responsibilities among the various levels of government.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' Policies that have tribal implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

X. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: May 31, 2006.

James Jones,

Director, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—AMENDED

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.1268 is added to subpart D to read as follows:

§ 180.1268 Potassium silicate; exemption from the requirement of a tolerance.

Potassium silicate is exempt from the requirement of a tolerance in or on all food commodities so long as the potassium silicate is not applied at rates exceeding 1% by weight in aqueous solution and when used in accordance with good agricultural practices.

[FR Doc. E6–8939 Filed 6–13–06; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WT Docket No. 05–211; FCC 06–78]

Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Federal Communications Commission, on its own motion, clarifies certain aspects of the Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures. Among other things, the Commission clarifies that the expansion of the unjust enrichment payment schedule to ten years applies only to licenses granted on or after April 25, 2006. This ensures that retroactive penalties are not imposed on pre-existing designated entities.

DATES: Effective June 14, 2006.

FOR FURTHER INFORMATION CONTACT: Brian Carter at (202) 418–0660.

SUPPLEMENTARY INFORMATION: This is a summary of the *Order on Reconsideration of the Second Report and Order* (*Order on Reconsideration*) released on June 2, 2006. The complete text of the *Order on Reconsideration* including attachments and related Commission documents is available for public inspection and copying from 8 a.m. to 4:30 p.m. Monday through Thursday or from 8 a.m. to 11:30 a.m. on Friday at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The *Order on Reconsideration* and related Commission documents may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, facsimile 202–488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI please provide the appropriate FCC document number, for example, FCC 06–78. The *Order on Reconsideration* and related documents are also available on the Internet at the Commission's Web site: *http://wireless.fcc.gov/auctions.*

I. Introduction

1. The Commission, on its own motion, released an Order on Reconsideration which clarifies certain aspects of the *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Second Report and Order* (*Designated Entity Second Report and Order*), 71 FR 26245, (May 4, 2006). The Commission also addresses certain procedural issues raised in filings submitted in response to the *Designated Entity Second Report and Order.*

II. Background

2. In the *Further Notice of Proposed Rule Making* in this proceeding (*FNPRM*), 71 FR 6992 (February 10, 2006), the Commission sought comment on a proposal by a commenter that the Commission restrict the award of designated entity benefits to designated entities that have material relationships with large in-region incumbent wireless service providers. The Commission asked for comment on each of the elements of this proposal, including what types of material relationships should trigger a restriction on the availability of designated entity benefits and what types of entities other than large in-region incumbent wireless service providers should be covered.

3. In the *Designated Entity Second Report and Order*, the Commission revised its Part 1 rules to include certain material relationships as factors in determining designated entity eligibility. Specifically, the Commission adopted rules to limit the award of designated entity benefits to any

applicant or licensee that has impermissible material relationships or an attributable material relationship created by certain agreements with one or more other entities for the lease or resale (including under a wholesale arrangement) of its spectrum capacity. The Commission found that these additional eligibility restrictions were necessary to meet its statutory obligations and to ensure that, in accordance with the intent of Congress, every recipient of the Commission's designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public. In particular, the Commission determined that the relationships underpinning such leasing and resale agreements underscored the need for stricter regulatory parameters to ensure that benefits were reserved to provide opportunities for designated entities to become robust independent facilities-based service providers with the ability to provide new and innovative services to the public, and to prevent the unjust enrichment of unintended beneficiaries.

4. In the *FNPRM*, the Commission also sought comment on whether, if it adopted a new restriction on the award of bidding credits to designated entities, the Commission should adopt revisions to its unjust enrichment rules. The Commission asked over what portion of the license term the unjust enrichment provisions should apply if it decided to require reimbursement by licensees that, either through a change of material relationships or assignment or transfer of control of the license, lose their eligibility for a bidding credit pursuant to any eligibility restriction that it might adopt. In the *Designated Entity Second Report and Order*, the Commission adopted rule modifications to strengthen its unjust enrichment rules in order to better deter entities from attempting to circumvent its designated entity eligibility requirements and to recapture designated entity benefits when ineligible entities control designated entity licenses or exert impermissible influence over a designated entity. Specifically, the Commission adopted a ten-year unjust enrichment schedule for licenses acquired with bidding credits.

5. Finally, in the *Designated Entity Second Report and Order*, in order to ensure its continued ability to safeguard the award of designated entity benefits, the Commission explained how it will implement its rules concerning audits, particularly with respect to designated entities that win licenses in the upcoming AWS auction, and refined its rules with respect to the reporting obligations of designated entities. In the *Order on Reconsideration*, the Commission provides guidance on these implementation rules as well as on the substantive rules mentioned above.

6. Several parties have submitted filings in this docket addressing various aspects of the *Designated Entity Second Report and Order*. Among the filing are a petition for expedited reconsideration and two supplements.

III. Discussion

A. Section 309(j)(3)(E)(ii)

7. Certain parties assert that the Commission's application of the new designated entity rules to the licenses offered in Auction No. 66 violates section 309(j)(3)(E)(ii) of the Communications Act, a directive that the Commission ensure that, after it issues bidding rules, interested parties have sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services. The Commission disagrees.

8. The Commission rejects the basic assumption that the new designated entity rules implicate section 309(j)(3)(E)(ii) at all and concludes that while that provision instructs the Commission to promote the objective of ensuring that interested parties after the issuance of bidding rules have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services, the new designated entity rules do not constitute bidding rules for purposes of section 309(j)(3)(E)(ii). The Commission has explained that this provision does not require the Commission to postpone an auction until every external factor that might influence a bidder's business plan is resolved with absolute certainty. Rather, the provision applies to auction-specific information and specific mechanisms relating to day-to-day auction conduct. The new designated entity rules included neither auction-specific information nor specific mechanisms relating to day-to-day auction conduct. Therefore, the Commission concluded that it does not believe that they fall under the rubric of section 309(j)(3)(E)(ii).

9. The Commission also notes that parties were on notice for many months of the Commission's intent to apply the changes to the designated entity rules adopted in the proceeding to licenses issued in Auction No. 66. The Commission finds that parties had ample warning that a change in the designated entity rules was coming and should have been prepared to react as soon as the new rules were announced. The Commission concludes that while parties complain that the then-existing short-form filing deadline for Auction No. 66 was two weeks after the release of the new designated entity rules, auction applicants are permitted, even after the short-form filing deadline, to take a variety of steps to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services, including adding non-controlling investors at any time before or during the auction.

10. The Commission notes that it has rescheduled the deadline for filing short-form applications to participate in Auction No. 66, and interested parties have until June 19, 2006, or 54 days after the release of the *Designated Entity Second Report and Order* to file their applications. The auction itself is scheduled to take place on August 9, 2006. The Commission also notes that even assuming that section 309(j)(3)(E)(ii) applies to these rules, this new schedule provides applicants with more than sufficient time to adjust business plans and reevaluate market conditions in light of the new designated entity rules.

11. The Commission asserts that section 309(j)(3) requires the Commission to balance several statutory objectives and that the Commission promote several other objectives in exercising its competitive bidding authority, including the rapid deployment of new technologies and services to the public, promotion of economic opportunity and competition, recovery for the public of a portion of the value of the spectrum and avoidance of unjust enrichment, and efficient and intensive use of the spectrum. The Commission emphasizes that two of these other statutory objectives are of particular importance here: (1) Promoting the development and rapid deployment of new technologies, products, and services for the benefit of the public; and (2) avoiding unjust enrichment. The Commission believes that these objectives impose on it an obligation to avoid unnecessary or unreasonable delays of Auction No. 66. The Commission has evidence that potential bidders have an immediate need for the licenses that will be offered in Auction No. 66 and that delaying the auction would impair the rapid deployment of affordable wireless service to the public. Indeed, there is evidence in the record that suggests that delaying the auction further will impede the ability of smaller entities to successfully obtain licenses in Auction No. 66, even though parties claim that

the Commission's new rules will deter small businesses from participating in the auction. The alternative proposed by the various parties of holding Auction No. 66 as currently scheduled but setting aside the Commission's new designated entity rules with respect to the licenses offered in that auction, would put the Commission in the position of neglecting its statutory duty to avoid unjust enrichment by assuring that designated entity benefits go to those entities that use their licenses to provide facilities-based services for the benefit of the public. The additional alternative proposed by parties of delaying the auction to allow further comment on the rules adopted in the *Designated Entity Second Report and Order* would constitute unreasonable delay in light of its statutory obligation to promote the development and rapid deployment of services for the benefit of the public. For all of these reasons, the Commission continues to believe that it has reasonably balanced the objectives set forth in section 309(j)(3) and that proceeding with the auction as scheduled would best serve the public interest.

B. Material Relationships

12. *Notice.* Certain parties argue that the Commission violated the Administrative Procedure Act by adopting the new material relationship rules. They contend, first, that the Commission failed to give sufficiently specific notice, and thus sufficient opportunity for comment, on the new restrictions on leasing and resale arrangements. Second, they argue that the Commission made certain aspects of the rules immediately effective without the requisite statutory notice. The Commission finds both claims unconvincing.

13. An agency is not required to adopt a final rule that is identical to the proposed rule. In fact agencies are encouraged to modify proposed rules as a result of the comments they received. As long as parties could have anticipated that the rules ultimately adopted was possible, it is considered a logical outgrowth of the original proposal, and there is no violation of the APA's notice requirements.

14. Applying these standards, it is clear that there was ample notice of the new material relationship rules in this case. The *FNPRM* emphasized the Commission's ongoing commitment to prevent companies from circumventing the objectives of the designated entity eligibility rules and to ensuring that its small business provisions are available only to bona fide small businesses. The Commission noted the concern raised in the record that those rules did not adequately prevent large corporations from structuring relationships in a manner that allows them to gain access to benefits reserved for small businesses. While the Commission tentatively proposed adoption of the parties rule, the Commission sought comment on whether other material relationships should trigger a restriction on the award of designated entity benefits. In the *FNPRM*, the Commission asked among other things whether limiting the prohibited material relationships to large incumbent wireless service providers or entities with significant interests in communications services would be sufficient to address any concerns that its designated entity program may be subject to potential abuse from larger corporate entities.

15. The *FNPRM* made clear that the Commission was considering several approaches to defining a material relationship and broadly sought comment on the specific nature of the relationship that should trigger such a restriction.

16. While parties claim that they had no notice that an arrangement such as lease or resale could constitute a material relationship, the *FNPRM* specifically contemplated it. The Commission noted that in its *Secondary Markets* proceeding, it had concluded that certain spectrum manager leases between a designated entity licensee and a non-designated entity lessee would cause the spectrum lessee to become an attributable affiliate of the licensee, thus rendering the licensee ineligible for designated entity benefits and making such a spectrum lease impermissible. The Commission then sought comment on whether it should follow a similar approach. Commenting parties clearly understood that the Commission was contemplating rule changes that would extend beyond material relationships with incumbent wireless carriers.

17. After reviewing the record, the Commission concluded that certain agreements between designated entities and others are generally inconsistent with Congress's legislative intent. Specifically, the Commission explained that where an agreement concerns the actual use of the designated entity's spectrum capacity, it is the agreement, as opposed to the party with whom it is entered into, that causes the relationship to be ripe for abuse and creates the potential for the relationship to impede a designated entity's ability to become a facilities-based provider, as intended by Congress. Accordingly, the Commission adopted rules in the *Designated Entity Second Report and Order* to limit the award of designated entity benefits to any applicant or licensee that has impermissible material relationships or an attributable material relationship created by agreements with one or more other entities for the lease or resale (including under a wholesale arrangement) of its spectrum capacity.

18. These rules were a logical outgrowth of the questions the Commission asked in the *FNPRM* and are well within the scope of the inquiry initiated there. The fact that the Commission elected to adopt a definition of material relationship that differed from that specifically proposed by one of the parties does not mean that the Commission failed to provide notice of the rule modifications it ultimately adopted.

19. The Commission disagrees with the contention by various parties that it made certain aspects of the rules immediately effective and finds that such an argument is based on a gross misreading of the rule. The reference to the date of the release in the new rule did not impose any consequences on parties immediately following the date of release. Rather, once the rules became effective—30 days after **Federal Register** publication—actions taken following the release might affect a party's status, but only if not undone in the period before the rule became effective. Thus, parties had the requisite period of notice to adjust in response to the new rule.

20. *Requests for General Clarification.* After releasing the *Designated Entity Second Report and Order,* Commission staff received a number of questions seeking general advice regarding how the Commission intended to implement its rule modifications. The Commission therefore clarifies how it will consider: (1) The meaning of spectrum capacity in the context of material relationships, (2) grandfathering, and (3) applicability of the rules to particular services.

21. *Material Relationships.* The Commission noted that a number of questions have been raised regarding how the Commission will evaluate impermissible and attributable material relationships for the purposes of determining eligibility for both designated entity benefits and the imposition of unjust enrichment. In the *Designated Entity Second Report and Order*, the Commission concluded that an applicant or licensee has impermissible material relationships when it has agreements with one or more other entities for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative basis,

more than 50 percent of the spectrum capacity of any individual license. The Commission decided that such impermissible material relationships would render the applicant or licensee (i) ineligible for the award of future designated entity benefits, and (ii) subject to unjust enrichment on a license-by-license basis. The Commission further concluded that an applicant or licensee has an attributable material relationship when it has one or more agreements with any individual entity, including entities and individuals attributable to that entity, for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including under a wholesale arrangement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license that is held by the applicant or licensee. The Commission decided that such an attributable material relationship would be attributed to the applicant or licensee for the purposes of determining the applicant's or licensee's (i) eligibility for future designated entity benefits, and (ii) liability for unjust enrichment on a license-by-license basis. As stated in the *Designated Entity Second Report and Order*, the Commission's policy is to assure that a designated entity preserves at least half of the spectrum capacity of each license for which the designated entity has been awarded and retained designated entity benefits in exchange for the provision of service as a facilities-based provider for the benefit of the public.

22. *Meaning of Spectrum Capacity.* In the *Order on Reconsideration,* the Commission also clarifies how it will measure compliance with the thresholds it adopted in its definitions of material relationships. The restrictions it adopted regarding impermissible and attributable material relationships require a designated entity to assess the percentage of its spectrum capacity that will be leased (under either spectrum manager or de facto transfer leasing arrangements) or subject to resale (including under a wholesale arrangement). In response to request for clarification, the Commission provides additional guidance on determining the percentage of a designated entity's spectrum capacity involved in lease or resale agreements.

23. The Commission observes, as an initial matter, that there are a number of ways spectrum capacity could be defined. It would be difficult for the Commission to enumerate every possible means by which a licensee could lease or make its spectrum capacity available to another party to resell. By adopting spectrum capacity as a measurement, the Commission sought to provide licensees with some flexibility to tailor their agreements to their business needs. The Commission is reluctant to employ only a single measure of spectrum capacity. Nevertheless, to assist designated entities as they evaluate secondary market transactions, the Commission clarifies that if they meet the spectrum capacity thresholds on an MHz* pops basis, the Commission will find them in compliance. The MHz* pops basis is consistent with the Commission's current method of apportioning unjust enrichment when licenses are partitioned and/or disaggregated and provides a meaningful measure here. However, while meeting the spectrum capacity thresholds on an MHz * pops basis is sufficient to comply with the Commission's rules, it is not the only means of compliance. In other words, any entity meeting the thresholds on an MHz* pops basis will be found in compliance, but entities not meeting the thresholds on an MHz* pops basis may also be found in compliance based on other factors. The MHz* pops measure is intended as a safe harbor; it is not meant to limit complying with the rules in other ways that the Commission cannot fully anticipate at this time. The Commission recognizes that its decision not to enumerate all other means of compliance necessarily leaves some uncertainty, but thinks that the MHz* pops safe harbor provides sufficient certainty while allowing licensees and the Commission flexibility to conduct a more contextual analysis.

24. *Grandfathering.* In the *Designated Entity Second Report and Order,* the Commission explained that it would not employ its new restrictions to reconsider the eligibility for any designated entity benefits that had been awarded to licensees prior to the April 25, 2006, release date of the decision or to determine eligibility for designated entity benefits in an application for a license, an authorization, or an assignment or transfer of control, or a spectrum lease that had been filed with the Commission before, and was still pending approval on, that date.

25. The Commission received a number of inquiries regarding how the Commission will consider future agreements that were agreed upon prior to the release date of its decision. The Commission therefore offers the following explanation: Agreements entered into by a designated entity—and, to the extent required, approved by or pending approval by the Commission—no later than April 24, 2006 that concern the lease or resale by the designated entity of its spectrum after the release date of the *Designated Entity Second Report and Order* are grandfathered for the purposes of existing eligibility benefits and the imposition of unjust enrichment to the extent that the designated entity has no discretion as to the future lease or resale. The applicability of grandfathering to the future lease or resale of spectrum in a pre-existing agreement depends on whether or not the provision was a ''done deal'' such that, prior to April 25, 2006, the decision to lease or to allow the resale of spectrum was no longer within the discretion of the designated entity.

26. *Applicability of Material Relationships Rules to Certain Services.* The Commission notes that there has also been some question about the applicability of the new material relationship rules with regard to agreements to lease spectrum in the 700 MHz Guard Band Manager Service and those other services not covered by the Commission's secondary market leasing policies. Consequently, the Commission clarifies that the new material relationship rules will apply only to those services in which leasing are permitted under the Commission's secondary markets rules.

C. Unjust Enrichment

27. *Notice.* Various parties argue that the Commission violated the Administrative Procedure Act by giving inadequate notice and opportunity for comment prior to adopting new unjust enrichment provisions. The Commission concludes that this claim is refuted by the plain language of the *FMPRM* and by the parties' own filings in response to it.

28. In the *FMPRM*, the Commission observed that the existing rules require the payment of unjust enrichment when an entity that acquires its license with small business benefits loses its eligibility for such benefits or transfers a license to another entity that is not eligible for the same level of benefits. The Commission also noted that a commenter had proposed extending this reimbursement obligation to any licensee that acquires a license with the help of a bidding credit but then makes a change in its material relationships or seeks to assign or transfer control of the license to an entity that would result in its loss of eligibility for the bidding credit pursuant to any eligibility restriction that the Commission adopt. According to the commenter strengthening the unjust enrichment rules was necessary to fulfill the Commission's statutory obligation to

prevent unjust enrichment. The *FMPRM* sought comment both on the commenter's specific proposal and on whether the Commission should seek to strengthen the unjust enrichment rules in some other manner. The Commission also asked a series of questions about the scope of the reimbursement obligation, seeking comment on whether it should be triggered only where the licensee takes on new investment or also when it enters into any new material financial relationship or material operational relationship that would have rendered the licensee ineligible for a bidding credit. Finally, while the Commission noted the commenter's proposal for a five-year reimbursement obligation, the Commission did not tentatively propose adopting it. Instead, it asked over what portion of the license term should the unjust enrichment provisions apply.

29. Notwithstanding the broad scope of the questions asked by the *FMPRM*, the commenter claims that parties had no notice that the Commission was contemplating any changes to its unjust enrichment rules. The *FMPRM* makes clear the Commission did not put itself in such a straitjacket, and it would have been unreasonable for any party to believe that the Commission had done so. Nowhere did the Commission say it would consider only a five-year reimbursement obligation or that it would artificially limit the rule changes only to relationships with particular entities. Indeed, the comments filed in response to the *FMPRM* demonstrate that parties did in fact understand the scope of the contemplated changes to the unjust enrichment rules.

30. The changes the Commission ultimately adopted to its unjust enrichment rules were clearly within the scope of the revisions contemplated by the *FMPRM* or, at a minimum, a logical outgrowth of them. Indeed, had the Commission only revised the five-year unjust enrichment schedule for certain types of transactions but not for others, the Commission would have risked creating an illogical scheme that would have created an incentive for designated entities to prioritize certain types of transactions over others. For all of these reasons, the Commission rejects the parties' APA notice claim.

31. *Impact of New Rules.* In the *Designated Entity Second Report and Order,* the Commission adopted changes to its unjust enrichment rules to ensure that designated entity benefits go to their only intended beneficiaries. The Commission agreed with commenters that the adoption of stricter unjust enrichment rules would increase the probability that the designated entity would develop into a competitive facilities-based service provider and deter speculation by those who do not intend to offer service to the public, or who intend to use bidding credits to obtain a license at a discount and later to sell it at the full market price for a windfall profit.

32. The Commission therefore modified its unjust enrichment rules to expand the unjust enrichment payment schedule from five to ten years. Further, the Commission required that it be reimbursed for the entire bidding credit amount owed if a designated entity loses its eligibility for a bidding credit prior to the filing of the applicable construction notifications. Specifically, the Commission adopted the following ten-year unjust enrichment schedule for licenses acquired with bidding credits. For the first five years of the license term, if a designated entity loses its eligibility for a bidding credit for any reason, including but not limited to, entering into an impermissible material relationship or an attributable material relationship, seeking to assign or transfer control of a license, or entering into a *de facto* transfer lease with an entity that does not qualify for bidding credits, 100 percent of the bidding credit, plus interest, is owed. For years six and seven of the license term, 75 percent of the bidding credit, plus interest, is owed. For years eight and nine, 50 percent of the bidding credit, plus interest, is owed, and for year ten, 25 percent of the bidding credit, plus interest, is owed. The Commission also imposed a requirement that the Commission must be reimbursed for the entire bidding credit amount owed, plus interest, if a designated entity loses its eligibility for a bidding credit for any reason, including but not limited to, entering into an impermissible material relationship or an attributable material relationship, seeking to assign or transfer control of a license, or entering into a *de facto* transfer lease with an entity that is not eligible for bidding credits prior to the filing of the notification informing the Commission that the construction requirements applicable at the end of the license term have been met.

33. Various parties assert that the new provisions will eliminate designated entities' access to capital and financing. For several reasons, these claims do not justify reconsideration of the recent rule changes. The parties assert that designated entities access to capital will be eliminated by the 10-year unjust enrichment payment schedule because private equity and other investors frequently adhere to three to seven year investment horizons, with five years being an accepted average. Given the Commission's recent finding that access to Educational Broadcast Service spectrum for longer than fifteen years is essential to attract the capital needed to deploy facilities for spectrum based services, the Commission is not convinced that the appropriate investment horizon for designated entity status should be only three to seven years. Designated entity benefits are offered to ensure that small businesses have an opportunity to participate in the provision of spectrum-based services, not to ensure the short-term exit strategies of parties providing capital. The Commission strengthened its rules to ensure that those that receive such benefits were properly motivated to build out their spectrum and provide services for the benefit of the public by closing off the opportunity to sell licenses awarded with bidding credits for huge profits without ever having to provide actual facilities-based services. Predictions regarding the new rules' effect on venture capital alone are not a basis for reconsidering the rules.

34. In the *Order on Reconsideration,* the Commission noted that even if some sources of financing and capital would no longer be available on the same terms as before, the adoption of new rules is not arbitrary and capricious, or otherwise contrary to law. The Commission must balance the various statutory objectives of Section 309(j), and based on the record in response to the *FMPRM* and many years of experience, the Commission found that the new unjust enrichment rules are necessary to increase the probability that designated entities will develop into facilities-based providers of service for the benefit of the public. It is neither the Commission's statutory responsibility nor its intent merely to provide small businesses with generalized economic opportunities in connection with spectrum licenses. The Commission has not been charged with providing entities with a path to financial success, but rather with an obligation to facilitate opportunities for small businesses to provide spectrum based services to the public. Therefore, it is the Commission's responsibility to create strong incentives for designated entities to use spectrum to provide facilities-based service to the public instead of holding their licenses and selling them for profit. The Commission concluded that it believes that its new rules create appropriate incentives in this regard while still affording designated entities the opportunity to achieve financial success by providing service to the public. It is important to

remember that designated entities are provided with bidding credits in order to enable them to obtain spectrum and then provide facilities-based service to the public. To the extent that they do not do so, but instead sell their licenses to others in the marketplace at market prices, the Commission believes that it is reasonable that they no longer be allowed to enjoy the benefit of obtaining spectrum at below-market prices.

35. *Clarification.* In the *Order on Reconsideration,* the Commission clarifies its statement in the *Designated Entity Second Report and Order* that retroactive penalties will not be imposed on pre-existing designated entities. Specifically, the Commission clarifies that the newly-adopted ten-year unjust enrichment schedule applies only to licenses that are granted after the release of the *Designated Entity Second Report and Order.* Likewise, the requirement that the Commission be reimbursed for the entire bidding credit amount owed if a designated entity loses its eligibility for a bidding credit prior to the filing of the notifications informing the Commission that the construction requirements applicable at the end of the license term have been met applies only to those licenses that are granted on or after the April 25, 2006 release date of the *Designated Entity Second Report and Order.* The Commission also makes corresponding corrections to section 1.2111 of its rules.

D. Review of Agreements, Annual Reporting Requirements, and Audits

36. In the *Order on Reconsideration,* the Commission also clarifies and emphasizes certain aspects of section 1.2114, its newly-adopted rule relating to reportable eligibility events. As the rule expressly states, a designated entity must seek Commission approval for all reportable eligibility events. In the *Designated Entity Second Report and Order,* the Commission emphasizes that section 1.2114 requires prior Commission approval for a reportable eligibility event. The Commission also clarifies that a reportable eligibility event includes any event that might affect a designated entity's ongoing eligibility, under either its material relationship or controlling interest standards, and it corrects new section 1.2114(a) accordingly. Although the Commission affirms that it has delegated authority to the Wireless Telecommunications Bureau (Bureau) to implement its rule changes on reporting, the Commission anticipates that the Bureau's procedures will provide the means by which parties will apply for approval of all such arrangements. Such approval may require modifications to the terms of the parties' arrangements or unjust enrichment payments based on the impact of such arrangements on designated entity eligibility. The Commission also affirms its conclusions in the *Designated Entity Second Report and Order* with regard to the implementation of its regulations relating to the review of long-form applications and agreements to determine designated entity eligibility under the controlling interest standard. The Commission also affirms its event-based and annual reporting requirements as well as its commitment to audit the eligibility of every designated entity that wins a license in the AWS auction at least once during the initial term.

E. Regulatory Flexibility Act

37. In the *Order on Reconsideration,* the Commission disagrees with the claims of the various parties that its recently adopted rules violate the Regulatory Flexibility Act (RFA). Among other things, the parties assert that the Commission failed to provide adequate notice in the Initial Regulatory Flexibility Analysis (IRFA) about the scope of the proposed rules, their application to current designated entity licensees, or the ten-year unjust enrichment schedule for licenses acquired with bidding credits. The Commission notes as an initial matter that the IRFA is not subject to judicial review. Section 611 of the RFA expressly prohibits courts from considering claims of non-compliance with the initial regulatory flexibility analysis requirement of RFA section 603. Moreover, the parties have not articulated the legal basis for their claim that a purported lack of notice constitutes an independent violation of the RFA. In any case, the Commission has demonstrated above that the *FNPRM* provided ample notice of the possible rules changes at issue. For the same reason, any claim about the sufficiency of the Final Regulatory Flexibility Analysis (FRFA) based on charges of inadequate notice of lack of opportunity of comment is also without merit.

38. The Commission also disagrees with the claims of the various parties that the Commission failed to describe significant alternatives to the rules it adopted in order to minimize any significant economic impact on small entities as required by the RFA. The Final Regulatory Flexibility Analysis (FRFA) in the *Designated Entity Second Report and Order* referred to the substantive part of the Order, which discussed in great depth the impact of the rules on small businesses, alternatives considered, and why the Commission adopted the rules at issue. Reiteration of the discussion of the impact on small businesses in the FRFA is not required by the RFA and such reiteration would have been repetitive here, as analyses of alternatives related to small businesses infuse the decision. In adopting the Commission's rule modifications to better achieve Congress's plan, the Commission fully explained that it was finding a reasonable balance between the competing goals of first, providing designated entities with reasonable flexibility in being able to obtain needed financing from investors and, second, ensuring that the rules effectively prevent entities ineligible for designated entity benefits from circumventing the intent of the rules by obtaining those benefits indirectly, through their investments in qualified businesses. Consistent with previous changes the Commission has made to its designated entity rules, the rule modifications at issue were the result of trying to maintain this balance in the face of a rapidly evolving telecommunications industry, legislative changes, judicial decisions, and the demand of the public for greater access to wireless services. Consequently, the Commission believes that its analysis fully complied with the requirements of the RFA.

IV. Conclusion

39. For all of the reasons set forth in the *Order on Reconsideration* the Commission clarifies certain aspects of the *Second Report and Order* as well as its rules for determining the eligibility of applicants for size-based benefits in the context of competitive bidding.

V. Procedural Matters

A. Paperwork Reduction Act Analysis

40. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198.

B. Congressional Review Act

41. The Commission will include a copy of the *Order on Reconsideration of the Second Report and Order* in a report it will send to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

C. Effective Date

42. The *Order on Reconsideration of the Second Report and Order* and the accompanying rule changes are effective upon publication in the **Federal Register**. The Commission finds there is good cause under section 553(d)(3) of the Administrative Procedure Act to make the changes it implements with this Order effective upon **Federal Register** publication, without the usual 30-day period, because these changes (with the possible exception of those concerning the unjust enrichment rules) constitute minor points of clarification of the rules adopted in the *Designated Entity Second Report and Order*, which were published in the **Federal Register** on May 4, 2006, 71 FR 26245. As to the clarifying changes in the Commission's unjust enrichment rules, these changes, at most, serve to ''grant[ ] or recognize[ ] an exemption or relieve[ ] a restriction'' and would therefore fall within the exception contained in section 553(d)(1).

D. Ordering Clause

43. *It is ordered* that pursuant to the authority granted in sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(b), 155(c)(1), 303(r), and 309(j), the *Order on Reconsideration of the Second Report and Order*, is hereby ADOPTED and part 1, subpart Q of the Commission's rules are amended as set forth in the rule changes, effective June 14, 2006.

List of Subjects in 47 CFR Part 1

Administrative practice and procedures, Auctions, Licensing, Telecommunications.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 as follows:

PART 1—PRACTICE AND PROCEDURE

■ For the reasons discussed in the preamble, the FCC amends part 1 of the Code of Federal Regulations to read as follows:

■ 1. The authority citation for part 1 continues to read as follows:

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309.

■ 2. Revise paragraphs (a), (b) introductory text, (d)(2)(i) introductory text, (d)(2)(ii) and by adding paragraph (d)(2)(iii) to § 1.2111 to read as follows:

§ 1.2111 Assignment or transfer of control: unjust enrichment.

(a) *Reporting requirement.* An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's rules) of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission a statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the local consideration that the applicant would receive in return for the transfer or assignment of its license (see § 1.948). This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (*e.g.*, management or consulting contracts either with or without an option to purchase; below market financing).

(b) *Unjust enrichment payment: set-aside.* As specified in this paragraph an applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's rules) of, or for entry into a material relationship (see §§ 1.2110, 1.2114) (otherwise permitted under the Commission's rules) involving, a license acquired by the applicant pursuant to a set-aside for eligible designated entities under § 1.2110(c), or which proposes to take any other action relating to ownership or control that will result in loss of eligibility as a designated entity, must seek Commission approval and may be required to make an unjust enrichment payment (Payment) to the Commission by cashier's check or wire transfer before consent will be granted. The Payment will be based upon a schedule that will take account of the term of the license, any applicable construction benchmarks, and the estimated value of the set-aside benefit, which will be calculated as the difference between the amount paid by the designated entity for the license and the value of comparable non-set-aside license in the free market at the time of the auction. The Commission will establish the amount of the Payment and the burden will be on the applicants to disprove this amount. No Payment will be required if:

* * * * *

(d) * * *

(2) * * *

(i) For licenses initially granted after April 25, 2006, the amount of payments made pursuant to paragraph (d)(1) of this section will be 100 percent of the value of the bidding credit prior to the filing of the notification informing the Commission that the construction requirements applicable at the end of the initial license term have been met. If the notification informing the Commission that the construction requirements applicable at the end of the initial license term have been met, the amount of the payments will be reduced over time as follows:

* * * * *

(ii) For licenses initially granted before April 25, 2006, the amount of payments made pursuant to paragraph (d)(1) of this section will be reduced over time as follows:

(A) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible);

(B) A transfer in year 3 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit;

(C) A transfer in year 4 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit;

(D) A transfer in year 5 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit; and

(E) For a transfer in year 6 or thereafter, there will be no payment.

(iii) These payments will have to be paid to the United States Treasury as a condition of approval of the assignment, transfer, ownership change, or reportable eligibility event (see § 1.2114).

* * * * *

3. Revise paragraph (a)(1) of § 1.2114 to read as follows:

§ 1.2114 Reporting of Eligibility Event.

(a) * * *

(1) Any spectrum lease (as defined in § 1.9003) or resale arrangement (including wholesale agreements) with one entity or on a cumulative basis that might cause a licensee to lose eligibility for installment payments, a set-aside license, or a bidding credit (or for a particular level of bidding credit) under

§ 1.2110 and applicable service-specific rules.

* * * * *

[FR Doc. E6–9275 Filed 6–13–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–1073]

Radio Broadcasting Services; Columbia, MO

AGENCY: Federal Communications Commission.

ACTION: Final rule; denial of petition for reconsideration.

SUMMARY: This document denies a Petition for Reconsideration filed by The Curators of the University of Missouri directed at a staff letter action in this proceeding, which dismissed the Petition for Rulemaking requesting the reservation of vacant FM Channel 252C2 at Columbia, Missouri for noncommercial educational use. With this action, the proceeding is terminated.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Memorandum Opinion and Order*, adopted May 24, 2006, and released May 26, 2006. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals 2, CY–A257, 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *http://www/BCPIWEB.com*. The Commission will not send a copy of this *Memorandum Opinion and Order* pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because the aforementioned petition for reconsideration was denied.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 06–5227 Filed 6–13–06; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–1076; MB Docket No. 05–121; RM–11197]

Radio Broadcasting Services; Knightdale and Wilson, NC

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document grants a petition filed by Capstar TX Limited Partnership, licensee of Station WRDU(FM), Channel 291C0, Wilson, North Carolina, requesting the reallotment of Channel 291C0 from Wilson to Knightdale, as its first local service, and modification of the Station WRDU(FM) license to reflect the change. Channel 291C0 can be reallotted to Knightdale, using reference coordinates 35–47–50 NL and 78–22–15 WL, which requires a site restriction of 10 kilometers (6.2 miles) east of the community to avoid short-spacings to the license sites of Station WFJA(FM), Channel 288A, Sanford, North Carolina and Station WMNA–FM, Channel 292A, Gretna, Virginia.

DATES: Effective July 10, 2006.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* MB Docket No. 05–121, adopted May 24, 2006, and released May 26, 2006. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Information Center, 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

On April 10, 2003, Station WRDU(FM) was granted a license to specify operation on Channel 291C0 in lieu of Channel 291C at Wilson, North Carolina. *See* File No. BLH–20020607AAR.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under North Carolina, is amended by adding Knightdale, Channel 291C0 and by removing Wilson, Channel 291C.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E6–9073 Filed 6–13–06; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–1054; MB Docket No. 05–5; RM–11139]

Radio Broadcasting Services; Morro Bay and Oceano, CA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: At the request of Lazer Broadcasting Corporation, licensee of Station KLMM(FM), Morro Bay, California, this document reallots Channel 231A from Morro Bay to Oceano, California, as the community's first local transmission service, and modifies the license for Station KLMM(FM) to reflect the new community. Channel 231A is reallotted at Oceano at a site 12.4 kilometers (7.7 miles) south of the community at coordinates 34–59–20 NL and 120–37–56 WL.

DATES: Effective July 3, 2006.

ADDRESSES: Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Victoria M. McCauley, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order,* MB Docket No. 05–5, adopted May 17, 2006, and released