

§ 1003.100 Basis and purpose.

(a) *Basis.* This part implements sections 1128(c), 1128A, 1842(j), and 1842(k) of the Social Security Act (42 U.S.C. 1320a-7(c), 1320a-7a, 1395u(j), and 1395u(k)).

3. Section 1003.102 is amended by revising paragraph (b) introductory text and adding paragraph (b)(3) to read as follows:

§ 1003.102 Basis for civil money penalties and assessments.

(b) The OIG may impose a penalty against any person whom it determines in accordance with this part:

(3) Is a physician who has knowingly and willfully—

(i) Billed for services as an assistant at surgery during a routine cataract operation, or

(ii) Included in his or her bill the services of an assistant at surgery during a routine cataract operation; and has not received prior approval from the appropriate Peer Review Organization or Medicare carrier for such services based on the existence of a complicating medical condition.

(Catalog of Federal Domestic Assistance Programs, No. 13.744, Medicare—Supplementary Medical Insurance Program)

Dated: February 18, 1987.

R.P. Kusserow,
Inspector General, Department of Health and Human Services.

Approved: March 5, 1987.

Otis R. Bowen,
Secretary.

[FR Doc. 87-7746 Filed 4-9-87; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION**47 CFR Part 1**

[FCC 87-59]

Procedural Rules; Implementation of Amendments to Equal Access to Justice Act Amendments

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The FCC has adopted rule amendments to implement changes to the Equal Access to Justice Act (EAJA). The EAJA provides for the award of attorney's fees to qualified parties who

prevail over the Government in certain administrative proceedings. The EAJA requires each government agency to establish uniform procedures for implementing the Act.

The amended rules provide instruction to eligible parties who seek to recover attorney's fees from the Commission, consistent with recent amendments to the EAJA enacted by Congress.

EFFECTIVE DATE: February 5, 1987.

FOR FURTHER INFORMATION CONTACT: James B. Mullins, Office of General Counsel, Federal Communications Commission, Washington, DC 20554, (202) 254-6530.

SUPPLEMENTARY INFORMATION:**Federal Communications Commission Order**

Adopted: February 5, 1987.

Released: March 3, 1987.

By the Commission.

In the matter of Equal Access to Justice Act Rules, FCC 87-59.

1. The rules set forth herein are designed to implement amendments to the Equal Access to Justice Act (EAJA), Pub. L. 99-80, 99 Stat. 183, 5 U.S.C. 504. The EAJA provides for the award of attorney's fees and other expenses to qualified parties who prevail over the Federal Government in certain administrative and court proceedings. The EAJA requires that each agency establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. The EAJA, which had expired on September 30, 1984, was reauthorized by Pub. L. 99-80, which made several substantial changes to the EAJA. These rules reflect those changes and largely follow the model rules recommended by the Administrative Conference of the United States. See 51 FR 16659 (May 6, 1986).

2. In reauthorizing the EAJA, Congress made the following amendments relevant to the Commission:

1. The Act is applicable to any case commenced after October 1, 1984.

2. Net worth ceilings for eligible parties have been raised to \$2,000,000 for individuals and \$7,000,000 for partnerships, corporations and certain other entities.

3. Units of local government that fall under the ceilings of net worth and number of employees have been made eligible for fee awards.

4. The position of the agency that must be substantially justified has been specifically defined to include the underlying action or failure to act on which the relevant proceeding is based as well as the agency's position in litigation.

5. Whether or not the position of the agency was substantially justified is to be determined based on the administrative record of the proceeding as a whole adduced during the course of the adjudication for which fees and other expenses are sought.

3. We find that prior notice and comment procedures are unnecessary to implement the rule amendments because the revisions involve general rules of agency organization, practice or procedure. See 5 U.S.C. 553(b)(3)(A). Pursuant to § 1.427(b) of the Commission's Rules the rule amendments are effective February 5, 1987. See 47 CFR 1.427(b).

4. The rules are issued pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, 47 U.S.C. 154(i), 303(r); and the Equal Access to Justice Act, Pub. L. 99-80, 5 U.S.C. 504(c)(1).

5. In accordance with section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), we hereby certify that these rules will not have a significant economic impact upon a substantial number of small entities. The EAJA itself may have an impact since it applies to individuals and small business entities. It represents a congressional determination that small entities should not bear the burden of litigation where the Government's position is not substantially justified. The rules simply implement the EAJA, carrying out congressional intention, and do not, by themselves, impose significant economic burdens or benefits. This certification shall be provided to the Chief Counsel for Advocacy of the Small Business Administration.

The officials responsible for this action are the following Commissioners: Mark S. Fowler, Chairman, James H. Quello, Mimi Weyforth Dawson, Dennis R. Patrick, Patricia Diaz Dennis.

List of Subjects in 47 CFR Part 1

Administrative practice and procedure.

Federal Communications Commission.
William J. Tricarico,
Secretary.

PART 1—PRACTICE AND PROCEDURE

Chapter I of Title 47 of the Code of Federal Regulations is hereby amended as follows:

1. The authority citation for Part 1 continues to read:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement. 5 U.S.C. 552, unless otherwise noted.

2. Section 1.1502 is revised to read as follows:

§ 1.1502 When the EAJA applies.

The EAJA applies to any adversary adjudication pending or commenced before the Commission on or after August 5, 1985. It also applies to any adversary adjudication commenced on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in Subpart B of these rules, had been filed with the Commission within 30 days after August 5, 1985.

3. Section 1.1503 is amended by revising paragraph (a) to read as follows:

§ 1.1503 Proceedings covered.

(a) The EAJA applies to adversary adjudications conducted by the Commission. These are adjudications under 5 U.S.C. 554 in which the position of the Commission or any other agency of the United States, or any component of an agency, is presented by an attorney or other representative who enters an appearance and participates in the proceeding. Any proceeding in which this Agency may fix a lawful present or future rate is not covered by the EAJA. Proceedings to grant or renew licenses are also excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise "adversary adjudications."

4. Section 1.1504 is amended by revising paragraphs (b)(1), (b)(2), (b)(5), (c) and (f) to read as follows:

§ 1.1504 Eligibility of applicants.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than \$2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees;

(5) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than \$7 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to

determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the Administrative Law Judge determines that such treatment would be unjust and contrary to the purposes of the EAJA in light of the actual relationship between the affiliated entities. In addition, the Administrative Law Judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

5. Section 1.1505 is amended by revising paragraph (a) to read as follows:

§ 1.1505 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection either with a proceeding, or with a significant and discrete substantive portion of a proceeding, unless the Administrative Law Judge determines that the position of the Commission over which the applicant has prevailed was substantially justified. The position of the Commission includes, in addition to the position taken by the Commission in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant is on the appropriate Bureau (see § 1.21 of this chapter) whose representative shall be called "Bureau counsel" in this subpart. To avoid an award a Bureau must demonstrate that its position was substantially justified in law and fact or that special circumstances make an award unjust.

6. Section 1.1511 is amended by revising paragraph (b) to read as follows:

§ 1.1511 Contents of application.

(b) The application shall also include a statement that the applicant's net worth does not exceed \$2 million (if an individual) or \$7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in

section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

7. Section 1.1526 is amended by revising paragraph (a) to read as follows:

§ 1.1526 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or Bureau counsel, or on his or her own initiative, the Administrative Law Judge may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification, an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

[FR Doc. 87-7886 Filed 4-9-87; 8:45 am]

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47 CFR Part 73

Oversight of Radio and TV Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Order amends broadcast regulations in 47 CFR Part 73.

Amendments are made to correct inaccurate rule texts, contemporize certain requirements and to execute editorial revisions as needed for purposes of clarity and ease of understanding.

EFFECTIVE DATE: April 10, 1987.

ADDRESS: Federal Communications Commission, Washington, DC. 20554.

FOR FURTHER INFORMATION CONTACT:
Steve Crane, Mass Media Bureau, (202) 632-5414.

SUPPLEMENTARY INFORMATION: In this Order, modifications are made to update, delete, clarify or correct regulations in Title 47, Code of Federal Regulations. Adopted March 19, 1987 and released March 27, 1987.

Federal Communications Commission

Order

Adopted: March 19, 1987.

Released: March 27, 1987.

By the Chief, Mass Media Bureau.

In the matter of oversight of the radio and TV broadcast rules.

1. In this Order, the Commission focuses its attention on the oversight of its radio and TV broadcast rules. Modifications are made herein to update, delete, clarify or correct broadcast regulations as described in the following amendment summaries:

(a) In BC Docket 82-187 the Commission adopted a series of amendments to the technical rules to reflect changes in international agreements. (See *Report and Order*, 49 FR 32357, August 14, 1984).

One of the modifications was the removal of paragraph (d) in § 73.28, Assignment of stations to channels.

There remains a cross reference to this eliminated paragraph in the Note following paragraph (b) in § 73.24, Broadcast facilities, showing required.

The Note is amended herein to correct this inaccurate reference. (See amendment 2.)

(b) The following corrections are made in § 73.182, Engineering standards of allocation:

(i) The opening sentences of paragraph (d) is missing part of the rule's text pertaining to primary, secondary and intermittent service areas; it is restored here.

(ii) A cross reference in paragraph (d) to § 73.11 is corrected to read § 73.14;

(iii) Two cross references to paragraph (v), as stated in paragraph (m), are corrected to cross reference paragraph (s); and

(iv) The costs reference to paragraph (w), found in footnote 2 to the Table in paragraph (s), is revised to read paragraph (t). (See amendment 3.)

(c) A typographical error exists in subparagraph (d)(1) of § 73.313, Prediction of coverage. It is corrected so the affected sentence correctly states "At least one (emphasis added) radial must include . . ." (See amendment 4.)

(d) The Metric Conversion Act of 1975 directed conversion of measurement units in the Federal rules and

regulations to the international system of units—the metric system. The Commission has carried out this mandate in a series of proceedings. One of these was the Order adopted May 17, 1985 (See *Order, Radio and TV Broadcasting: Metrication of Rules*, 50 FR 23697, June 5, 1985).

In that Order, an amendment was made in § 73.611, Reference points and distance computations, that revised the text of paragraph (d) by directing the rule user to ". . . see paragraph (c) of § 73.208" for pertinent distance calculations.

Unintentionally, the rule was drafted in such a way that the amended paragraph (d) was retained as the sole text of the rule, and the balance, paragraphs (a), (b) and (c), was removed. This mistake is corrected here by reinstating paragraphs (a), (b) and (c) and designating the current text as paragraph (d), as was originally conceived. (See amendment 5.)

(e) Note 9 of Figure 6 in § 73.699, TV engineering charts, uses the archaic terms "me" (megacycles) and "cycles per second". Corrections are made here to contemporize the terms to MHz (megahertz) and Hz (Hertz). (See amendment 6.)

(f) The specifications for the maximum amount of time the FCC allows to construct broadcast and auxiliary stations is stated in § 73.3598. The types of stations are divided into two groups, TV stations in paragraph (a) and other broadcast, auxiliary and ITF stations in paragraph (b). There are distinct headings for each type station, which should be printed in italics but are not. A change to italics is made by this Order. (See amendment 7.)

(g) Amendments are made to the listing of certain FCC policies as follows:

(i) Public notice was given in the *Federal Register* on July 18, 1986 providing additional clarification of the procedures adopted in BC Docket 80-90 (Modification of FM broadcast station rules to increase the availability of commercial FM broadcast assignments, 48 FR 29486, June 27, 1983). The *Federal Register* citation for this Public Notice is added as paragraph (d) to § 73.4107, which is the policy listing pertaining to this subject.

(ii) A new policy listing is added herein pertaining to transmitter site map submissions required by FCC Forms 301 and 340. The citation is the Memorandum Opinion and Order and Public Notice adopted on October 24, 1986 and will be designated § 73.4108, FM transmitter site map submissions.

(iii) Section 73.4140, Minority ownership, will have an additional

citation added to the three currently stated therein. It is the Report and Order in Docket 82-797 adopted December 21, 1984. Also, the citation to "General Docket 82-297" in paragraph (c) of this policy listing is revised to correctly read General Docket 82-797. (See amendments 8, 9, and 10).

2. No substantive changes are made herein which impose additional burdens or remove provisions relied upon by licensees or the public. We conclude, for the reasons set forth above, that these revisions will serve the public interest.

3. These amendments are implemented by authority delegated by the Commission to the Chief, Mass Media Bureau. Inasmuch as these amendments impose no additional burdens and raise no issue upon which comments would serve any useful purpose, prior notice of rulemaking, effective date provisions and public procedure thereon are inapplicable pursuant to the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B).

4. Since a general notice of proposed rulemaking is not required, the Regulatory Flexibility Act does not apply.

5. Accordingly, *It Is Ordered*, That pursuant to sections 4(i), 303(r) and 5(c)(1) of the Communications Act of 1934, as amended, and § 0.61 and 0.283 of the Commission's Rules, Parts 73 of the FCC Rules and Regulations *Is Amended* as set forth, effective on the date of publication in the *Federal Register*.

6. For further information on this Order, contact Steve Crane, (202) 632-5414, Mass Media Bureau.

Federal Communications Commission.

James C. McKinney,

Chief, Mass Media Bureau.

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 73.24 is amended by revising the Note following paragraph (b) to read as follows:

§ 73.24 Broadcast facilities; showing required.

* * * * *

(b) * * *

Note.—With respect to new Class II-A stations or to stations for which applications were accepted for filing before July 13, 1964, the provisions of Note 1 of § 73.37 of this chapter shall apply. Special provisions concerning interference from Class II-A to stations of other classes authorized after October 30, 1961, are contained in § 73.22(d) of this chapter and Note 3 to § 73.21 of this chapter. The level of interference shall be

computed pursuant to §§ 73.182 and 73.186 of this chapter.

3. Section 73.182 is amended by revising footnote 2 to the Table in paragraph (s) and by revising paragraphs (d) and (m) to read as follows:

§ 73.182 Engineering standards of allocation.

(d) The several classes of AM broadcast stations have in general three service areas, i.e., primary, secondary and intermittent service areas. (See § 73.14 for the definitions of primary, secondary and intermittent service areas.) Class I stations render service to all three areas. Class II stations render service to a primary area but the secondary and intermittent service areas may be materially limited or destroyed due to interference from other stations, depending on the station assignments involved. Class III and IV stations usually have only primary service areas, as interference from other stations generally prevents any secondary service and may limit the intermittent service area. However, complete intermittent service may be obtained in many cases depending on the station assignments involved.

(m) Objectionable interference from a station on the same channel shall be considered to exist to a station when, at the field strength contour specified in paragraph (s) of this section with respect to the class to which the station belongs, the field strength of an interfering station (or the root-sum-square value of the field strengths of two or more interfering stations) operating on the same channel, exceeds for ten (10) percent or more of the time the value of the permissible interfering signal set forth opposite such class in paragraph (s) or this section.

(s) * * *
"2 For adjacent channel, see paragraph (t) of the section."

4. Section 73.313 is amended by revising paragraph (d)(1) to read as follows:

§ 73.313 Prediction of coverage.

(d) * * *
(1) Profile graphs must be drawn for eight radials beginning at the antenna site and extending 16 kilometers therefrom. The radials should be drawn for each 45° of azimuth starting with True North. At least one radial must include the principal community to be

served even though it may be more than 16 kilometers from the antenna site. However, in the event none of the evenly spaced radials include the principal community to be served, and one or more such radials are drawn in addition, these radials must not be used in computing the antenna height above average terrain.

5. Section 73.611 is revised to read as follows:

§ 73.611 Reference points and distance computations.

(a) In considering petitions to amend the Table of Allotments (§ 73.606(b)), the following reference points shall be used by the Commission in determining assignment separations between communities:

(1) Where transmitter sites for the pertinent channels have been authorized in communities involved in a petition to amend the Table of Allotments, separations between such communities shall be determined by the distance between the coordinates of the authorized transmitter sites in the respective communities as set forth in the Commission's authorizations therefor.

(2) Where an authorized transmitter site is available for use as a reference point in one community but not in the other for the pertinent channels, separations shall be determined by the distance between the coordinates of the transmitter site as set forth in the FCC's authorization therefor and the coordinates of the other community as set forth in the publication of the United States Department of the Interior entitled, *Index to The National Atlas of the United States of America*. If this publication does not contain the coordinates for said other community, the coordinates of the main post office thereof shall be used.

(3) Where no authorized transmitter sites are available for use as reference points in both communities for the pertinent channels, the distance between the two communities listed in the above publication shall be used. If said publication does not contain such distance, the separation between the two communities shall be determined by the distance between the coordinates thereof as set forth in the publication. Where such coordinates are not contained in the publication, the coordinates of the main post offices of said communities shall be used.

(4) Where the distance between the reference point in a community to which a channel is proposed to be assigned and the reference point in another community or communities does not

meet the minimum separation requirements of § 73.610, the channel may be assigned to such community upon a showing that a transmitter site is available that would meet the minimum separation requirements of § 73.610 and the minimum field strength requirements of § 73.685. In such cases, where a station is not authorized in the community or communities to which measurements from the proposed channel assignment must be made pursuant to § 73.610 a showing should also be made that the distance between suitable transmitter sites in such other community or communities and the proposed transmitter site for the new channel meet the Commission's minimum spacing and coverage requirements.

(b) Station separations in licensing proceedings shall be determined by the distance between the coordinates of the proposed transmitter site in one community and

(1) The coordinates of an authorized transmitter site for the pertinent channel in the other community; or, where such transmitter site is not available for use as a reference point,

(2) The coordinates of the other community as set forth in the *Index to The National Atlas of the United States of America*; or if not contained therein,

(3) The coordinates of the main post office of such other community.

(4) In addition, where there are pending applications in other communities which, if granted, would have to be considered in determining station separations, the coordinates of the transmitter sites proposed in such applications must be used to determine whether the requirements with respect to minimum separations between the proposed stations in the respective cities have been met.

(c) In measuring assignment and station separations involving cities listed in the Table in combination, where there is no authorized transmitter site in any of the combination cities on the channel involved, separation measurements shall be made from the reference point which will result in the lowest separation.

(d) To calculate the distance between two reference points see paragraph (c), § 73.208. However, distances shall be rounded to the nearest tenth of a kilometer.

6. Section 73.699 is amended by revising Note 9 of Figure 6 to read as follows:

§ 73.699 TV engineering charts.

Figure 6 * * *

Notes

* * * * *

(9) The burst frequency shall be 3.579545 MHz. The tolerance on the frequency shall be ± 10 Hz with a maximum rate of change of frequency not to exceed 1/10 Hz per second.

* * * * *

7. Section 73.3598 is amended by italicizing the introductory headings of paragraphs (a) and (b). As revised, the headings to paragraphs (a) and (b) read as follows:

§ 73.3598 Period of construction.

(a) *TV broadcast stations.* * * *

(b) *Other broadcast, auxiliary and Instructional TV Fixed Stations.* * * *

8. Section 73.4107 is amended by adding new paragraph (d) to read as follows:

§ 73.4107 FM broadcast assignments, increasing availability of.

* * * * *

(d) See Public Notice, 51 FR 26009, July 18, 1986.

9. Section 73.4108 is added to the Listing of FCC policies to read as follows:

§ 73.4108 FM transmitter site map submissions.

See Memorandum Opinion and Order and Public Notice, adopted October 24, 1986. 1 FCC Rcd 381 (1986); 51 FR 45945, December 23, 1986.

10. Section 73.4140 is amended by revising paragraph (c); by correcting the spelling of the term Minority in the section title; and by adding new paragraph (d) to read as follows:

§ 73.4140 Minority ownership; tax certificates and distress sales.

* * * * *

(c) See Policy Statement, General Docket 82-797, FCC 82-523, adopted December 2, 1982. 92 FCC 2d 849; 48 FR 5943, February 9, 1983.

(d) See Report and Order, General Docket 82-797, FCC 84-647, adopted December 21, 1984. 99 FCC 2d 1249; 50 FR 1239, January 10, 1985.

[FR Doc. 87-7888 Filed 4-9-87; 8:45 am]

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