be considered to have been provided in accordance with this section if provided to the patient before administration of the first oral contraceptive and every 30 days thereafter, as long as the therapy continues.

(c) *Contents of patient package insert.* A patient package insert for an oral contraceptive drug product is required to contain the following:

(1) The name of the drug.

(2) A summary including a statement concerning the effectiveness of oral contraceptives in preventing pregnancy, the contraindications to the drug's use, and a statement of the risks and benefits associated with the drug's use.

(3) A statement comparing the effectiveness of oral contraceptives to other methods of contraception.

(4) A boxed warning concerning the increased risks associated with cigarette smoking and oral contraceptive use.

(5) A discussion of the contraindications to use, including information that the patient should provide to the prescriber before taking the drug.

(6) A statement of medical conditions that are not contraindications to use but deserve special consideration in connection with oral contraceptive use and about which the patient should inform the prescriber.

(7) A warning regarding the most serious side effects of oral contraceptives.

(8) A statement of other serious adverse reactions and potential safety hazards that may result from the use of oral contraceptives.

(9) A statement concerning common, but less serious side effects which may help the patient evaluate the benefits and risks from the use of oral contraceptives.

(10) Information on precautions the patients should observe while taking oral contraceptives, including the following:

(i) A statement of risks to the mother and unborn child from the use of oral contraceptives before or during early pregnancy;

(ii) A statement concerning excretion of the drug in human milk and associated risks to the nursing infant;

(iii) A statement about laboratory tests which may be affected by oral contraceptives; and

(iv) A statement that identifies activities and drugs, foods, or other substances the patient should avoid because of their interactions with oral contraceptives.

(11) Information about how to take oral contraceptives properly, including information about what to do if the patient forgets to take the product, information about becoming pregnant after discontinuing use of the drug, a statement that the drug product has been prescribed for the use of the patient and should not be used for other conditions or given to others, and a statement that the patient's pharmacist or practitioner has a more technical leaflet about the drug product that the patient may ask to review.

(12) A statement of the possible benefits associated with oral contraceptive use.

(13) The following information about the drug product and the patient package insert:

(i) The name and place of business of the manufacturer, packer, or distributor, or the name and place of business of the dispenser of the product.

(ii) The date, identified as such, of the most recent revision of the patient package insert placed prominently immediately after the last section of the labeling.

(d) *Other indications.* The patient package insert may identify indications in addition to contraception that are identified in the professional labeling for the drug product.

(e) *Labeling guidance texts.* The Food and Drug Administration issues informal labeling guidance texts under § 10.90(b)(9) of this chapter to provide assistance in meeting the requirements of this section. A request for a copy of the guidance texts should be directed to the Center for Drug Evaluation and Research, Division of Metabolism and Endocrine Drug Products (HFD-510), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

(f) *Requirement to supplement approved application.* Holders of approved applications for oral contraceptive drug products that are subject to the requirements of this section are required to submit supplements under § 314.70(c) of this chapter to provide for the labeling required by this section. Such labeling may be put into use without advance approval by the Food and Drug Administration.

§ 310.501a [Removed]

3. Section 310.501a *Medroxyprogesterone acetate injectable for contraception* is removed.

Dated: May 2, 1989.

Frank E. Young,

Commissioner of Food and Drugs.

[FR Doc. 89-12511 Filed 5-24-89; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

RIN 0596-AA57

Ski Area Permits

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This final rulemaking sets forth special procedures for issuing special use permits for ski areas on National Forest System lands. These amendments implement the authority granted by the National Forest Ski Area Permit Act of October 22, 1986, to authorize nordic and alpine ski areas and facilities with a single permit for up to 40 years. The intended effect is to update the rules governing ski area permits to reflect the longer term now available and to establish orderly procedures for conversion of existing permits to the new, longer term permits.

EFFECTIVE DATE: June 26, 1989.

FOR FURTHER INFORMATION CONTACT: John Shilling, Recreation Management, Forest Service, USDA, P.O. Box 96090, Washington, DC 20090-6090 (202) 382-9426.

SUPPLEMENTARY INFORMATION: On October 18, 1988 (53 FR 40739-40742), the Forest Service published in the **Federal Register** proposed amendments to its Special Uses regulations at 36 CFR Part 251, Subpart B to implement the National Forest Ski Area Permit Act of 1986. The Act provides new authority to authorize ski areas for a term of up to 40 years. Previously, ski area permits were issued under the authority of the Act of March 4, 1915, which limits permits for resorts and other public facilities to a term of 30 years and a land area not to exceed 80 acres. The proposed rule set forth the procedures and criteria that would be applied in evaluating whether existing ski areas permits qualify for conversion to a longer term.

The Forest Service received 9 letters commenting on the proposed rule representing a broad spectrum of interested persons and entities. Respondents included a trade association representing the interest of ski areas currently holding special use permits, 2 recreation associations representing the interests of their members, one wildlife interest group, one university department of recreation resources, two Federal agencies, one individual permit holder, and one local government. All reviewers provided specific comments and suggestions on particular provisions. The major comments with the Department's response are presented by section of the proposed rule. A new term permit for ski areas was developed after publishing the proposed rule. All applicable requirements of the current rule dealing with special uses, comments received on the proposed rule and all requirements of the final rule, are addressed in the permit. The ski industry was consulted during preparation of the permit.

Comments Relating to Specific Provisions of the Proposed Rule

Section 251.51—Definitions

The proposed rule added a definition for "ski area." Three respondents questioned what constitutes a ski area. One reviewer questioned what was meant by "preponderance " This reviewer was concerned over the possibility that a ski area might generate a substantial amount of revenue from food and lodging and therefore not qualify. The common definition of "preponderance" meaning superiority in numbers, or more than one-half, is intended. A review of a representative sample of ski area financial data has shown that revenue from the sale of lift tickets and ski school instructions accounts for 70 to 90 percent of total revenue subject to fee. It is evident from review of this financial data that not enough revenue would accrue from non-ski sources that a bonafide ski area would not be qualified to receive a permit under this authority.

One respondent suggested that revenue from "trail passes" be inserted into the list of revenue sources permissible for consideration. The Department feels this improves the definition and has added this term.

Two reviewers questioned the meaning of "ancillary facilities." One requested clarification, wondering if food and lodging facilities would be approved ancillary uses. The other stated that the word was too vague and that it might include things like condominiums, stores, sewage plants, lodges, and homes for the developer or manager of the facility. While none of the facilities listed by reviewers are specifically barred from national forest lands, under the appropriate authority, a decision to allow or disallow them in conjunction with a ski area is a discretionary decision of the Forest Service based on the specifics of a proposal. Food service is necessary for skiers. Lodging may be permitted if necessary and when private land is not available. A few condominiums have been allowed where private land has not been available, and their use is strictly controlled. If condominiums were to be allowed, their occupancy of National Forest System Lands—because of the ownership structure of condominiums—would not be authorized under the Ski Area Permit Act but under another, more appropriate Act. Ski shops are usually necessary to serve skiers and are allowed. The preferred location for sewage treatment plants is not on National Forest Lands. They are, however, not prohibited. The policy regarding employee housing is, like condominiums, one of giving preference to private land if it is available (without regard to cost). These facilities, with the exception of condominiums, if allowed and owned or under the control of the permittee would be authorized to occupy National Forest lands under a single ski area permit.

The Department does not find that the respondent's concern about appropriateness of facilities conflicts with the definition as drafted. While everyone knows a ski area when they see one, it is important that the term "ski area" be defined objectively. By identifying what a ski area is, the proposed definition would bar the issuance of a term permit under the authority of the National Forest Ski Area Permit Act for what are basically summer season operations but which may install a simple lift or engage in a minor nordic ski operation. Therefore, except for the addition of "trail passes," the definition is adopted as proposed.

Section 251.53. Authorities

This section added the National Forest Ski Area Permit Act of 1986 to the list of authorities under which a special use permit can be issued. The text of the proposed rule read as follows:

(n) Operation of nordic and alpine ski areas and facilities for up to 40 years and encompassing such acreage as determined necessary as authorized by the National Forest Ski Area Permit Act of 1986 (16 U.S.C 497b).

One reviewer recommended that the word "necessary" be struck and that the phrase, "sufficient and appropriate to accommodate the permittee's needs for ski operations," which is a portion of the language contained in the Act, be used instead. The case being made was that the word "necessary" was unduly restrictive, and that the wording in the law indicates a more accommodating posture.

The Department agrees in part. The sentence from the law reads, "A ski area permit— * * * (3) shall encompass such acreage as the Secretary determines sufficient and appropriate to accommodate the permittee's needs for ski operations and appropriate ancillary facilities;* * *." Therefore, we have replaced "necessary" with "sufficient and appropriate." However, because the wording proposed by the respondent could give the appearance that the decision as to what is sufficient and appropriate lies with the permittee, not with the authorized forest officer, the phrase "as determined by the authorized forest officer" has been added.

One respondent questioned the assertion in the proposed rule that the Act does not provide authority to issue permits when the improvements are owned by the United States. In the few cases where improvements are owned by the Government, the authority remains the Granger-Thye Act of 1950, the only authority the Forest Service has to rent or lease facilities. Therefore, resorts including ski areas with United States-owned facilities must continue to be authorized under the Granger-Thye Act.

Section 251.56(b) Duration and renewability

In the proposed rule, the existing text of § 251.56 was designated as paragraph (b)(1). This paragraph addresses requirements applicable to all authorizations. A new paragraph (b)(2) was added to address the duration and renewability of ski area term permits. One reviewer questioned the last sentence of paragraph (b)(1) which specifies that authorizations exceeding 30 years will provide for revision of terms and conditions at specified intervals to reflect changing times and conditions. This is the language in the current rule and was set out in the proposed rule because paragraph (b) had to be reorganized to accommodate special ski area provisions. One reviewer commented that the provision was contrary to the intent of the National Forest Ski Area Permit Act. While the Department does not agree with the reviewer about the intent of the Act, permit modification from time to time is provided for by the terms of the permit. The requirement for periodic revision was originally implemented for leases and rights-of-way issued under other authorities. Therefore, the final rule specifically exempts authorizations issued under the Ski Area Permit Act from revision at specified intervals.

Paragraph (b)(2) of the proposed rule set forth criteria to be considered in deciding the length of tenure appropriate for a specific ski area special use permit. To meet the requirement of the Act, it is necessary that the Secretary establish uniform rules for the Forest Service authorized officer so that there is consistency and even-handed treatment of current and future permit holders in determining tenure. Comments were received from three reviewers regarding the criteria to be used by the authorized officer in determining under what circumstances a permit should be issued for a term of less than 40 years.

One reviewer believed it is unnecessary to establish criteria for determining when a permit of less than 40 years should be issued. In lieu of the criteria in the proposed rule, this reviewer felt that the rule should simply restate the language of the Act that authorizes the Secretary to issue permits up to 40 years. The Department disagrees. In charging the Secretary ordinarily to issue a permit for 40 years unless the Secretary determines there are specific reasons not to, the Congress effectively directed the Secretary to establish criteria for making that determination

Paragraph (b)(2)(i)(C) of the proposed rule stated that in establishing the financial need for a 40-year term permit, a permittee could not argue that the longer term was needed to cover regular, ongoing operation and maintenance costs. The Department felt this provision was necessary to bar what would effectively be mortgaging the underlying National Forest System land by a business that has insufficient cash flow from its operations to pay expenses. One respondent expressed the position that for a new ski area a portion of the capital might be needed for these purposes for at least the first 5 years for operation and this should not bar a permit from a full term of 40 years.

The Department agrees that the situation described could occur but believes that the rule should not be changed. Rather, this situation can best be handled by a provision in the ski area permit which grants a long-term permit but provides 5-year intervals for development and construction. This clause meets the proponent's need for a long-term permit and the Government's need to be able to rescind quickly the privileges of the permit should the permittee fail to perform. The clause reads as follows:

D. *Term.* For new areas or areas without a Master Development Plan.

1. This authorization is for a term of [5-year maximum] years to provide for the holder to prepare a Master Development Plan. Subject to acceptance of the Master Development Plan by the authorized officer, this authorization shall be extended for an additional [5-year maximum] years, for a total of ________ years, to provide the holder sufficient time to construct sufficient facilities approved in the Master Development Plan within the schedule outlined in clause III.B. (Site Development Schedule), so that the area may be used by the public. Further Provided; This authorization shall be extended by its terms for an additional [30-year maximum] years, for a total of [40-year maximum] years, if it is in compliance with the site development schedule in the Master Development Plan and is in operation by the 10-year anniversary date of the issuance of this authorization. Failure of the holder to comply with all or any provisions of this clause shall cause the authorization to terminate under its terms.

The situation this reviewer describes would be satisfactorily accommodated by this clause. The total length of tenure, however, could be constrained to less than 40 years if other criteria listed at § 251.56(b)(2) apply.

In proposed § 251.56(b)(2)(i)(E), one criterion to be considered in deciding the length of term would be that the project envisioned in the Master Development Plan be of such magnitude that long-term financing and operation is clearly warranted. One reviewer expressed the opinion that the word "clearly" added a heightened level of scrutiny that seemed inappropriate and suggested the word be struck. We do not agree. A high level of scrutiny is necessary to meet the responsibility to the public in review and approval of projects which have the potential to occupy public lands for 40 years. It is, therefore, appropriate that there be a clear, evident need for long term financing and operation.

The same reviewer noted that where the proposed Rule referred to a Master Development Plan, the term was not defined. This reviewer requested that the Department explain the role of the Master Development Plan and its expected content. The plan is a document prepared by the proponent. It is a comprehensive and systematic approach to development, encompassing the entire resort complex as presently envisioned into the future, in connection with both private lands and National Forest System lands authorized under the special use permit. The Master Development Plan may consist of multiple documents such as the preliminary conceptual proposal, principal developmental stage, and supplemental revisions—including National Environmental Policy Act evaluation documents. The plan is dynamic in nature and may require revision as the need and changing times dictate. Upon approval, the plan revisions become part of the special use permit by appropriate amendment. Because of the dynamic nature of a Master Development Plan and the varying contents depending on the scope of the proposed operation, it is not possible to define with precision a Master Development Plan. Moreover, it is not necessary for implementation of the Act to include the definition in the rule.

A second reviewer posed a concern that the criteria could encourage development when the owner desires a longer permit. The reviewer argued that, in the quest to obtain a 40-year term, a ski area developer who might otherwise be satisfied with a small day ski area would be encouraged to build large, expensive facilities and to locate them on National Forest System lands. The Act and congressional intent is clear in this regard. A stated purpose of the Act is to provide for the "long-term construction, financing, and operation needs of ski areas on national forest lands." The Congress stated that it expects permits to ordinarily be issued for 40 years. The Department believes that other factors such as site utility; current and projected skier demand; market area; financial markets and tax considerations, will dictate the scope of planned development—not the criteria used by the authorized forest officer to evaluate permit term.

Proposed § 251.56(b)(2)(ii)(C) provided that, as a criterion for evaluating the need for a 40-year term permit, the full 40-year tenure must be consistent with the approved forest land and resource management plan. Section 6(i) of the National Forest Management Act of 1976 (16 U.S.C 1600–1614) requires that permits be consistent with land management plans. Rules implementing Forest Service planning are at 36 CFR Part 219, with minimum management requirements delineated at 36 CFR 219.27. These requirements essentially summarize other legal requirements such as the Historic Preservation Act, the Endangered Species Act, and good management practices. One reviewer asked that we "explain the circumstances that might induce the Service to write a forest plan that would cause a limitation on the issuance of a ski area permit." In response, resource allocations as developed in the forest plans might be constraining. An example could be the inability to meet all or any of these minimum management constraints in 36 CFR 219.27. In most cases, impacts can be acceptably mitigated. However, a competing potential use of the land with a higher public benefit could preclude development of a ski area. An example would be the need to construct a major reservoir which could flood the only potential base area for a ski operation. While the law requires that permits be consistent with plans, this can be achieved by modifying development proposals, by modifying the plans, or both. Forest plans are more likely to identify potential opportunities and local interest in development of a ski area rather than bar their construction.

Proposed § 251.56(g) set forth the requirements by which existing permits may be converted to the longer term permit offered by the new act. The proposal would require the Forest Service to offer a new permit but allows the existing permittee to decide whether or not to convert. Paragraph (g)(3)(ii) would require that any current permittee who consents to conversion must meet the criteria for determining length of term set forth in § 251.56(b)(2). One reviewer recommended this section be eliminated. This reviewer contends the criteria are outside the scope of the Act. The Department does not agree. If a permittee converts to the new permit, the term of that permit must be established. The law does not grant an automatic 40-year term to converted permits. In fact, in the committee reports accompanying the Act, the Congress stated it was not their expectation that every ski area would get a 40-year term permit, or even that the "preponderance" of areas get a 40-year term. Existing ski areas vary immensely in financial or operational need. Guidance is necessary to assist the authorized officer in making the determination for length of tenure in the conversion of existing permitted operations. Because there is no basis for establishing a separate criterion for terms of converted permits, this criterion is adopted without change in the final rule.

Section 251.56(g)(4) of the proposed rule provided that, if a permittee has declined to accept a new permit under the National Forest Ski Area Permit Act but subsequently desires a modification to the existing permit, it would be mandatory to obtain a new permit under the new act. This would mean that it would not be possible to amend a current ski area term permit issued under the Act of 1915. One reviewer recommended replacement wording: "A holder retains the right to decline a new authorization offered pursuant to this paragraph and to continue to operate under the terms of the existing permits until the existing term permit expires at which time the holder must convert to a permit issued under the authority of the National Ski Area Permit Act of 1986."

The Department disagrees with this recommendation because it precludes amendment of the terms of a permit and would prolong the dual ski area permit system. It is clear Congress intended to provide for the eventual elimination of the dual permit system. Congress was also sympathetic to the desire of any permittee who chose to retain existing permits to be able to do so. While an existing holder has the right under the act to accept or reject a new permit, from time to time it may become necessary to agree bilaterally to amend a term permit to provide for changed conditions. If a change occurs that would necessitate amendment of the existing term permit, the Agency should be able to insist that a new permit be issued under the National Forest Ski Area Permit Act of 1986, to hasten the replacement of the dual permit system. However, the Department is sensitive to the possible need of some permittees to retain their permits for business or financial reasons. Therefore, the final rule has been changed by adding "unless the holder provides compelling justification for retaining the existing permit."

The proposed rule would have added a new paragraph (h) to § 251.56 dealing with periodic revision of ski area authorizations. This section would have provided for a ten-year revision of the terms to be specified in the permit to accommodate decisions made in forest resource and land management plan which is to be revised on a 10–15 year cycle. Two reviewers were concerned that the ten-year provision rule may not be sufficient to allow for placing necessary controls on the permit holder for environmental protection. Another respondent cautioned that the requirement was beyond the scope of the Act. This reviewer took the position that the rule would effectively create a ten-year permit with 3 ten-year renewal options. In considering reviewers' comments, the Forest Service has concluded that the intent of this proposed provision can be adequately met by the clauses in the ski area permit which give the authorized officer the authority needed to revise permits for environmental protection, public health, and safety needs. Therefore, paragraph (h) has not been retained in the final rule.

Section 251.17(h)—Rental Fees

The proposed rule added a new provision that would make existing ski area permits subject to any new fee system that might be developed. This provision also expressly asserted the authority of the Forest Service to make adjustments to the current fee system. Four comments were received on rental fees for ski areas. Three of these supported this provision, stressing the importance of the Forest Service obtaining fair market value for the use of the National Forest System lands. These reviewers agreed that provisions should be made to keep the fee system sufficiently flexible so that it will continue to obtain fair market value rental fees and if a new system is developed, that this new system could be applied to all existing permits. The Department is directed by the Independent Offices Appropriation Act of 1952 (31 U.S.C. 9701) and Bureau of the Budget Circular A–25 to receive fair market value for permitted uses. In enacting the National Forest Ski Area Permit Act, the Congress reiterated that fees shall be based on fair market value. The Forest Service uses a fee determination method called the Graduated Rate Fee System which was designed to obtain fair market value for the larger resort developments on the National Forests. The system was designed from empirical data of winter sports sites on the National Forests using records maintained for Federal income tax purposes. The fee is a function of revenue generated and the owner's investment as determined from capitalized assets. The system, as designed, obtains a fair market value for the use of the National Forest lands.

Two respondents objected to paragraph (h) because it would allow the Forest Service to make changes to the fee system or to implement a new fee system. However, the basic premise—that these changes would be made to obtain fair market value was not challenged by these reviewers. One respondent proposed alternative language which combines the language of the proposed rule with the requirement to obtain fair market value. The Department agrees with this, and the reviewers' proposal has been adopted in the final rule. In addition, to implement this provision, the following ski area term permit clause has been drafted:

Holder to pay fair market value for the permitted use. The holder must pay fair market value for the use of National Forest System land.

1. The provisions of the Graduated Rate Fee System (GRFS) identified under this permit may be revised by the Forest Service to reflect changed times and conditions. Changes will become effective when:

a. Mutually agreed; or,

b. Permit is amended for other purposes; or,

c. A new permit is issued including reissue after termination.

2. The Graduated Rate Fee System may be replaced in its entirety by the Chief of the Forest Service if a new generally applicable fee system is imposed affecting all holders of authorizations under Pub. L. 99–522. Replacement shall become effective on the beginning of the holder's business year following establishment.

General Comments

Restriction of access and size of area under permit

Five of the 8 reviewers expressed concern regarding the amount of National Forest System land that would be put under permit for ski areas and possible limitation on public access for other forms of recreation imposed by the permit holder. In response, all National Forest System lands are opened to public entry unless specifically closed. Specific authorization is not required to use National Forest System lands or facilities for camping, picnicking, hiking, fishing, hunting, horse riding, boating, or similar recreational activity, unless specifically closed for good reasons as authorized in 36 CFR Part 261 Subpart B. There was fear expressed that a 40-year leasehold estate would be created. Neither the Act nor the regulation would create a leasehold estate. The authorizing document is not a lease but a term permit, which is defined at § 251.51 as, "a special use authorization to occupy and use National Forest System land, other than rights-of-way under § 251.53(1) of this part, for a specified period which is both revocable and compensable according to its terms." Pursuant to 36 CFR 251.55 which addresses the permittee's "Nature of Interest" the Government retains the right of access and to make other uses of the area. Neither the character and use of the lands nor a permittees interest will change from the current situation as a result of issuing a new ski area permit.

Regarding the size of the area under permit, although ski areas are currently under the authorization of an annual permit, converting them to a term permit which may extend to 40 years will not be done without consideration of the consequences. Forest Supervisors will give serious consideration to the placement of the permit boundary and lands included therein and will continue to be directed by § 251.55(d) which requires that the lands under permit will be limited to that which the authorized officer determines: (1) Will be occupied by the facilities authorized; (2) to be necessary for the construction, operation, maintenance, and full utilization of the authorized facilities or the conduct of authorized activities; and, (3) to be necessary to protect the public health and safety and the environment. Lands not currently meeting these criteria will not be included and lands which in the future fail to meet the criteria may be withdrawn from the permit unilaterally by the authorized officer. Permit clauses to address the size of the area read as follows:

Non-exclusive Use. This permit is not exclusive. The Forest Service reserves the right to use or permit others to use any part of the permitted area for any purpose, provided such use does not materially interfere with the rights and privileges hereby authorized.

Area Access. Except for any restrictions as the holder and the authorized officer may agree to be necessary to protect the installation and operation of authorized structures and developments, the lands and waters covered by this permit shall remain open to the public for all lawful purposes. To facilitate public use of this area, all existing roads or roads as may be constructed by the holder, shall remain open to the public, except for roads as may be closed by joint agreement of the holder and the authorized officer.

Periodic Revision. 1. The terms and conditions of this authorization shall be subject to revision to reflect changing times and conditions so that land use allocation decisions made as a result of revision to the Forest Land and Resource Management Plan may be incorporated.

2. At the sole discretion of the authorized officer this term permit may be amended to remove authorization to use any National Forest System lands not specifically covered in the Master Development Plan and/or needed for use and occupancy under this authorization.

National Environmental Planning Act Compliance

One reviewer submitted comments and recommendations on the Forest Service's policy and procedures for complying with the requirements of National Environmental Policy Act (NEPA) in acting on ski area permits in general. These comments were beyond the scope of this rule. This reviewer also stated that it was unclear how the Forest Service reached the position that the promulgation of these rules will have no significant impact on the environment. In response, the Department wants to emphasize that the NEPA process is not in anyway pre-empted by these rules. The focus of the National Forest Ski Area Permit Act was to eliminate the dual permit system by removing the 80-acre limitation and to provide for improved financial security of ski area permittees by increasing the maximum term from 30 to 40 years. Congress was dealing with the instruments of authorization and not with land allocation decisions nor questions of environmental concern. The proposed rule was, therefore, limited to those procedures necessary to implement the Act. For this reason, the proposed rule itself was not found to have a significant effect on the quality of the human environment. Neither the Act nor these rules relieve the Forest Service in its management of all aspects of the National Forest System lands of any duty under any other Act. In fact, compliance with the National Environmental Policy Act and the National Forest and Rangelands Renewable Resources Planning Act as amended by the National Forest Management Act were specifically cited in the National Forest Ski Area Permit Act of 1986. At every decision point for each stage of the development of a ski area, it is necessary to undertake environmental analysis and to document these analyses in either an Environmental Assessment or an Environmental Impact Statement.

The same reviewer took the opportunity to call attention to the necessity for ski areas to comply with section 319 requirements of the Clean Water Act of 1987, which establishes a new non-point source management program for all States and requires that Federal projects be consistent with the State's Management Program. There are many State, local and other Federal laws and regulations which affect ski areas. The rules already require permit holders to abide by all applicable laws; therefore, there is no need for a redundant provision in this rulemaking. In addition, the ski area permit contains the following clause, which is very similar to the current existing clause found in all special use permits and which addresses this requirement:

Rules, Laws and Ordinances. The holder, in exercising the privileges granted by this term permit, shall comply with all present and future regulations of the Secretary of Agriculture and federal laws; and all present and future, state, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit to the extent they are not in conflict with federal law, policy or regulation. The Forest Service assumes no responsibility for enforcing laws, regulations, ordinances and the like which are under the jurisdiction of other government bodies.

Another respondent was concerned that the 10-year periodic revision of the rule may not provide sufficient flexibility for a Forest Supervisor to make mid-term permit modifications in response to impacts to fish and wildlife resources that were unforeseen at the time a permit was issued. The 10-year periodic revision has been dropped (§ 251.56(h)). Very strong controls for all areas of natural resource protection and management exist in the terms of the permit itself and elsewhere within 36 CFR Parts 251 and 261. In addition to the permit clause on Rules, Laws, and Ordinances, the holder is required to maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the authorized officer. Standards are subject to periodic change by the authorized officer. The holder must prepare and annually revise an operating plan to cover winter and summer operations as appropriate. The provisions of the approved operating plan and the annual revisions become a part of the permit. In the approval process for the operating plan, the authorized officer may define areas to be addressed in addition to the required areas of vegetation management, erosion control, etc. When quick action is needed, the authorized officer may require immediate temporary suspension of the operation, in whole or in part, when it is determined to protect public health, safety, or the environment.

One reviewer suggested it would be wise to provide for varying tenure for occupancy of different structures on national forest lands. The example was given that while it may be appropriate to provide long tenure for a lift facility, other facilities such as a sewage treatment plant might warrant a shorter tenure. The reviewer believes a shorter tenure could also be offered to encourage or require that some inappropriate uses be phased out and moved to private lands. For facilities that may cause environmental problems, the mechanisms exist under the permit for correcting the problem or removing the facility. If in the planning, it was determined that employee housing would have to be provided, with the consent of the authorized officer, for the first ten years until a community base was established on private lands, this could be approved as part of the acceptance of the Master Development plan which becomes part of the special use permit.

Transfer of Permits. One respondent expressed the opinion that the Forest Service should be concerned with the transferring of the new long-term permits to new owners of the improvements. Given the substantially longer tenure, they believe some limits and conditions should be set. Existing § 251.59, Transfer of special use privileges, specifies that a buyer of the permit holders improvements must qualify and agree to comply with and be bound by the terms and conditions of the special use permit and such new conditions as may warrant. In addition, a clause in the ski area term permits addresses this requirement as follows:

Divestiture of Ownership. Upon change in ownership of the facilities authorized by this permit, the rights granted under this authorization may be transferred to the new owner upon application to and approval by the authorized officer. The new owner must qualify and agree to comply with and be bound by the terms and conditions of the authorization. In granting approval, the authorized officer may modify the terms, conditions, and special stipulations to reflect any new requirements imposed by current Federal and state land use plans, laws, regulations or other management decisions.

A concern was also expressed that there was an increasing trend for ski areas to be sold and often to foreign corporations. The Department has not seen an increase in the rate of sale of ski areas on National Forest System lands. Changes in ownership occur infrequently. We are aware of only two areas of 165 which have foreign corporations as parent companies. Without legislation to the contrary, sale to foreign owners is not prohibited if they meet the financial qualifications.

One reviewer believed the new permit presented an opportunity to strongly endorse and even require major ski areas to be active partners in the Agency's Resort Naturalist program. The Agency is actively working with its ski area permittees to initiate programs which will increase public understanding and appreciation for natural resource management but does not believe it is appropriate to require participation as a condition of a permit.

Having considered the comments received, the Department is adopting final rules to govern issuance of new ski area permits and conversion of existing ski area permits. The rule contains the provisions from the proposed rule except as noted in the preceding responses to comments. These rules address the tenure and renewability of ski area permits. The rules do not directly or indirectly provide for nor abrogate any change to any specific use of National Forest System lands or decisions affecting use of these lands.

Regulatory Impact

This rule has been reviewed under USDA procedures and Executive Order 12291. It has been determined that this regulation is not a major rule. Little or no effect on the economy will result from this regulation since it affects only those parties who occupy or use land within the National Forest System for ski area development. The effect of the law is to marginally increase net benefits to the Government and the permittees by reducing the number of special use permits issued and thus the administrative costs associated with issuance The issuing of regulations and the conversion of all existing ski area permits to the new authority, subject to permittee concurrence, is a requirement of the law governing ski area permits

The Department of Agriculture has determined that this action will not have a significant effect on a substantial number of small entities. Furthermore, it does not directly result in additional procedures or paperwork not already required by law. The special use authorization and application procedures applicable to obtaining new ski area permits are cleared for the uses of this final rule and have been assigned OMB control No. 0596-0082. These information collection requirements are approved for use through August 31, 1989. Information requirements in the ski area permit are currently under review by the Office of Management and Budget, notice of which was given in the **Federal Register** on April 4. 1989, at 54 FR 13537.

Based on past experience and environmental analysis, this rule in and of itself will have no significant effect on the human environment, individually or cumulatively. Therefore, it is hereby excluded from documentation in an environmental assessment or an environmental impact statement (40 CFR 1508.4).

List of Subjects in 36 CFR Part 251

Electrical power, Mineral resources, National forests, Public lands rights-of-way, Reporting and recordkeeping requirements, Water resources.

Therefore, for the reasons set forth in the preamble, Subpart B—Special Uses of Part 251 of Title 36 of the Code of Federal Regulations is amended as follows:

PART 251—LAND USES [AMENDED]

Subpart B—Special Uses [Amended]

1. The Authority citation for Subpart B is revised to read as follows:

Authority: 16 U.S.C. 472, 497b, 551, 1134, 3210; 30 U.S.C. 185; 43 U.S.C. 1740, 1761-1771.

2. In § 251.51, add the following definition in the appropriate alphabetical order:

§ 251.51 Definitions.

* * * * *

"Ski area"—a site and attendant facilities expressly developed to accommodate alpine or nordic skiing and from which the preponderance of revenue is generated by the sale of lift tickets and fees for ski rentals, for skiing instruction and trail passes for the use of permittee-maintained ski trails. A ski area may also include ancillary facilities directly related to the operation and support of skiing activities.

* * * * *

3. In § 251.53, revise the introductory text and add a new paragraph (n) to read as follows:

§ 251.53 Authorities.

Subject to any limitations contained in applicable statutes, the Chief of the Forest Service, or other Agency official to whom such authority is delegated, may issue special use authorizations for National Forest System land under the authorities cited and for the types of use specified in this section as follows:

* * * * *

(n) Operation of nordic and alpine ski areas and facilities for up to 40 years and encompassing such acreage as the Forest Officer determines sufficient and appropriate as authorized by the National Forest Ski Area Permit Act of 1986 (16 U.S.C. 497b).

4. In § 251.56 revise paragraph (b) and add new paragraph (g) to read as follows:

§ 251.56 Terms and Conditions.

* * * * *

(b) *Duration and renewability*—(1) *Requirements.* If appropriate, each special use authorization will specify its duration and renewability. The duration shall be no longer than the authorized officer determines to be necessary to accomplish the purpose of the authorization and to be reasonable in light of all circumstances concerning the use, including (i) resource management direction contained in land management and other plans; (ii) public benefits provided; (iii) cost and life expectancy of the authorized facilities; (iv) financial arrangements for the project; and (v) the life expectancy of associated facilities, licenses, etc. Except for special use authorizations issued under the National Forest Ski Area Permit Act of 1986, authorizations exceeding 30 years shall provide for revision of terms and conditions at specified intervals to reflect changing times and conditions.

(2) *Ski area permits.* (i) For authorizations issued under the National Forest Ski Area Permit Act of 1986, the authorized officer normally shall issue a ski area authorization for 40 years, if, upon consideration of information submitted by the applicant, the authorized officer finds that the ski area development meets the following standards:

(A) In the case of an existing permit holder, existing on-site investment is of sufficient magnitude to justify authorization for 40 years;

(B) In the case of an existing permit holder, existing investment of capital is in ski-related facilities;

(C) Planned investment capital is directly related to development of ski area facilities and is not for financing regular, ongoing operation and maintenance costs;

(D) Ski facilities requiring long-term investment are, or will be, located predominately on land authorized under a permit;

(E) The number and magnitude of planned facilities, as detailed in a Master Development Plan, clearly require long-term financing and/or operation;

(F) The United States is not the owner of the principal facilities within the authorized ski area.

(ii) A term of less than 40 years shall be authorized for a ski area when the applicant requests a shorter term or when, in the authorized officer's discretion:

(A) Analysis of the information submitted by the applicant indicates that a shorter term is sufficient for financing of the ski area;

(B) The ski area development, whether existing or proposed, does not meet the standards of paragraph 2(i)(A)-(F) of this section; or

(C) A 40-year authorization would be inconsistent with the approved forest land and resource management plan governing the area (36 CFR Part 219).

* * * * *

(g) *Conversion of Ski Area Authorizations.* (1) The Forest Service shall request that all existing permit holders convert existing authorizations for ski areas to a new authorization issued pursuant to the National Forest Ski Area Permit Act.

(2) Any current holder of a ski area permit who wishes to convert an existing permit to one issued pursuant to the National Forest Ski Area Permit Act must submit a written request for the new authorization to the authorized officer.

(3) With the consent of the holder, the authorized officer shall convert the authorization if:

(i) The holder is in compliance with the existing authorization;

(ii) All fees currently due under the existing authorization are paid in full; and

(iii) Any proposed modifications of terms and conditions of the existing authorization included in a request for conversion meet the standards of paragraphs (2)(i) (A) through (F) of this section and the relevant requirements of this subpart.

(4) A holder retains the right to decline a new authorization offered pursuant to this paragraph and to continue to operate under the terms of the existing permit. However, pursuant to the rules at § 251.61 of this subpart, major modifications of existing permits shall require conversion to a permit issued under the authority of the National Forest Ski Area Permit Act, unless the holder provides compelling justification for retaining the existing permit.

7. In § 251.57, add a new paragraph (h) as follows:

§ 251.57 Rental fees.

* * * * *

(h) Each ski area authorization issued under the authority of the National Forest Ski Area Permit Act shall include a clause that provides that the Forest Service may adjust and calculate future rental fees to reflect Agency revisions to the existing system for determining fees based on fair market value or to comply with any new fee system for determining fees based on fair market value that may be adopted after issuance of the authorization.

Clayton Yeutter,

Secretary.

Date: May 19, 1989.

[FR Doc. 89-12493 Filed 5-24-89; 8:45 am]

BILLING CODE 3410-11-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 761

[OPTS-00085A; FRL-3575-7]

Toxic Substances Control Act Regulations; Correction of Technical Amendment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; Technical amendment correction.

SUMMARY: EPA issued a technical amendment, which was published in the **Federal Register** of April 15, 1988 (53 FR 12522), to some of the rules under the Toxic Substances Control Act. On page 12524, in the list of paragraphs in 40 CFR 761.60 where "50 ppm" was revised to read "500 ppm," inadvertently paragraph (a)(1) was included. The reference should have remained "50 ppm" because EPA did not intend to change the scope of regulatory coverage of § 761.60. This document corrects that mistake.

DATE: This correction is effective May 25, 1989.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, TSCA Assistance Office (TS-799), Environmental Protection Agency, Rm. EB-44, 401 M Street SW., Washington, DC 20460, (202-554-1404), TDD: (202-554-0557).

List of Subjects in 40 CFR Part 761

Environmental protection, Hazardous materials, Labeling, Polychlorinated biphenyls, Reporting and recordkeeping requirements.

Dated: May 17, 1989.

Cynthia Stroup,

Acting Director, Exposure Evaluation Division.

Therefore, 40 CFR Part 761 is amended as follows:

PART 761—[AMENDED]

1. The authority citation for Part 761 continues to read as follows:

Authority: 15 U.S.C. 2605, 2607, and 2611; Subpart G also issued under 15 U.S.C. 2614 and 2616.

§ 761.60 [Amended]

2. In § 761.60(a)(1), "500 ppm" is revised to read "50 ppm."

[FR Doc. 89-12561 Filed 5-24-89; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[BC Docket No. 81-742, FCC 89-108]

Broadcast Services; License Renewal Process

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This action (1) imposes limitations on the settlements of competing applications and petitions to deny filed in the license renewal context; (2) requires a case-by-case review of citizens' agreements reached in the license renewal context to ensure that they are in the public interest; (3) modifies the Commission's policy regarding enforcement of programming-related promises in citizens' agreements; and (4) eliminates the Commission's policy of permitting competing applicants in license renewal proceedings to rely on the availability of an incumbent licensee's transmitter site.

This action is taken by the Commission generally to eliminate abuse of its license renewal process. This action should (1) discourage persons from filing competing applications and petitions to deny in broadcast license renewal proceedings with the purpose of settling out for a profit; (2) ensure that citizens' agreements reached in the license renewal context are consistent with the public interest; (3) conform the Commission's policy regarding enforcement of citizens' agreements with its deregulatory initiatives; and (4) require all competing applicants to establish reasonable assurance of the availability of a transmitter site to discourage the filing of non *bona fide* applications and to provide an independent basis for comparing the technical proposals of the incumbent and competing applicants.

EFFECTIVE DATE: June 28, 1989.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Marilyn Mohrman-Gillis, Policy & Rules Division, Mass Media Bureau, (202) 632-7792.

SUPPLEMENTARY INFORMATION: 1. The information collection and reporting burden on persons seeking Commission approval for the dismissal of pre-Initial Decision competing applications and for non-monetary citizens' agreements is estimated to average fifteen minutes per response. The information collection and reporting burden on persons seeking Commission approval for the settlement of post-Initial Decision competing applications and petitions to deny is estimated to average two hours per response. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of the Managing Director, Washington, DC 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503.

2. This is a summary of the Commission's "Report and Order" in BC Docket No. 81-742, adopted March 30, 1989 and released May 16, 1989. The full text of the Commission's decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, Northwest, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services (202) 857-3800, 2100 M Street, Northwest, Suite 140, Washington, DC 20037.

Background

3. This rule making action addresses three broad issues raised for comment in the Commission's "Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81-742," 53 FR 31894 (Aug. 22, 1988) ("Second Further Notice"), a comprehensive inquiry on reform of the broadcast license renewal process.

4. First, in response to troubling allegations that some parties might be using the license renewal process to obtain payments or benefits from the renewal applicant unrelated to legitimate public interest aims, the Commission invited public comment on this alleged abuse. Specifically, the Commission asked whether competing applications (applications for construction permits for broadcast facilities that are mutually exclusive with renewal applications filed by incumbent licensees) and petitions to deny were being filed against license renewal applicants for the purpose of exacting large settlement payments for dismissing these challenges, and whether limitations on settlement payments would help curb such abuse. Related to this issue was whether the limits should extend to citizens' agreements (agreements between broadcasters and citizens' groups generally regarding programming or employment matters) reached in exchange for dismissing petitions to deny filed in the license renewal context. In response, virtually all commenters, representing both industry and public interest groups, asserted that abuse is a serious problem that warrants immediate Commission action. The clear majority of commenters supported limitations on settlement payments for the dismissal of both competing applications and petitions to deny.

5. Second, the Commission sought comment on whether it should modify its policy regarding enforcement of program-related promises made in citizens' agreements, "Agreements Between Broadcast Licensees and the Public," 57 FCC 2d 42 (1975), particularly since it no longer required detailed programming proposals in conjunction with renewal applications and no longer applied a "promise versus performance" standard to renewals. Accordingly, the Commission asked whether it should eliminate its policy of regarding program-related promises made in citizens' agreements as commitments to the Commission to be relied upon in its decision making processes. Only a few parties (five of twenty-nine commenters and reply commenters) addressed the issue of enforcement of citizens' agreements. The majority of these urge the Commission to maintain its current enforcement policies.

6. Finally, the Commission sought comment on whether it should eliminate what is known as the *Cameron* doctrine,

a policy that allowed a competing applicant in a comparative renewal proceeding to presume that the incumbent licensee's transmitter site would be available to it if it prevailed. *See George E. Cameron Jr. Communications*, 71 FCC 2d 460 (1979). The Commission was concerned that the presumption, among other things, facilitated the filing of non *bona fide* applications by permitting renewal challengers merely to clone technical proposals submitted by the renewal applicants. All of the eight commenters that addressed the issue advocated elimination of the *Cameron* presumption.

7. The Commission also sought comment on other proposed reforms of the license renewal process, but stated they would be resolved separately. First, it sought comment on whether it should modify FCC Form 301 to require competing applicants in the license renewal context to submit additional information as another means of deterring non *bona fide* applicants. The Commission incorporated the record regarding Form 301 into General Docket No. 88-328, which dealt with proposed Form 301 amendments for all construction permit applications, including those in the renewal context. The Commission adopted a "Report and Order in Gen. Docket No. 88-328," FCC 89-110, 54 FR 19951 (May 9, 1989), which amended Form 301 to require all applicants for construction permits to provide more financial, ownership, and integration information.

8. The Commission also sought comment on proposals for reforming the standards used in comparative hearings to determine whether an incumbent licensee or a competing applicant will best serve the public interest, convenience, and necessity. Specifically, the Commission sought comment on proposals to clarify its standards for awarding a so-called "renewal expectancy," a credit awarded to incumbent licensees for "meritorious" service that meets the needs and interests of its community of license; and on proposals to eliminate or reduce in weight certain of the criteria used to compare incumbent licensees and competing applicants in a renewal proceeding.

For reasons stated in a separate "Third Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81-742," FCC 89-109 (adopted March 30, 1989), the Commission decided to seek comment on an additional proposal for making the Commission's renewal expectancy standard more concrete and less subject to protracted litigation and abuse. It stated that those portions of BC Docket No. 81-742 pertaining to the renewal expectancy standard, as well as the other comparative criteria, would therefore be held open pending further comment.

Rule and Policy Changes

9. *Settlement Limitations*. Based upon a careful review of the record, as well as its own experience in administering the licensing process, the Commission recognized that its existing policies, albeit unintentionally, were providing mechanisms and incentives for abuse of its processes. As one measure to curb the abuse, the Commission imposed limitations on settlements of license renewal challenges. With regard to settlements of competing applications, the Commission banned all payments to competing applicants (other than the incumbent licensee) for withdrawing an application prior to the Initial Decision stage of a comparative hearing, and thereafter, restricted payments to the legitimate and prudent expenses of the withdrawing applicant. With regard to settlements of petitions to deny license renewal applications, the Commission's new policies depend on whether the petition is dismissed in exchange for money or promises to implement some type of nonfinancial reform. Where a petition is dismissed for money, the Commission limited any settlement payments to the legitimate and prudent expenses of the withdrawing petitioner. Where a petition is dismissed for a promise by the licensee to implement a nonfinancial reform, such a settlement, which is generally referred to as a citizens' agreement, must be reviewed and approved by the Commission under its public interest standard. In reviewing such agreements, the Commission stated that it would apply a rebuttable presumption that any agreement in which the petitioner is paid to perform the promised reform would be regarded as contrary to the public interest.

10. The Commission imposed limitations on settlements of competing applications to assure that such applications are filed for the purpose of obtaining a broadcast license rather than to settle out for a profit. It stated that banning payments for settlements of all pre-Initial Decision applications should also: (1) Increase the likelihood that only serious, *bona fide* applicants (those that are willing to develop a complete record of the issues) will have the opportunity to settle for expenses; (2) prevent non *bona fide* applicants from exerting undue pressure on incumbents to settle early in a comparative proceeding; and (3) encourage all applicants (knowing they will only be able to settle for expenses if they survive the hearing) to evaluate the risks and benefits of their applications before filing. Moreover, by permitting post-Initial Decision settlements for expenses, the Commission recognized that settlements, where abuse is not a factor, can be an efficient means to terminate a renewal challenge.

11. The Commission determined that these limitations do not apply to the dismissal of a renewal application by an incumbent licensee. The Commission found that it is unlikely that an incumbent has filed a renewal application with the intent of settling out for a profit. Moreover, a licensee that no longer wishes to be in the broadcast business should be permitted to dismiss a renewal application with no restrictions.

12. In imposing limitations on settlements of competing applications, the Commission addressed the issue of whether the particular limitations imposed were authorized by section 311(d), of the Communications Act. Section 311(d) was amended in 1981 to provide that the Commission shall approve a settlement agreement "only if it determines that (A) the agreement is consistent with the public interest, convenience, or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement."

13. Upon close scrutiny of the statute, the legislative history, and the comments submitted regarding the Commission's authority under section 311(d), the Commission determined that nothing in the statute denies the Commission the authority to establish reasonable parameters for when and under what circumstances payments pursuant to settlement agreements do not serve the public interest. First, settlement restrictions are completely consistent with the plain language of section 311(d). The only constraint on the Commission's authority to approve settlements is that they must be consistent with the public interest, and the application must not have been filed for the purpose of reaching the settlement. Second, the Conference Report only instructs that section 311(d) was intended to prevent a person from filing a "frivolous application * * * to harass an incumbent" or to "offer[ ] to withdraw the frivolous applications upon payment of money * * *." This is precisely the intent of the settlement limitations the Commission imposed. Moreover, nothing in the statutory language or the legislative history requires the Commission to proceed on

an *ad hoc*, case-by-case basis. Instead, the statute merely makes explicit the Commission's broad authority to decide what settlement standard would best serve the public interest.

14. In imposing settlement limitations, the Commission stated that it would no longer adhere to its prior reasoning in *Western Connecticut Broadcasting Co.*, 88 FCC 2d 1492 (1982). In *Western Connecticut*, the Commission eliminated a legitimate and prudent expense limitation that it imposed on settlements of competing applications prior to the enactment of section 311(d). In so doing, the Commission noted that since settlements would be reviewed in accordance with the newly amended section 311(d), there was no further need for the settlement limitations. After careful examination, the Commission stated that it did not sufficiently consider other factors that bear on settlements in the renewal context, including the potential for abuse. It decided, therefore, expressly to depart from *Western Connecticut*.

15. The Commission also imposed legitimate and prudent expense limitations on monetary settlements of petitions to deny license renewal applications to remove the profit motive for filing petitions to deny. The Commission permitted recovery of expenses, rather than impose a complete ban on settlement payments, because it was concerned that banning all settlement payments in connection with petitions to deny would seriously impede the monitoring and regulatory function of such petitions. The Commission essentially believed it would be inappropriate to ask the public to incur considerable out-of-pocket expenses in order to alert it to licensee deficiencies with no possibility of reimbursement. The Commission decided that the legitimate and prudent expense limitation would strike the appropriate balance between deterring abuse and not discouraging the filing of petitions to deny.

16. The Commission decided that different limitations for competing applications and petitions to deny were warranted because, among other things, different incentives were operative. Unlike petitioners, a competing applicant stands to gain a very valuable broadcast license. The inability to collect attorney's fees and expenses in settlements of competing applications does not prevent *bona fide* applicants from trying to obtain a license. In contrast, if the Commission were to prohibit petitioners from recovering fees and expenses, there would be an economic disincentive to file a petition to deny.

17. Finally, the Commission decided that its new policy of reviewing nonfinancial settlements, or citizens' agreements, on a case-by-case basis appropriately takes into account that concessions extracted from a licensee in citizens' agreements can be merely disguised payoffs for dismissing a renewal challenge. The Commission's rebuttable presumption, that any agreements that call for the petitioner to be paid for carrying out a programming or employment initiative are contrary to the public interest, recognizes that such arrangements are particularly susceptible to abuse. The Commission noted that this policy applies only to citizens' agreements reached in exchange for dismissing a petition to deny in the license renewal context and, therefore, it did not reach the question whether such agreements in other contexts provide the potential for abuse of Commission processes.

18. *Enforcement of Citizens' Agreements.* The Commission also determined that it would no longer enforce citizens' agreements containing licensee representations related to programming matters. As a result of its deregulatory initiatives, the Commission no longer applies a "promise versus performance" standard to renewal applications. Consequently, it found that promises regarding programming contained in citizens' agreements were, in general, no longer germane to the Commission's decision making process. The Commission noted that this change in policy would not apply to citizens' agreements regarding EEO or other nonprogram-related aspects of a station's operations.

19. *Cameron Policy.* Finally, the Commission eliminated the *Cameron* doctrine, a policy that allowed competing applicants in a comparative renewal proceeding to presume that they could acquire the incumbent licensee's transmitter site if they prevailed. It did so for a number of reasons. First, the *Cameron* presumption was permitting license renewal challengers, who were relying on an incumbent's transmitter in their application, to simply copy the incumbent's technical proposal. This in turn facilitated the filing of non *bonafide* applications, and operated unfairly to neutralize an advantage in the comparative hearing that an incumbent had earned. Further, the presumption was unrealistic because a site might truly be unavailable. Relying on this presumption potentially disserved the public because it allowed an applicant, that did not have an available site, to be granted a license. As a consequence, competing applicants can not rely upon this doctrine but must provide reasonable assurance of site availability.

Procedural Matters

20. The rule and policy changes in this "Report and Order" will become effective on June 28, 1989, subject to approval by the Office of Management and Budget. The policies will apply to all prospective competing applications and petitions to deny, as well as those applications and petitions that are on file with the Commission, but have not been designated for a hearing as of the effective date of the "Report and Order". The policies will not apply to any post-designation applications or petitions, or to any competing applications that have been settled and presented to the Commission for approval prior to the effective date. The *Cameron* policy change will apply to all prospective and pre-designation applications as of the effective date. Any pre-designation applicants that have relied on the *Cameron* presumption will have 30 days from the effective date of the "Report and Order" to supplement their application to show site availability.

21. In order to aid with the enforcement of the Commission's new settlement limitations, the Commission adopted a series of disclosure and certification requirements which are contained in §§ 73.3523 and 73.3524. These rules are set out in full in the Amendatory Text below. The Commission intends to enforce its policies and rules using the full panoply of penalties available against all persons who fail to comply.

22. *Final Regulatory Flexibility Act Analysis.* Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 605, it is certified that the adopted rules will not have a significant negative impact on a substantial number of small entities. The policy and rule changes will affect broadcast licensees who are seeking license renewal, applicants for construction permits for broadcast facilities that are mutually exclusive with facilities subject to license renewal, and persons or groups filing petitions to deny license renewals. The policy and rule changes implemented herein, which are intended to eliminate or reduce abuse of the Commission's license renewal process, should benefit all licensees, competing applicants and petitioners, including the small entities. The Commission has considered that limitations on settlements of petitions to

deny have the potential to discourage citizens' groups from filing petitions. The Commission believes that its legitimate and prudent expense limitation on settlements of petitions strikes the appropriate balance between the need to discourage abuse of its process without discouraging the filing of legitimate petitions to deny.

23. *Ordering Clauses.* Authority for the rule changes is contained in Sections 4 (i) and (j), 301, 303, 308 and 309 of the Communications Act of 1934, as amended.

24. Accordingly, *it is ordered,* That the policies and the amendments to the Commission's Rules and Regulations set forth in the Amendatory Text below shall become effective on June 28, 1989, subject to Office of Management and Budget approval.

25. *It is further ordered,* That the portions of this proceeding related to the renewal expectancy factor and the comparative renewal criteria (Parts III, IV and V of the "Second Further Notice") are held open pending further comment on these issues pursuant to a "Third Further Notice of Inquiry and Notice of Inquiry and Notice of Proposed Rule Making" in this proceeding.

26. *It is further ordered,* that the part of this proceeding related to amendments to FCC Form 301 (paragraphs 25–29 of the "Second Further Notice"), the policies related thereto, and the comments and reply comments received in response thereto are incorporated into General Docket No. 88-328. This proceeding has been resolved by a Report and Order adopted March 30, 1989. (54 FR 19951, May 9, 1989.)

27. *It is further ordered,* that, except as specified in Paragraphs 25–26 above, this proceeding is terminated.

List of Subjects in 47 CFR Part 73

Radio broadcasting, Television broadcasting.

Amendatory Text

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 73—[AMENDED]

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

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

2. Section 73.3523 is added to 47 CFR Part 73 to read as follows:

§ 73.3523 Dismissal of applications in renewal proceedings.

(a) Any applicant for a construction permit, that has filed an application that is mutually exclusive with an application for the renewal of a license of an AM, FM or television station (hereinafter "competing applicant"), and seeks to dismiss or withdraw its application and thereby remove a conflict between applications pending before the Commission, must obtain the approval of the Commission.

(b) If a competing applicant seeks to dismiss or withdraw its application prior to the Initial Decision stage of the hearing on its application, it must submit to the Commission a request for approval of the dismissal or withdrawal of its application, a copy of any written agreement related to the dismissal or withdrawal of its application, and an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has received or will receive any money or other consideration in exchange for dismissing or withdrawing its application;

(2) A statement that its application was not filed for the purpose of reaching or carrying out an agreement with any other applicant regarding the dismissal or withdrawal of its application; and

(3) The terms of any oral agreement relating to the dismissal or withdrawal of its application.

In addition, within 5 days of the applicant's request for approval, each remaining competing applicant and the renewal applicant must submit an affidavit setting forth:

(4) A certification that neither the applicant nor its principals has paid or will pay any money or other consideration in exchange for the dismissal or withdrawal of the application; and

(5) The terms of any oral agreement relating to the dismissal or withdrawal of the application.

(c) If a competing applicant seeks to dismiss or withdraw its application after the Initial Decision stage of the hearing on its application, it must submit to the Commission a request for approval of the dismissal or withdrawal of its application, a copy of the any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has received or will receive any money or other consideration in excess of the legitimate and prudent expenses of the applicant;

(2) The exact nature and amount of any consideration paid or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement;

(4) A statement that its application was not filed for the purpose of reaching or carrying out an agreement with any other applicant regarding the dismissal or withdrawal of its application; and

(5) The terms of any oral agreement relating to the dismissal or withdrawal of its application.

In addition, within 5 days of the applicant's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(6) A certification that neither the applicant nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the withdrawing applicant in exchange for the dismissal or withdrawal of the application; and

(7) The terms of any oral agreement relating the dismissal or withdrawal of the application.

(d) For the purpose of this section:

(1) Affidavits filed pursuant to this section shall be executed by the applicant, permittee or licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) An application shall be deemed to be pending before the Commission from the time an application is filed with Commission until an order of the Commission granting or denying the application is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by an applicant in preparing, filing, and prosecuting its application.

(4) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as nonfinancial concessions that confer any type of benefit on the recipient.

3. Section 73.3524 is added to 47 CFR Part 73 to read as follows:

§ 73.3524 Dismissal of petitions to deny in renewal proceedings.

(a) Whenever a petition to deny has been filed against any application for the renewal of a license for an AM, FM, or television station, or against a construction permit application that is mutually exclusive with a renewal application, and the petitioner seeks to dismiss or withdraw the petition to deny, either unilaterally or in exchange for financial consideration, the petitioner must file with the Commission a request for approval of the dismissal or withdrawal, a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) A certification that neither the petitioner nor its principals has received or will receive any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal or withdrawal of the petition to deny;

(2) The exact nature and amount of any consideration received or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement; and

(4) The terms of any oral agreement related to the dismissal or withdrawal of the petition to deny.

In addition, within 5 days of petitioner's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(5) A certification that neither the applicant nor its principals had paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the petitioner in exchange for dismissing or withdrawing the petition to deny; and

(6) The terms of any oral agreement relating to the dismissal or withdrawal of the petition to deny.

(b) Citizens' agreements. Whenever a petition to deny has been filed against any application for the renewal of a license for an AM, FM, or television station, or against a construction permit application that is mutually exclusive with a renewal application, and the petitioner seeks to dismiss or withdraw the petition to deny in exchange for non-financial consideration (*e.g.*, programming, ascertainment or employment initiatives), this is referred to as a citizens' agreement. The parties to the agreement must file with the Commission a joint request for approval of the citizens' agreement, a copy of any written agreement, and an affidavit executed by each party setting forth:

(1) Certification that neither the petitioner, nor any person or organization related to the petitioner, has received or will receive any money or other consideration in connection with the citizens' agreement other than legitimate and prudent expenses incurred in prosecuting the petition to deny;

(2) Certification that neither the petitioner, nor any person or organization related to petitioner is or will be involved in carrying out, for a fee, any programming, ascertainment, employment or other non-financial initiative referred to in the citizens' agreement; and

(3) The terms of any oral agreement.

(c) For the purposes of this section:

(1) Affidavits filed pursuant to this section shall be executed by the applicant, permittee or licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) A petition shall be deemed to be pending before the Commission from the time a petition is filed with the Commission until an order of the Commission granting or denying the petition is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by a petitioner in preparing, filing, and prosecuting its petition for which reimbursement is being sought.

(4) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

4. Section 73.3525 is amended by adding at the beginning of paragraph (a) the following:

§ 73.3525. Agreements for removing application conflicts.

(a) Except as provided in § 73.3523 regarding dismissal of applications in comparative renewal proceedings, whenever applicants * * *

* * * * *

5. Section 73.3568 is amended by revising the first sentence of paragraph (a) and the first sentence of paragraph (c) as follows:

§ 73.3568 Dismissal of applications.

(a) Subject to the provisions of § 73.3523 (Dismissal of applications in renewal proceedings) and § 73.3525 (Agreements for removing application conflicts), any application may, upon request of the applicant be dismissed without prejudice as a matter of right prior to the designation of such application for hearing. * * *

* * * * *

(c) Subject to the provisions of § 73.3523 (Dismissal of applications in renewal proceedings) and § 73.3525 (Agreements for removing application conflicts), requests to dismiss an application without prejudice after it has been designated for hearing will be considered only upon written petition properly served upon all parties of record. * * *

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 89-12455 Filed 5-24-89; 8:45 am]

BILLING CODE 6712-01-M