failure to file the notice. Good cause includes allegations based on facts that could not previously be discovered with diligence, and fraud or suppression of evidence by the tentative selectee.

(2) The notice of Petition to Deny shall be limited to two pages. The notice shall include specific allegations that concisely state the reasons why the applicant lacks the qualifications to be a licensee or why a grant of the application would be inconsistent with the public interest. The notice shall be supported by certification made by a person or persons having personal knowledge thereof.

(d) Untimely Petitions to Deny, as well as other pleadings in the nature of a Petition to Deny, and any other pleadings or supplements which do not lie as a matter of law or are otherwise procedurally defective, are subject to return by the FCC's staff without consideration.

22. In § 73.3591, paragraph (b) is revised to read as follows:

§ 73.3591 Action on applications.

* * * * *

(b) In making its determinations pursuant to the provisions of paragraph (a) of this section, the FCC will not consider any other application, or any application if amended so as to require a new file number, as being mutually exclusive or in conflict with the application under consideration unless such other application was substantially complete, or, in the case of low power TV and TV translator stations, complete and sufficient, and tendered for filing by:

(1) The close of business on the day preceding the day designated by Public Notice as the day the listed application is to be available and ready for processing; or

(2) The date prescribed in § 73.3516(e) in the case of applications which are mutually exclusive with applications for renewal of license of broadcast stations.

* * * * *

23. In § 73.3597, paragraphs (a)(1) and (a)(2), (b)(1) and (c)(1) are revised to read as follows:

§ 73.3597 Procedures on transfer and assignment applications.

(a) * * *

(1) The permit or license was not authorized after a comparative hearing or, in the case of low power TV and TV translator stations, the permit or license was not authorized after a lottery in which the permittee for licensee benefited from minority or diversity preferences;

(2) The application involves an FM translator station or FM booster station only;

* * * * *

(b)(1) The commencement date of the one-year period set forth in paragraph (a) of this section shall be the date on which the station initiated program tests in accordance with § 73.1620 or § 74.14.

* * * * *

(c)(1) As used in paragraphs (c) and (d) of this section:

(i) "Unbuilt station" refers to an AM, FM, or TV broadcast station or a low power TV or TV translator station for which a construction permit is outstanding, and, regardless of the stage of physical completion, as to which program tests have not commenced or, if required, been authorized.

* * * * *

PART 81—STATIONS ON LAND IN THE MARITIME SERVICES

24. In Part 81, a new § 81.51 is added to read as follows:

§ 81.51 Grants by random selection.

If there are mutually exclusive applications for an initial license under this part, the Commission may grant the applications pursuant to the system of random selection prescribed in § 1.972 of this chapter.

PART 87—AVIATION SERVICES

25. In Part 87, a new § 87.48 is added to read as follows:

§ 87.48 Grants by random selection.

If there are mutually exclusive applications for an initial license under this part, the Commission may grant the application pursuant to the system of random selection prescribed in § 1.972 of this chapter.

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

26. In § 90.143, a new paragraph (b) is added and former paragraph (b) is redesignated as (c), to read as follows:

§ 90.143 Grants of applications.

* * * * *

(b) All applications in pending status will be processed in the order in which the application acceptable for filing was received by the Commission; provided, however, that if there are more applications than can be accommodated on available frequencies, the Commission may grant the applications pursuant to the system of random selection prescribed in § 1.972 of this chapter.

(c) * * *

PART 94—PRIVATE OPERATIONAL-FIXED MICROWAVE SERVICES

27. In § 94.37, a new paragraph (c) is added to read as follows:

§ 94.37 Grant of application without hearing.

* * * * *

(c) All applications in pending status will be processed in the order in which the application acceptable for filing was received by the Commission; provided, however, that if there are more applications than can be accommodated on available frequencies, the Commission may grant the applications pursuant to the system of random selection prescribed in § 1.972 of this chapter.

* * * * *

Appendix D—Modifications to Application for Authority To Construct or Make Changes in a Low Power TV, TV Translator or FM Translator Station (FCC Form 346)

The winner from among mutually exclusive low power television and television translator applicants will be selected by a lottery. In conducting a lottery, the law requires that certain preferences be awarded to encourage diversity in the owership of mass communications media and minority ownership. Thus, new Section V requires certification if applicable by an applicant that it is entitled to and seeks to claim a minority preference: that it and/or its owners have no interest, in the aggregate, exceeding 50 percent in any media of mass communications, or that it and/or its owners have more than three mass communications media facilities; and that it and/or its owners have no interest in the aggregate, exceeding 50 percent in a media of mass communications in the same area to be served by the proposed low power television or television translator station.

Section II, Legal Qualifications, is amended to require "Real Party In Interest" and "Multiple Applications" certifications. The applicant is required to certify that there is no other application pending that would be directly mutually exclusive with the application in which the applicant has an interest of one percent or more or in which any party to the application is an officer, director or has an interest of one percent or more, direct or indirect. The applicant is also required to certify that no agreement, either explicit or implicit, has been entered into for the purposes of transferring or assigning to another party, any station construction permit or license or interest therein that is awarded as a result of a random selection or lottery. Certain questions in Section II relating to other media interests and minority ownership have been eliminated, as they are now incorporated in new Section V, discussed above.

Technical modifications include the following additional requirements: (1) In Section I: That the applicant indicate whether the application is for a LPTV STV (FCC approved technical system), submit a plot comparing the existing and proposed predicted signal contours (protected contour) with applications for minor changes in existing stations; certify compliance with applicable station identification rules. (2) In Engineering Data Section: That applicant tabulate the transmitting antenna pattern (if directional) at every ten degrees and all maxima and minima submit a composite radiation pattern in cases where multiple transmitting antennas are proposed.

Separate Statement of Chairman Mark S. Fowler

Re: Lottery Procedures March 31, 1983.

I applaud the effort of Congress to empower the Commission to employ a lottery to alleviate the Commission's processing and adjudication burdens and the accompanying delay that selecting among many competing applicants for broadcast or other licenses engenders. A lottery method of selection can assist in the inauguration of new telecommunications services that might otherwise be subject to interminable delay. I would have desired, however, that the lottery system authorized by Congress have offered all qualified license applicants an equal opportunity for success. A nondiscriminatory lottery is not only vastly easier to administer than the skewed lottery architected by Congress, but also reflects a paramount aspiration of this Nation: equal justice or opportunity for all persons under the law. I unequivocally oppose relying on the color of a person's skin to determine whether special preferences should be awarded in seeking communications licenses through a lottery system. The tragic history of race relations in the United States naturally elicits enormous sympathy for those who in the past have suffered grievously on account of race. But this sympathy should not blind us to the constitutional questions raised by the minority preference system and to the unhappy policy implications of enshrining racial preferences into law.

The decisions in *University of California Regents* v. *Bakke* [1] and *Fullilove* v. *Klutznick* [2] established standards by which to test the constitutional validity of a lottery that prefers minority applicants. First, findings must have been made that discrimination existed in a particular industry. Second, a remedial program must be narrowly tailored to remedy the effects of that past discrimination without excluding other innocent groups from the opportunity to participate in the relevant field. Third, the program must be subject to continuing

[1] 438 U.S. 265 (1978).

[2] 448 U.S. 448 (1980).

oversight to assure that it will cause the least possible harm to innocent third parties.

Bakke established the proposition that preferences for minorities may be used only where there have been "judicial, legislative, or administrative findings of specific instances of discrimination in the field in issue. [3] "Without such findings . . . it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another," [4] for there could be no showing of a compelling justification for inflicting competitive disadvantages on innocent individuals.

In *Fullilove*, the Court approved a preferential program for public works contracting but only because Congress had made findings on the basis of "abundant evidence . . . that minority businesses have been denied effective participation in public contracting opportunities . . . ." [5] The absence of any similar findings with respect to the broadcast industry is arguably fatal to the Commission's preferential program. It is clear from the *Bakke* decision that evidence of past discrimination in society at large is insufficient to justify the imposition of an affirmative action program. [6]

There have been no Congressional findings of illegal discrimination in the communications field. In the Conference Report accompanying the Communications Amendments Act of 1982, the Conference Committee made findings that minority groups were "significantly underrepresented in the ownership of telecommunications facilities." [7] Congress, however, omitted any findings that attributed this underrepresentation to illegal discrimination by either governmental or private parties. Underrepresentation in an industry or profession, *simpliciter*, cannot justify racial preferences. *See Bakke* at p. 302

Even if there had been findings that illegal discrimination in the communications industry had handicapped some minorities in competing for broadcast licenses, the remedy created by the Congress would still be of questionable legitimacy. Central to the Court's holding in *Fullilove* was the doctrine that the preference accorded to minorities must be equivalent to the extent of the past discrimination. Congress, however, has awarded minorities a 2 to 1 lottery preference without findings that this degree of preference accurately reflects the amount of the handicap that might be attributed to putative past discrimination. The preferences awarded extend to all minority applicants, whether or not the applicant has substantial resources or enjoyed the same or better educational or other opportunities compared to a non-preferred applicant.

An affirmative action remedy must be tailored to correspond to the extent of injury traceable to past illegal discrimination, and must be subject to continuing oversight to ensure that it will do the least possible harm to innocent persons disadvantaged thereby. [8] The statute upheld in *Fullilove*, for example, a goal of devoting 10% of each public works grant to minority businesses, but provided that bids from minorities above ordinary competitive levels need only be entertained to the extent they reflect "costs inflated by the present effects of prior disadvantage and discrimination." [9] With regard to the "continuing oversight requirements," the Communications Amendments Act of 1982 is silent. [10] The program challenged in *Fullilove* was a one-time program, and there was consequently no need for continuing oversight. The lottery preferences, in contrast, can be employed indefinitely, and some type of meaningful oversight would seem to be required to justify a racial classification.

Because the preferential program adopted today impinges on the civil rights of innocent individuals on account of race, I believe it to be constitutionally unsound. I believe that whenever the courts, Congress, or this Commission diverge from a norm of color-blindness, there must be a compelling reason, for, as Justice Stevens has noted, "classifications based on race are potentially so harmful to the entire body politic." [11] No compelling reason animated Congress to etch racial preferences into the lottery system. [12] Too often in our history, policymakers and the courts have caused adverse social repercussions by making ill-advised decisions in matters of race. [13] Indeed, as Justice Stevens further observed, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." [14]

The victims of the minority preference system are innocent non-preferred persons who are denied equal opportunity to compete for a Commission license. It seems to me that history has demonstrated that when race, class or caste are officially sanctioned as reasons for denying equal opportunity, then a principle has been established that threatens to deny equal opportuntiy for everyone. As Justice Jackson so eloquently put it in *Korematsu* v. *U.S.*, [15] the principle lies around like a loaded weapon read to be used by persons who claim an urgent need.

To diverge from a norm of color blindness is to foster racial antagonism [16] and to denigrate individual liberty. While some commentors have suggested that to get beyond racism, the country must employ racist means, [17] I believe that viewpoint is utterly irreconciliable with American ideals of equal civil rights. Four score and seven years ago, Justice Harlan urged a constitutional norm of color-blindness that history had applauded: "In respect to civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved." [18] Events at home and abroad since Justice Harlan delivered his memorable words substantiate their ageless wisdom.

I wish to make it clear that these views should not be interpreted as a weakening of my commitment to increasing the participation of minorities in broadcasting through nondiscriminatory means. [19]

I also disagree with another aspect of the lottery order: namely, the Commission's determination to bar newspapers from eligibility for a diversity preference. The statutory provision relating to lotteries requires that certain preferences be accorded when a lottery is used to grant licenses for any medium of mass communication. One of the preferences to be awarded is a diversity preference, meant to encourage divergent sources of programming and information. The preference applies to applicants who control less than four other media of mass communications. The statute provides that the "term 'media of mass communication' includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, *the licensed facilities of which* may be substantially devoted toward providing programming . . ." [20] Because newspapers are not licensed, it is clear that the Congress did not intend that they be deemed a medium of mass communications. In addition, the other media listed differ in type from newspapers in that they utilize the electromagnetic spectrum.

My fellow commissioners rely on language in the Conference Report [21] to support their view that newspapers are to be included within the definition of mass media. The fact that the Conference Report mentions newspapers when the statute is silent with respect to them argues in favor of a contrary conclusion, for it makes clear that consideration went into the question of whether newspapers should be included within the definition of mass media, and that Congress did not vote affirmatively in favor of inclusion. The use of a Conference Report to supercede the meaning of an unambiguous statute is inappropriate, [22] for it is a

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[3] *Bakke, supra*, at p. 307.

[4] *Ibid.* at p. 309.

[5] *Fullilove, supra*, at p. 477.

[6] *Ibid.* at p. 307.

[7] H. Rep. No. 97-765, 97th Cong. 2nd Sess. (1982) ("Conference Report") at p. 45.

[8] *Bakke, supra*, at pp. 308-309.

[9] *Fullilove, supra*, at p. 481.

[10] A statement in the Conference Report directs the Commission to furnish annual reports on the effect of § 309(i)(3) (Conference Report at p. 45). The minority preferences, however, do not terminate even if underrepresentation by minorities in broadcasting is overcome.

[11] *Fullilove, supra*, at p. 534 (Stevens, J. dissent).

[12] Congress seemingly assumed that diversity of broadcast programming would be advanced by increasing broadcast ownership by minorities. There is not a scintilla of evidence based on experience or otherwise to support this assumption.

[13] *See Dred Scott* v. *Sandford*, 60 U.S. (19 How) 393 (1857); the *Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

[14] *Fullilove, supra*, at p. 534 n. 4 (Stevens, J. dissent).

[15] 323 U.S. 214, 246 (1944) (Jackson, J. dissent).

[16] *Anderson* v. *Martin*, 375 U.S. 399 (1964).

[17] *Bakke, supra*, at p. 407 (Blackmun, J. dissent).

[18] *Plessy* v. *Ferguson*, 163 U.S. 537, 554 (Harlan, J. dissent) (1896).

[19] I also believe it is my duty to administer faithfully the lottery statute enacted by Congress despite my doubts as to its constitutionality.

[20] 47 U.S.C § 309(i)(3)(c)(i) (emphasis supplied).

[21] Conference Report at p. 41.

[22] *Caminetti* v. *U.S.*, 242 U.S. 470, 490 (1917).

fundamental canon in matters of statutory construction that "legislative purpose is expressed by the ordinary meaning of the words used." [23]

As a matter of policy, I also believe it to be unsound to prevent newspapers from obtaining a diversity preference in obtaining an LPTV license. Newspapers can be an invaluable source of equity capital and management talent, as was demonstrated in the early history of radio and television stations, where newspapers played a substantial role in underwriting local television stations. It is also in the national interest to allow newspapers to diversify their financial investments. Congress acknowledged the importance of preserving newspapers as viable means of communication in the Newspaper Preservation Act [24] and to prejudice their ability to communicate through the medium of LPTV is antithetical to the motives that spurred the passage of that Act.

The argument advanced in support of the Commission's position—that diversity in mass media will be furthered by the Commission's yolking newspapers within the ambit of mass media—is twice flawed. First, it means that the diversity demerit would be imposed on a newspaper in San Francisco if it applied for an LPTV station in Omaha. Such a combination would clearly not impair diversity, because San Francisco newspapers do not penetrate the Omaha market, and an Omaha LPTV station would not compete in the San Francisco market. Secondly, the diversity of views championed by the First Amendment and public interest considerations has both a quantitative and qualitative aspect. A reasonable number of varying views are required to stimulate edifying political or other discourse. But such discourse will be impoverished without concern for the quality of viewpoints expressed. As Alexander Meiklejohn observed,[25] it is more important that everything worth saying shall be said than that everyone shall speak. To allow newspapers to own LPTV stations would increase the quality and richness of views received by the audience and thereby further diversity concerns. A rigid insistence on maximizing the gross number of different viewpoints at the expense of all other First Amendment values is contrary to the public interest.

March 31, 1983.

Concurring Statement of Commissioner Anne P. Jones

In Re: Second Report and Order in General Docket No. 81-768: Use of Lotteries to Select Certain Initial Radio Licensees

Since the rules and procedures established by this Report and Order are intended to speed authorization of service and may have that effect, I concur. I do so, however, with substantial reservations of which I will mention only a few.

First, it seems to me these rules and procedures could and should be simpler, shorter, and better designed for their intended purpose. For example, I believe Commissioner Rivera is correct that the preference scheme adopted out of deference to the Conference Report may not in all circumstances result in the "significant preferences" for under-represented persons and groups mandated by the statute. If experience demonstrates that a different scheme is needed to achieve the statutory purpose, I hope the Commission will adopt it on the premise that the statute and not the Conference Report is the law of the land.

Second, I believe the flood of applications being received in the cellular mobile radio service is demonstrating that the Commission may have erred in excluding that service from this proceeding. If we are to avoid a licensing debacle in cellular comparable to that which already exists in low power television, we should promptly move toward use of the lottery mechanism to choose from among competing qualified cellular applicants.

Third, I am distressed that the Commission did not give serious consideration in this proceeding to the possibility of granting "significant preferences" to women. On this point, I note that the evidence cited by Commissioner Dawson clearly indicates that women are "applicants . . . the grant to which of [a mass media] license or permit would increase the diversification of ownership of the media of mass communications." Hence they should be granted a preference and may well also qualify for the "additional significant preference" which under the statute "shall be granted to any applicant controlled by a member or members of a minority group."

With these reservations and some others, I concur in issuance of this Report and Order in the hope that it will be only the first step in establishment of a fair, efficient, and simple mechanism for speeding authorization of needed telecommunications service by choosing by random from among competing qualified applicants for radio licenses. I look forward to the next step.

Re: Second Report and Order in General Docket 81-768

Concurring Statement of Commissioner Mimi Weyforth Dawson

To the extent preferences have been enacted into law and to the extent those preferences appear to be based on under-representation in broadcast ownership, I believe that a preference for female ownership should also be given in cases involving lotteries.

First, it seems clear that the preferences awarded by the lottery statute are based on traditional underrepresentation in broadcast ownership. As the legislative history of the lottery statute says, preferences are awarded because the

Conferees find that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well.

Conference Report at 43.

In addition, it seems obvious that women are seriously underrepresented in the ownership of broadcast stations. A May 1982 study prepared for the Commission by ELRA Group, Inc. estimates that only 2.8 per cent of television stations, 8.6 per cent of AM stations and 9 per cent of FM stations are owned [1] by women. And 50 per cent of the female owners of AM stations, 43 per cent for FM stations and 27 per cent for TV stations are the wives of other owners. Since women comprise more than 51 per cent of the population, it is clear that they are significantly underrepresented in the ownership of broadcast stations, and, in fact, the legislative history of the lottery statute notes that women are "significantly underrepresented in the ownership of telecommunications facilities." *Conference Report* at 44-45.[2]

I understand that the statute and its legislative history are not entirely clear on the inclusion of women in the preference scheme. For example, the statute itself states that the minorities for whom preferences are designed "include" certain enumerated groups. *See Conference Report* at 10. Thus, the language does not appear to preclude additions to the enumerated groups.[3] Moreover, the legislative history states that underrepresented groups such as women would, of course, be eligible for both media ownership and minority ownership preferences if they meet the eligibility guidelines. The Conferees expect that such groups will also substantially benefit from this lottery preference scheme, and, consequently, the American public will benefit by having access to a wider diversity of information sources.

Conference Report at 45. To me, this suggests that the Commission could include a preference for female ownership if it chose to to do.

However, because of the apparent confusion in the statute and its legislative history, I welcome the notice seeking comment on the Commission's authority to extend the minority preference to include

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[23] *Richards* v. *U.S.*, 369 U.S. 1, 9 (1962).

The Representatives and Senators who voted on the lottery statute were entitled to rely on the text of the statute and not the Conference Report in determining how to vote. Similarly, when the President deliberated as to whether to sign the bill, he could assume that the unambiguous statutory language controlled.

[24] 15 U.S.C. 1801.

[25] Meiklejohn: Political Freedom, 26 (1948), quoted in *CBS* v. *Democratic Nat'l. Committee* 412 U.S. 94, 122 (1973).

[1] The study uses majority ownership (i.e., 50 per cent or more) as the bench mark for "ownership."

[2] In apparent recognition of this the Commission has begun to include in comparative cases some preference, if not a well-defined one, for female ownership. *E.g.*, Waters Broadcasting Corp., ——— F.C.C. 2d ———, 52 Rad. Reg. 2d (P&F) 1063, 1069 (1982) ("substantial enhancement for minority and female ownership").

[3] For example, the United States Court of Appeals for the Eighth Circuit has construed similar language in a bankruptcy statute. There, the court found that the statute at issue used the word "includes" when setting out the types of organizations that come within the definition rather than the word "means." When a statute is phrased in this manner, the fact that the statute does not specifically mention a particular entity (in this case labor unions) does not imply that the entity falls outside of the definition.

Highway & City Freight Drivers v. *Gordon Transports, Inc.*, 567 F.2d 1285, 1289 (8th Cir. 1978) (footnote omitted).

women as well as the letter to Congress noting this confusion. I will look forward to the early issuance of these documents as well as the documents in the notice proceeding.

Statement of Commissioner Henry M. Rivera Dissenting in Part

Re: Use of Lotteries to Select Certain Initial Licensees

I dissent from the majority's decision to grant a diversity preference to those who own a full power television station (and no more than three media outlets) in all cases except when the LPTV station applied for is encompassed by or encompasses the Grade A contour of the full service station.[1] That approach defies Congress' intent to foreclose applicants who own a medium of mass communications in the same market as the facility being applied for from obtaining a diversity preference. Congress' wishes on this point are strong and quite specific:

The Conferees strongly believe that the avoidance of local ownership concentration should continue to be a factor of major significance in promoting diversity in the licensing process. Where an applicant for a license or permit has controlling interest (over 50 percent) in any other medium of mass communications which would be co-located with the licensed facility sought, it would not promote diversity to give such an applicant a preferred status relative to other applicants.[2]

Congress precluded local media owners from obtaining a diversity preference to promote the spirit of our existing duopoly, one-to-a-market and other crossownership rules; while not limiting a media owner's right to apply for, or obtain, a low power television license in its community of license, it is quite clear that Congress did intent to prevent such applicants from being preferred in any lottery.

The majority quite simply ignored this congressional purpose by adopting a Grade A encompassment standard for full power television stations. Under this standard, the owner of an urban full power television station seeking an LPTV station in its suburban service area will now be eligible for a diversity preference (so long as that owner does not own more than three media outlets). And, under the congressionally imposed multiplier scheme, such an applicant's chances of winning can be further increased if the forty percent collective minimum diversity advantage has not been achieved. The net effect of the Grade A encompassment standard adopted will be to undermine, not promote, the goal of local diversification, directly contrary to congressional intent. The majority should have used the Grade B contour duopoly standard now embodied in the rules [3] to govern the preference eligibility of television station owners applying for nearby LPTV stations.

Apart from this issue, I would also note two problems I hope the Congress will remedy during its first annual review of this legislation.

I am extremely troubled by the fact that the preference scheme we have adopted, while faithful to the narrow directives of the legislative history of Section 309(i) as amended, will not in practical effect accord with the statutory mandate to award a "significant preference" to applications that are minority-owned or controlled. The procedures we have fashioned here give new meaning to the word "significant" as far as prefereces for minority ownership are concerned. Unlike the diversity preference, the statistical advantage given for minority ownership is a relative one. Thus, the larger the pool of applicants in a given lottery, the smaller the preference to minority eligibles. Indeed, because of the high number of applications that will be involved in most LPTV lotteries, *de minimus* "preferences" will be the rule rather than the exception as far as minority ownership is concerned. This situation not only flies in the face of the *Report and Order* authorizing LPTV,[4] which set advancement of minority ownership as a primary goal, but the plain language of Section 309(i)(3)(A) as well. Congressional review of this condition is, therefore, imperative.

I also hope that Congress sees fit to alter its standard governing limited partnerships, which is at variance with FCC treatment of limited partnerships in the tax certificate context.[5] Both the tax certificate policy and the lottery legislation are designed to promote minority ownership of telecommunications facilities; I can think of no reason standards applicable to limited partnerships should differ between the two programs.

[FR Doc. 83-15395 Filed 6-10-83; 8:45 am]
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[1] *See Second Report and order* para. 77 n. 34.

[2] H.R. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982).

[3] See 47 CFR 73.636(a)(1).

[4] *See Report and Order Authorizing Low Power Television Service*, 47 Fed. Reg. 21468 (released May 18, 1982).

[5] *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, FCC 82-523 (released December 13, 1982).

federal register

Monday
June 13, 1983

Part III

General Services Administration

Changes to Federal Travel Regulations and Addendum to the Report to Congress on the Cost of Operation of Privately Owned Vehicles

GENERAL SERVICES ADMINISTRATION

[GSA Bulletin FPMR A-40, Supp. 5]

Federal Travel Regulations

AGENCY: Office of Federal Supply and Services, General Services Administration (GSA).

ACTION: Changes to Federal Travel Regulations.

SUMMARY: GSA has issued GSA Bulletin FPMR A-40, Supplement 5, transmitting changed pages to amend the Federal Travel Regulations (FTR), FPMR 101-7, to implement changes to certain travel allowance provisions for Federal employees performing official travel such as those requiring the use of Amtrak rail service, the use of Government-furnished transportation, etc.

EFFECTIVE DATES: The revised provisions of this supplement are effective as follows:

a. *Chapter 1. Travel Allowances.* The revised provisions of chapter 1 are effective for travel performed on or after June 19, 1983.

b. *Chapter 2. Relocation Allowances.* The revised provisions of chapter 2 are effective for employees whose effective date of transfer (date the employee reports for duty at the new official station) is on or after October 1, 1982. These revisions reflect the change in the household goods temporary storage entitlement period from 60 to 90 days which was initially implemented in page changes transmitted by GSA Bulletin FPMR A-40, Supplement 4, effective October 1, 1982. Changes to paragraphs 2-7.4 and 2-8.6c were inadvertently omitted from Supplement 4.

FOR FURTHER INFORMATION CONTACT: Ms. Doris Jones, Travel Regulations Branch (703) 557-1253.

SUPPLEMENTARY INFORMATION: 1. The General Services Administration has determined that this rule is not a major rule for the purposes of Executive Order 12291 of February 17, 1981, because it is not likely to result in an annual effect on the economy of $100 million or more; a major increase in costs to consumers or others; or significant adverse effects. The General Services Administration has based all administrative decisions underlying this rule on adequate information concerning the need for, and consequences of, this rule; has determined that the potential benefits to society from this rule outweigh the potential costs and has maximized the net benefits; and has chosen the alternative approach involving the least net cost to society.

2. A notice to Federal agencies will be published in GSA Bulletin FPMR A-40, Supplement 5, to emphasize potential employee liabilities for disregard of the provisions of the "Fly America Act" (49 U.S.C. 1517 as amended by Pub. L. 96-192). The notice is stated essentially as follows: The Fly America Act requires that Government-financed commercial foreign air transportation be performed by U.S. flag air carriers (certificated), where their services are reasonably available. Under guidelines issued by the Comptroller General of the United States and reflected in the FTR, if a U.S. flag air carrier is considered unavailable, a foreign air carrier may be used only in certain circumstances. However, if a foreign air carrier is used, the Federal traveler or agency is required to furnish a statement justifying the necessity therefor. Otherwise, expenditures for use of commercial foreign air transportation will be disallowed in the absence of a justification statement and will be the responsibility of the traveler. The traveler has a duty to comply with the Fly America Act, and the fact that he/she was unaware of the requirements of the Act does not relieve the traveler of liability for the cost of unjustified use of a foreign air carrier (Comp. Gen. B-192522, April 22, 1981). Agencies are urged to ensure that all employees are aware of the provisions of the Fly America Act.

Explanation of Changes

1. Paragraph 1-1.3c(4) is revised to include "obtained for short-term use" in the definition of a "Government-contract rental automobile" based on new policy for rental of motor vehicles by Government employees on official travel. Paragraph 1-1.3c(5) is amended to include "Government-contract rental" transportation as an exception to the definition of "Special conveyance."

2. Paragraph 1-2.2b-1 is added to specify travelers' cost liability when the authorized method of transportation is not used.

3. Paragraph 1-2.2c(1)(b) is revised to provided guidance in selecting the most advantageous method of common carrier transportation. Paragraphs 1-2.2c(1) (c), (d), and (e) are deleted; certain provisions which formerly appeared in these paragraphs are incorporated in paragraph 1-2.2c(1)(b). Provisions that mandated the use of Amtrak Metroliner coach service in the Northeast corridor have been deleted.

4. Paragraph 1-2.2c(2) is revised by adding subparagraphs (a), (b), and (c), and paragraphs 1-2.2c (3) and (4) are revised to reflect new policy that a Government-contract rental automobile shall be used as a first resource for short-term rental of automobiles by Federal employees on official TDY travel.

5. Paragraph 1-2.6c regarding the availability of a Government-furnished vehicle is revised for minor editorial changes.

6. Paragraph 1-3.3b(3) is revised and paragraph 1-3.3b(4) is deleted to conform with changes explained in paragraph 3, above. The provisions pertaining to cash payment for purchase of Amtrak tickets are incorporated in paragraph 1-10.2b(2).

7. Paragraphs 1-3.4b(1)(b) and 1-3.4c are revised to cite the current regulation governing the use of contract air carriers. Paragraph 1-3.4c is also revised to cross reference new paragraph 1-2.2b-1.

8. Paragraphs 1-3.5a and 1-3.5b are revised, and new paragraph 1-3.5a is added to expand provisions governing agencies and travelers' responsibilities in connection with refunds owed the U.S. Government for unused passenger transportation services.

9. Paragraphs 1-5.1b and 1-5.2 are revised for clarity.

10. Paragraph 1-7.3f is added to reference regulations issued by the Office of Personnel Management (OPM) (part 410.603 of Title 5, Code of Federal Travel Regulations) governing subsistence payments for extended training assignments. Agencies are advised that the OPM regulations shall be used when authorizing subsistence payments for training assignments over 30 calendar days.

11. Paragraph 1-8.1c(2) is revised to add new guidelines regarding the authorization or approval of travel under the actual subsistence expense basis of reimbursement due to unusual circumstances of the travel assignment.

12. Paragraphs 1-8.1c(3) (e) and (f) are added to provide agencies with additional criteria under which they have discretionary authority to authorize or approve actual expense reimbursement due to unusual circumstances of the travel assignment.

13. Paragraph 1-8.1f is added to conform with the change explained in paragraph 10 above.

14. Paragraph 1-10.2b(2) is revised as explained in paragraph 6 above.

15. Paragraph 1-11.3c is revised to increase the dollar amount above which receipts are required to support reimbursement claims for cash expenditures.

16. Paragraphs 2-7.4 and 2-8.6c are revised to reflect the new household goods temporary storage period which was inadvertently omitted when

changes to the relocation allowances were implemented in Supplement 4.

Accordingly, the Federal Travel Regulations, are amended as follows:

Chapter 1—Travel Allowances

Part 1—Applicability and General Rules

1. Paragraphs 1–1.3c(4) and 1–1.3c(5) are revised to read as follows:

1–1.3. General rules.

* * * * *

c. *Definitions*

(4) *Government-contract rental automobile.* A "Government-contract rental automobile" is an automobile obtained for short-term use from a commercial firm under the provisions of an appropriate General Services Administration (GSA) Federal Supply Schedule contract.

(5) *Special conveyance.* "Special conveyance" is any method of transportation other than common carrier, Government-furnished, Government-contract rental, or privately owned, which requires specific authorization or approval for the use thereof. Such transportation generally includes conveyances obtained through commercial rental means for less than 30 calendar days.

* * * * *

Part 2—Transportation Allowable

2. Paragraph 1–2.2 is amended by adding new paragraph 1–2.2b–1 to read as follows:

1–2.2. Methods of transportation.

b–1. *Traveler's cost liability when selected method is not used.* The traveler shall use the method of transportation administratively authorized or approved by the agency as most advantageous to the Government. (See 1–2.2b.) Any additional cost resulting from use of a method of transportation other than that specifically authorized, approved, or required by regulation, e.g., contract air service (see 1–2.2c(1)(i), below), shall be the traveler's responsibility.

* * * * *

3. Paragraph 1–2.2 is further amended by deleting paragraphs 1–2.2c(1) (c), (d), and (e), and by revising paragraph 1–2.2c(1)(b) to read as follows:

1–2.2. Methods of transportation.

* * * * *

(b) *Selecting the most advantageous method of common carrier transportation.*

(i) *Contract air service.* The use of discount fares offered by contract air carriers between certain cities (city-pairs) is considered advantageous to the Government and is mandatory for authorized air travel between those city-pairs. See 1–3.4b(1)(b) and FPMR Temporary Regulation A–22, Use of contract airline service between selected city-pairs, for policy and specific guidelines and exceptions.

(ii) *Noncontract air service.* The use of noncontract air service may be authorized only when justified under the conditions provided in FPMR Temporary Regulation A–22. Advance authorization and the justification for the use of noncontract air service shall be shown on the travel order, or other form of travel authorization, before the actual travel begins unless extenuating circumstances or emergency situations make advance authorization impossible. In this event, the employee shall obtain written approval from the appropriate agency official at the earliest possible time after completing the travel. The approval and justification therefor shall be stated on or attached to the travel voucher.

(iii) *Rail or bus service.* Rail or bus service may be used when determined by the agency to be advantageous to the Government, cost, energy, and other factors considered and when compatible with the requirements of the official travel. The use of discount fares offered to the Government by rail or bus carriers between selected cities (city-pairs) is considered advantageous. Whenever these discount fares are offered and the accompanying service will fulfill mission requirements, they should be used to the maximum extent possible. (See 1–3.3b and 1–3.4b for authorized service and accommodations and reduced fares.)

* * * * *

4. Paragraph 1–2.2c(2) is revised to read as follows:

* * * * *

(2) *Government-contract rental or Government-furnished Automobiles.* When it is determined that an automobile is required for official travel, a Government-contract or a Government-furnished automobile shall be used as follows:

(a) A Government-contract rental automobile is the first resource for short-term rental of an automobile by an employee on temporary duty (TDY) travel. This applies to employees who travel to their destination by common carrier, such as airplane, train, or bus and would customarily rent a Government-furnished vehicle for local transportation in the destination area. For travel under this subparagraph (a) an employee may also use a Government-furnished automobile if a Government-contract rental automobile is unavailable or if use of a Government-furnished automobile is practicable. Government-furnished automobiles will continue to be available for use in isolated areas where commercial rental contractors are not available.

(b) A Government-furnished automobile is the first resource when an automobile is required for official travel performed locally or within commuting distance of an employee's designated post of duty. If a Government-furnished automobile is unavailable, a Government-contract rental automobile may be used.

(c) If cost considerations are used in determining whether a Government-contract rental or a Government-furnished automobile should be authorized under this policy, the overall cost shall include any administrative costs as well as any costs associated with picking up and returning the automobile.

* * * * *

5. Paragraph 1–2.2c(3) is revised to read as follows:

* * * * *

(3) *Privately owned conveyance.* The use of a privately owned conveyance shall be authorized only when its use is advantageous to the Government, except as provided in 1–2.2d. A determination that the use of a privately owned conveyance would be advantageous to the Government shall be preceded by a determiantion that transportation by common carrier, a Government-contract rental automobile, or Government-furnished transportation is not available or would not be advantageous to the Government. To the maximum extent possible, these determinations and the authorization to use a privately owned conveyance shall be made before the performance of travel.

6. Paragraph 1–2.2c(4) is revised to read as follows:

* * * * *

(4) *Special conveyance.* Commercially rented vehicles, other than those under contract, and other special conveyances shall be used only when it is determined that use of other methods of transportation discussed in 1–2.2c would not be more advantageous to the Government. In the selection of commercially rented vehicles, first consideration shall be given to Government-contract rental vehicles available under an appropriate GSA Federal Supply Schedule contract.

* * * * *

7. Paragraph 1–2.6c is revised to read as follows:

1–2.6. Use of Government-furnished vehicles.

* * * * *

c. *Vehicle not available.* If a Government-furnished vehicle is not available when required as a first resource, a Government-contract rental or other commercially rented vehicle may be used provided such use is consistent with the provisions of 1–2.2c and the regulations and authorizations of the employee's agency.

* * * * *

Part 3—Use of Commercial Transportation

8. Paragraph 1–3.3b(3) is revised to read as follows:

1–3.3. Travel policy and class of service authorized.

* * * * *

b. * * *

(3) *Extra-fare trains.* Travel by extra-fare trains may be authorized or approved whenever their use is administratively determined to be more advantageous to the Government or is required for reasons of security. The use of National Railroad Passenger Corporation (Amtrak) Metroliner coach service is considered to be advantageous to the Government. (Note.—Metroliner Club service is considered to be first-class service.)

* * * * *

9. Paragraph 1–3.4b(1)(b) is revised to read as follows:

1–3.4. Special fares.

* * * * *

b. * * *

(1) * * *

(b) All agencies, except DOD, shall follow the policies, procedures, and requirements established in FPMR Temporary Regulation A–22, for the use of contract air carriers for official air travel between certain cities (city-pairs). DOD shall follow procedures established in the Military Traffic Management Regulation, AR 55–355/NAVSUP 4600.70/MCO P4600.14A/DLAR 4500.3.

10. Paragraph 1–3.4c is revised to read as follows:

* * * * *

c. *Unequal fares available.* Except as provided in FPMR Temporary Regulation A–22, when common carriers furnish the same method of travel at different fares between the same points for the same type of accommodations, the lowest cost service shall be used unless use of a higher cost service is administratively determined to be more advantageous to the Government. (See 1–2.2b–1.)

* * * * *

11. Paragraph 1–3.5 is revised to read as follows:

* * * * *

1–3.5. Unused, downgraded, or oversold transportation services.

a. *Unused tickets or reservations, or downgraded services.* When a traveler knows that reservations for transportation and/or accommodations will not be used he/she must cancel the reservations within the time limits specified by the carrier. Likewise, where the transportation furnished is different or of a lesser value than that authorized on the ticket or where a journey is terminated short of the destination specified on the transportation request, the traveler shall report the facts to the administrative office in the manner prescribed by the agency concerned. All adjustments in connection with official passenger transportation must be promptly processed to prevent losses to the Government. All unused tickets (including portions thereof), coupons, exchange orders, refund slips, notices of fare adjustments, etc., and the factual information relating to the unused passenger transportation must be attached to or entered on the travel voucher or other payment document. Failure of travelers to follow these procedures may subject them to liability for any resulting losses.

b. *Oversold reserved accommodations.* Tariff provisions of certain scheduled air carriers require the payment of liquidated damages in certain situations if the carrier fails to provide confirmed reserved space. When payment of liquidated damages results from travel on official business, these penalty payments are due the Government and not the traveler. Travelers shall be instructed to turn in to the agency any of these payments received from carriers.

c. *Agency responsibilities.* Each agency shall prescribe procedures for travelers to follow when submitting documentation and justification relating to unused or downgraded passenger transportation services. Included in these procedures will be instructions for submitting to the agency, payments received from carriers for denied confirmed reserved space.

Note.—Travelers are advised that the General Services Administration (GSA) publication, "How to prepare and process U.S. Government Transportation Requests," provides specific instructions for agencies and travelers regarding unused transportation services. Federal agencies may obtain copies of this publication by requisition from the GSA using national stock number 7610–01–038–1389, or from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 using stock number 022–005–00011–1.

* * * * *

Part 5—Baggage

12. Paragraph 1–5.1b is revised to read as follows:

1–5.1 Definitions.

* * * * *

(b) *Excess baggage.* Baggage in excess of the weight, size, or number of pieces that is carried free by transportation companies shall be classed as excess baggage.

* * * * *

13. Paragraph 1–5.2 is revised to read as follows:

* * * * *

1–5.2 Authorization for excess baggage.

Where less than first class accommodations are used, transportation of baggage up to the number of pieces or weight carried free on first-class service shall be allowed at Government expense; in all other instances, excess baggage charges shall be allowed only when authorized or approved.

* * * * *

Part 7—Per Diem Instead of Actual Subsistance

14. Paragraph 1–7.3 is amended by adding subparagraph 1–7.3f to read as follows:

1–7.3 Agency responsibility for authorizing individual rates.

* * * * *

f. *Subsistence payments for extended training assignments.*

(1) The Government Employees Training Act (5 U.S.C. 4101–4118), authorizes agencies to pay all or a part of the subsistence expenses of an employee assigned to training at a temporary duty station. Implementing regulations prescribed by the Office of Personnel Management (OPM) in part 410–603 of Title 5, Code of Federal Regulations (5 CFR 410–603) provide specific guidelines for the payment of subsistence expenses for employees on extended training assignments (more than 30 calendar days) at temporary duty stations.

(2) Generally, the OPM guidelines require a reduced subsistence payment of not more than 55 percent of the per diem rate (see 1–7), or if the training facility is in a high rate geographical area (HRGA), not more than 55 percent of the prescribed maximum daily rate

for the HRGA. Subsistence payments above these levels must be justified. However, these subsistence payments shall not in any case exceed the ceilings imposed by 5 U.S.C. 5702. Agencies shall refer to the OPM guidelines in 5 CFR 410–603 (published in 46 FR 40671–40672) for specific criteria to determine the appropriate subsistence payments. Guidelines are also published by OPM in the Federal Personnel Manual, Chapter 410, Section 6–3.

* * * * *

Part 8—Reimbursement of Actual Subsistence Expenses

15. Paragraph 1–8.1c is amended by revising paragraph 1–8.1c(2) to read as follows:

c. *Unusual circumstances of the travel assignment.*

* * * * *

(2) Notwithstanding the criteria outlined above, agencies shall not use the actual expense under unusual circumstances authority as blanket authority to authorize or approve automatic actual expense reimbursement for all travel to an area where the reimbursement rate is inadequate. This authority shall be used only on an individual case basis with approrpriate consideration in each case of the actual facts existing at the time the travel is directed and performed. If it becomes necessary to exercise this authority repetitively or on a continuing basis in a particular area, the agency should submit a request to GSA as prescribed in 1–8.7 for HRGA designation or for rate adjustment if the area is already an HRGA.

* * * * *

16. Paragraph 1–8.1c is further amended by adding paragraphs 1–8.1c(3) (e) and (f) are added to read as follows:

c. *Unusual circumstances of the travel assignment.*

* * * * *

(e) The traveler performs temporary duty in an area that has not been designated as an HRGA and due to the lack of availability of lower priced accommodations in the immediate area of the temporary duty site, the maximum per diem rate is inadequate; or the traveler performs temporary duty to an HRGA and the maximum actual expense reimbursement rate is substantially below that required to cover costs necessarily incurred. See 1–8.1c(2) regarding repeated use of this authority.

(f) The travel is to an area that is not designated as an HRGA but where the choice of accommodations is limited or the costs of accommodations are inflated because of conventions, sporting events, natural disasters, peak recreation season, a special occurrence at the temporary duty site (where the rates would not be inflated during normal times), or other causes which would reduce the number of available lodgings below the normal level.

* * * * *

17. Paragraph 1–8.1 is amended by adding new paragraph 1–8.1f to read as follows:

1–8.1 Authorization or approval.

* * * * *

f. *Subsistance payments for extended training assignments.* The regulations governing the payment of subsistance expenses for extended training assignments are issued by the Office of Personnel Management (OPM) in part 410.603 of Title 5, Code of Federal Regulations. (See 1–7.3f.) These OPM regulations shall be used as required and referenced in 1–7.3f when an employee is authorized training subsistence payments for a training assignment at a temporary duty station over 30 calendar days. The training assignment may be located in a high rate geographical area, or any other location where actual subsistence expense reimbursement may be authorized in 1–8 of these regulations.

* * * * *

Part 10—Source of Funds

18. Paragraph 1–10.2b(2) is revised to read as follows:

1–10.2 Procurement of common carrier transportation.

* * * * *

b. * * *

(2) Agencies may, by appropriate regulations, require a traveler to use cash to procure passenger transportation services within the United States (50 States and the District of Columbia) when the cost is over $10 but does not exceed $100, excluding Federal transportation tax, for each trip as authorized on the official travel authorization (see note below). Cash payment of official transportation expenses, without regard to the $100 limitation, is authorized when employees secure group or excursion fares available through travel agents as provided in 1–3.4b(2); travel agents may not otherwise be used under these cash payment provisions.

Note.—The National Railroad Passenger Corporation (Amtrak) will not accept a GTR for travel under $100. Amtrak will accept personal checks or major credit cards provided proper identification is shown when purchasing a ticket.

* * * * *

Part 11—Claims for Reimbursement

19. Paragraph 1–11.3c is amended to read as follows:

1–11.3. Travel vouchers and attachments.

* * * * *

c. *Receipts required.* Receipts are required for allowable cash expenditures in amounts in excess of $25, plus any applicable tax. When receipts are not available, the expenditures shall be explained on the voucher. Receipts are required for the following expenditures regardless of amount:

* * * * *

Chapter 2—Relocation Allowances

Part 7—Transportation of Mobile Homes

20. Paragraph 2–7.4 is revised to read as follows:

* * * * *

2–7.4. *Limitation on allowances.* The total amount allowable under 2–7.3 shall not exceed the maximum amount which would be allowable for transportation and 90 days' temporary storage of the employee's household goods if, instead of moving a mobile home, the maximum quantity of household goods allowable for the employee involved under 2–8.2 had been moved.

* * * * *

Part 8—Transportation and Temporary Storage of Household Goods and Professional Books, Papers, and Equipment

21. Paragraph 2–8.6c is revised to read as follows:

* * * * *

c. *Procedures.* In requesting an advance of funds, the employee shall submit a written statement designating: (1) The points of origin and destination, (2) the estimated weight of household goods to be shipped, and (3) any anticipated temporary storage not to exceed 90 days at Government expense. The estimate of weight required in support of an advance of funds shall consist of a statement of the estimated weight signed by the carrier selected to handle the shipment if it is available. If it is not available, evidence of actual weight or a reasonable estimate thereof acceptable to the agency shall be furnished.

* * * * *

(Executive Order No. 11609, July 22, 1971; 5 U.S.C. 5707)

Dated: May 20, 1983.

Ray Kline,

Acting Administrator of General Services.

[FR Doc. 83-15610 Filed 6-10-83; 8:45 am]

BILLING CODE 6820-AM-M

[GSA Bulletin FPMR A-40, Supp. 6]

Federal Travel Regulations; Changes to Federal Travel Regulations

AGENCY: Office of Federal Supply and Services, General Services Administration (GSA).

ACTION: Federal travel regulations; Changes to Federal travel regulations.

SUMMARY: GSA has issued GSA Bulletin FPMR A-40, Supplement 6, transmitting changed pages to amend the Federal Travel Regulations (FTR), FPMR 101-7, to (a) increase the mileage rates for use of privately owned vehicles and (b) revise the listing of high rate geographical areas. Certain of these FTR changes reflect the results of GSA's recent report to the Congress on the investigations of the cost of travel and the operation of privately owned vehicles. GSA is required by statute to conduct these cost investigations and report the results to the Congress annually. The report to the Congress was published as a notice document in the **Federal Register** on June 6, 1983 (48 FR 25272).

EFFECTIVE DATE: June 19, 1983.

FOR FURTHER INFORMATION CONTACT: Mrs. Doris Jones, Travel Regulations Branch (703-557-1253).

SUPPLEMENTARY INFORMATION: 1. The General Services Administration has determined that this rule is not a major rule for the purposes of Executive Order 12291 of February 17, 1981, because it is not likely to result in an annual effect on the economy of $100 million or more; a major increase in costs to consumers or others; or significant adverse effects. The General Services Administration has based all administrative decisions underlying this rule on adequate information concerning the need for, and consequences of, this rule; has determined that the potential benefits to society from this rule outweigh the potential costs and has maximized the net benefits; and has chosen the alternative approach involving the least net cost to society.

2. Accordingly, the Federal Travel Regulations are amended as follows:

a. Paragraphs 1-4.2a(2) and 1-4.2c (1) and (2) are revised to reflect an increase in the mileage rate from 20.0 cents to 20.5 cents per mile for the use of a privately owned automobile when its use is advantageous to the Government.

b. Paragraphs 1-4.4 b and d are revised to increase the mileage allowance to 18 cents per mile and paragraph 1-4.4c is revised to increase the mileage to 9.5 cents per mile for use of a privately owned automobile when it is used instead of a Government furnished automobile.

c. The HRGA listing in appendix 1-A to the FTR is revised to designate additional HRGA's and to increase the maximum actual subsistence expense rate and/or redefine the boundaries of certain existing HRGA's.

Note.—The GSA has published the revised HRGA listing as a notice document in this **Federal Register.**

(Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c))

Dated: May 9, 1983.

Ray Kline,

Acting Administrator of General Services.

[FR Doc. 83-15609 Filed 6-10-83; 8:45 am]

BILLING CODE 6820-AM-M

Addendum to the Report To Congress on the Cost of Subsistence and the Cost of Operation of Privately Owned Vehicles

1. The changes to the mileage rates for use of privately owned automobiles and travel allowances reflected in the report published on June 6, 1983, are effective for travel performed on or after June 19, 1983. The Federal Travel Regulations (FTR), FPMR 101-7, transmitted by GSA Bulletin FPMR A-40, Supplement 1, dated September 28, 1981, are amended as follows:

a. Paragraphs 1-4.2a(2) and 1-4.2c (1) and (2) are revised to reflect an increase in the mileage rate from 20.0 cents per mile to 20.5 cents per mile for the use of a privately owned automobile when its use is advantageous to the Government.

b. Paragraphs 1-4.4 b and d are revised to increase the mileage allowance to 18 cents per mile and paragraph 1-4.4c is revised to increase the mileage allowance to 9.5 cents per mile for use of a privately owned automobile when it is used instead of a Government furnished automobile.

c. The HRGA listing in appendix 1-A to the FTR is revised to designate additional HRGA's and to increase the maximum actual subsistence expense rate and/or redefine the boundaries of certain existing HRGA's. The following listing will be published in appendix 1-A.

DESIGNATED HIGH RATE GEOGRAPHICAL AREAS (HRGA'S)

High rate geographical areas	Prescribed maximum daily rates (in dollars)
Alabama	
**Birmingham (all locations within Jefferson County)	67
**Huntsville (all locations within Madison County)	63
**Mobile (all locations within Mobile County)	62
Arizona	
*Page (all locations within Coconino County)	60
**Phoenix/Scottsdale (all locations within Maricopa County)	70
Tucson (all locations within Pima County, including Davis Monthan AFB)	71
*Yuma (all locations within Yuma County)	55
Arkansas	
**Little Rock (all locations within Pulaski County)	64
California	
**Fresno (all locations within Fresno County)	72
Los Angeles (all locations within the counties of Los Angeles, Kern, Orange, and Ventura, including Edwards AFB and Naval Weapons Center and Ordnance Test Station, China Lake)	75
Monterey (all locations within Monterey County)	75
**Palm Springs (all locations within Riverside County)	
(Effective 7/1 thru 11/30)	73
(Effective 12/1 thru 6/30)	75
Sacramento (all locations within Sacramento County)	75
San Diego (all locations within San Diego County)	75
San Francisco/Oakland (all locations within the counties of San Francisco, Alameda, Contra Costa, and Marin)	75
San Jose (all locations within Santa Clara County)	75
**San Luis Obispo (all locations within San Luis Obispo County)	
(Effective 5/1 thru 10/31)	70
(Effective 11/1 thru 4/30)	64
**Santa Mateo (all locations within San Mateo County)	69
San Barbara (all locations within Santa Barbara County)	75
**Santa Cruz (all locations within Santa Cruz County)	
(Effective 5/1 thur 10/31)	75
(Effective 11/1 thru 4/30)	68
**Vallejo (all locations within Solano County)	68
Colorado	
Aspen (all locations within Pitkin County)	75
**Boulder (all locations within Boulder County)	71
*Colorado Springs (all locations within El Paso County)	61
Denver (all locations within the counties of Denver, Adams, Arapahoe, and Jefferson)	75
**Durango (all locations within La Plata County)	65
**Glenwood Springs (all locations within Garfield County)	69
**Grand Junction (all locations within Mesa County)	63
Vail (all locations within Eagle County)	75
Connecticut	
**Bridgeport (all locations within Fairfield County)	75
Hartford (all locations within the counties of Hartford and Middlesex)	75
New Haven (all locations within New Haven County)	75
**New London/Groton (all locations within New London County)	
(Effective 4/1 thru 10/31)	72
(Effective 11/1 thru 3/31)	61
Delaware	
Wilmington (all locations within New Castle County)	75
District of Columbia	
Washington, DC (all locations within the corporate limits of the District of Columbia; the cities of Alexandria, Falls Church, and Fairfax, and the counties of Arlington, Loudoun, and Fairfax in Virginia; and the counties of Montgomery and Prince Georges in Maryland) (see also Maryland and Virginia)	75
Florida	
***Cocoa Beach (all locations within Brevard County)	65