

comparative criteria to resolve mutually exclusive applications in both the commercial and NCE services, although the criteria were different for reserved and non-reserved spectrum. NCE applicants competing against commercial applicants for a non-reserved channel were evaluated using the commercial criteria. Both comparative processes, however, were called into question in the 1990s, leading the Commission to revisit its comparative criteria for applicants for both commercial and NCE stations. The Commission has adopted new selection criteria for NCE stations.

4. The Balanced Budget Act of 1997 ("1997 Budget Act") amended certain provisions of the Communications Act ("Act") germane to the Commission's ongoing review of its licensing processes. The 1997 Budget Act amended section 309(j) of the Act. As revised, section 309(j)(1) states: "If \* \* \* mutually exclusive applications are accepted for any initial licenses or construction permits, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection." Section 309(j)(2) sets forth the limited exceptions to section 309(j)(1), including "licenses or construction permits issued by the Commission \* \* \* (C) for stations described in section 397(6) of this Act." Section 397(6) of the Act provides the definition of NCE stations.

5. Given the different licensing mechanisms for NCE stations and all other stations, the Commission issued a *Further Notice of Proposed Rulemaking* ("FNPRM"), 63 FR 58358, October 30, 1998, in this docket and sought comment on how to resolve conflicts between commercial and NCE applicants for non-reserved spectrum. The Commission also sought comment on whether section 309 of the Act prohibited it from using competitive bidding to resolve any mutually exclusive applications when they included at least one filed by an applicant for an NCE station, or instead only when they involved competing applications for reserved channels.

6. In the *Report and Order* ("R&O"), 65 FR 36375, June 8, 2000, the Commission concluded that "the exemption of NCE applicants from our general mandatory auction authority does not prohibit us from auctioning non-reserved spectrum, even when NCE entities apply for those channels." The Commission decided to require applicants for NCE stations to compete with applicants for commercial stations

for non-reserved spectrum at auction. In order to minimize any hardship on applicants for NCE stations, the Commission also relaxed the criteria used to evaluate requests to reserve new channels.

7. The Association of Public Television Stations, the Corporation for Public Broadcasting, National Public Radio, and the State of Oregon challenged the Commission's decision in court. In *NPR v. FCC*, 254 F.3d 226 (DC Cir. 2001), the U.S. Court of Appeals for the D.C. Circuit rejected the Commission's construction of section 309. The court held that "nothing in the Act authorizes the Commission to hold auctions for licenses issued to NCEs to operate in the unreserved spectrum," because section 309(j)(2) denied the Commission the authority to use competitive bidding "based on the nature of the station that ultimately receives the license, and not on the part of the spectrum in which the station operates." 254 F.3d at 229.

8. In order to resolve the issues raised by the court's decision, we issued a *Second Further Notice of Proposed Rulemaking* (2FNPRM), 67 FR 9945, March 5, 2002. We asked for comment on the scope of the auction exemption, and offered three options, not necessarily mutually exclusive, on how to resolve the competing interests of applicants for commercial and NCE stations in the non-reserved spectrum. First, we proposed to hold applicants for NCE stations ineligible for this spectrum, stating that such an approach "is consistent with the statutory language" and "has the advantage of clarity and simplicity." Second, recognizing that, under our first proposal, spectrum might lie fallow if no commercial applicants applied to use it, we proposed to permit applicants for NCE stations to apply for non-reserved spectrum, subject to dismissal of their applications if they were mutually exclusive with those filed by commercial applicants. Third, given that applicants for NCE stations may not legally participate in auctions, we also sought comment on whether we should further relax the criteria for would-be applicants for NCE stations to reserve additional channels in the future, and whether we should permit NCE applicants the opportunity to apply such criteria, or other criteria, to reserve existing or "vacant" allotments. We also welcomed comment on other options.

### III. Discussion

#### A. Scope of Exemption for NCE Stations From Competitive Bidding

##### 1. Generally

9. *Background.* In the 2FNPRM, we sought comment on the breadth of section 309(j)(2)(C), which exempts NCE stations from competitive bidding. As indicated, that section exempts the licenses issued "for stations described in section 397(6) of this Act." Subsection (A) defines "noncommercial educational broadcast station" by incorporation of the Commission's eligibility rules for such stations in effect in 1978. Subsection (B) defines as NCE stations those that are municipality-owned and transmit only noncommercial programs for educational purposes.

10. *Discussion.* We conclude that the auction exemption for NCE stations applies to two types of broadcast stations: (1) AM, full-power FM, FM translator, and full-power TV stations that a nonprofit educational organization shows will be used to advance an educational program, and are eligible to be licensed as NCE stations pursuant to the Commission's service-specific standards, in effect as of November 1978; and (2) stations that will be used by a municipality to transmit only noncommercial programs for educational purposes. Section 309(j)(2)(C) states that "(t)he competitive bidding authority granted by this paragraph shall not apply to licenses or construction permits issued by the Commission \* \* \* (C) for stations described in section 397(6) of this Act." Section 397(6), in turn, states that "(t)he terms 'noncommercial educational broadcast station' and 'public broadcast station' mean a television or radio broadcast station which (A) under the rules and regulations of the Commission in effect on the effective date of this paragraph, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes." Defining stations within the scope of section 397(6)(A) must begin with the content of our eligibility rules as of November 2, 1978, because that is the date section 397(6) became effective. The substance of the eligibility rules for NCE stations has not changed since that time. Section 73.503(a) of the