



Federal Communications Commission
Washington, D.C. 20554

May 16, 2012

DA 12-741

Small Entity Compliance Guide

Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures

FCC 11-28
MB Docket No. 09-52

This Guide is prepared in accordance with the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities—small businesses, small organizations (non-profits), and small governmental jurisdictions—comply with the new rules adopted in the above-referenced FCC rulemaking docket(s). This Guide is not intended to replace the rules and, therefore, final authority rests solely with the rules. Although we have attempted to cover all parts of the rules that might be especially important to small entities, the coverage may not be exhaustive. This Guide may, perhaps, not apply in a particular situation based upon the circumstances, and the FCC retains the discretion to adopt approaches on a case-by-case basis that may differ from this Guide, where appropriate. Any decisions regarding a particular small entity will be based on the statute and regulations.

In any civil or administrative action against a small entity for a violation of rules, the content of the Small Entity Compliance Guide may be considered as evidence of the reasonableness or appropriateness of proposed fines, penalties or damages. Interested parties are free to file comments regarding this Guide and the appropriateness of its application to a particular situation; the FCC will consider whether the recommendations or interpretations in the Guide are appropriate in that situation. The FCC may decide to revise this Guide without public notice to reflect changes in the FCC's approach to implementing a rule, or to clarify or update the text of the Guide. Direct your comments and recommendations, or calls for further assistance, to the FCC's Consumer Center:

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Decision Document and Internet Link

- *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, FCC 11-28, 26 FCC Rcd 2556 (2011); 76 Fed. Reg. 14362 (Mar. 16, 2011) (Second Further Notice of Proposed Rule Making); 76 Fed. Reg. 18942 (April 6, 2011) (Second Report and Order, First Order on Reconsideration); http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0303/FCC-11-28A1.doc (Word); http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0303/FCC-11-28A1.pdf (Acrobat).

Background

- As part of the Commission's commitment to diversity of ownership and programming, as well as the federal government's obligation to assist Tribes in preserving their cultures and languages, and to promote tribal self-government, the Commission proposed a Tribal Priority under Section 307(b) of the Communications Act ("Section 307(b)"), which compels the Commission to distribute radio service in a fair, efficient, and equitable manner. The Tribal Priority was designed to assist Tribes and tribal entities that propose primarily to serve tribal lands and populations in obtaining new radio stations. The proposed Tribal Priority addresses the marked imbalance in the tribal population of the United States and the area of tribal lands, versus the number and reach of tribal-owned radio stations to serve these populations. On February 3, 2010, the Commission released a *First Report and Order* (25 FCC Rcd 1583 (2010)) adopting rules that establish the Tribal Priority for federally recognized Native American Tribes and Alaska Native Villages ("Tribes"), tribal consortia, and entities that are majority owned or controlled by Tribes. In the *Second Report and Order and First Order on Reconsideration*, the Commission enhanced the Tribal Priority, making it available to even more Tribes, especially those without tribal lands or with tribal lands too small or irregularly shaped to qualify under the coverage provisions of the Tribal Priority as originally adopted.
- In the *Notice of Proposed Rule Making* in this proceeding (24 FCC Rcd 5239 (2009)), the Commission also expressed concern that the auction and allotment processes, used to implement Section 307(b), have resulted in a disproportionate number of awards of new radio service to large, well-served urbanized areas, and that moreover our channel allotment policies have resulted in a large number of radio stations moving from rural and smaller communities to urbanized areas or adjacent to them. In the *Second Report and Order*, the Commission established a rebuttable presumption that an FM allotment or AM new station proponent seeking to locate at a community in an urbanized area, or that would cover or could be modified to cover more than 50 percent of an urbanized area, was in fact proposing a service to the entire urbanized area, and accordingly would not award such an applicant a preference for providing first local transmission service absent a compelling showing (1) that the proposed community is truly independent of the urbanized area, (2) of the community's specific need for an outlet for local expression separate from the urbanized area, and (3) of the proposed station's ability to provide that outlet. The Commission made other changes to assignment and allotment policies, including policies favoring new or relocated service to underserved areas (those receiving five or fewer radio services), and requiring more specificity regarding the claimed public interest benefits of changes to a station's community of license.

Key Objectives of Proceeding

- Authorize and implement the Tribal Priority.

- Amend, codify, and clarify certain assignment, allotment, and auction policies and procedures, in particular, limiting the award of dispositive preferences to applicants for new AM broadcast stations, and requiring more detailed showings by applicants proposing new or relocated broadcast service in and near urbanized areas, in order to maintain existing service, and provide for new service, to rural and smaller communities.

Entities Directly Affected by the Rule

- Federally recognized Native American Tribes and Alaska Native Villages and their citizens
- Applicants for AM, FM, Noncommercial Educational (“NCE”) FM radio stations
- AM, FM, NCE FM radio broadcasters
- Proponents of new allotments in the non-reserved FM broadcast band

Key Compliance Requirements

- **Tribal Priority.** To qualify for the Tribal Priority, as modified by the Commission in the *Second Report and Order and First Order on Reconsideration*, an applicant must demonstrate that it meets all of the following eligibility criteria:

- (1) the applicant is either a federally recognized Tribe or tribal consortium, or an entity 51 percent or more of which is owned or controlled by a Tribe or Tribes. Qualifying Tribes or tribal entities must be those at least a portion of whose tribal lands lie within the principal community contour of the proposed facility. Although the 51 or greater percent Tribal control threshold need not consist of a single Tribe, the qualifying entity must be 51 percent or more owned or controlled by Tribes at least a portion of whose tribal lands lie within the facility’s principal community contour;
- (2) (a) at least 50 percent of the area within the proposed station’s daytime principal community contour is over that Tribe’s Tribal Lands, or (b) the proposed principal community contour (i) encompasses 50 percent or more of that Tribe’s Tribal Lands, (ii) serves at least 2,000 people living on Tribal Lands, and (iii) the total population on Tribal Lands residing within the station’s service contour constitutes at least 50 percent of the total covered population. In neither (a) nor (b) may the applicant claim the priority if the proposed principal community contour would cover more than 50 percent of the Tribal Lands of a non-applicant Tribe.
(To the extent that a Tribe lacks Tribal Lands, the Commission will be receptive to requests for waiver of the above-listed tribal land coverage provisions that demonstrate a geographic area identified with the Tribe. Likewise, the Commission will entertain requests for waiver of the other requirements where appropriate);
- (3) the proposed community of license must be located on tribal lands; and
- (4) the tribal applicant must propose first or second aural (reception) service, or first local tribal-owned transmission service at the proposed community of license, in the case of a proposed commercial facility. The tribal applicant must propose at least a first local tribal-owned noncommercial educational transmission service, in the case of a proposed NCE facility.

- In the event that two or more applicants claiming the Tribal Priority are mutually exclusive, the one providing the highest level of service to the greatest population will prevail. The Tribal

Priority ranks between the current Priority (1) and co-equal Priorities (2) and (3) in the case of commercial applicants. Thus, the Tribal Priority will not take precedence over a proposal to provide first reception service to a greater than *de minimis* population, but will take precedence over the provision of second local reception service, or over a proposal for first local non-tribal owned transmission service. Likewise, an NCE applicant qualifying for the Tribal Priority will take precedence over all mutually exclusive applications, except an applicant proposing *bona fide* first aural reception service to a greater than *de minimis* population.

- The Tribal Priority will be applied at the allotment stage of the commercial FM licensing procedures; to commercial AM applications filed during an AM filing window, as part of the threshold Section 307(b) analysis; and to applications filed in an NCE FM filing window as the first part of the fair distribution analysis. NCE applicants must also meet all NCE eligibility and licensing requirements.
- Holding period restrictions, commencing with the award of a construction permit until the completion of four years of on-air operation, will apply to any authorization or allotment awarded pursuant to the Tribal Priority. In the case of an AM or NCE FM authorization awarded to a tribal applicant, the permittee/licensee will be prohibited during this period from making: (1) any change that would lower tribal ownership below the 51 percent threshold; (2) a change of community of license; or (3) a technical change that would cause less than 50 percent of the principal community contour to cover tribal lands. However, gradual changes in the composition of an NCE board that do not change the nature of the organization or break continuity of control will not violate the four-year holding period restrictions. Also, we will allow assignments or transfers within the four-year holding period, provided that the assignee/transferee also qualifies for the Tribal Priority in all respects. In the case of a commercial FM allotment, the restrictions will apply only to any proposed change of community of license or technical change as described above. The winner at auction of an FM allotment added to the Table of Allotments under a Tribal Priority, whether the winning bidder is Tribal or non-Tribal, must still provide broadcast service primarily to tribal lands for the entire four-year holding period.
- **Rural Radio – Section 307(b).** The analysis of applications and proposals under Section 307(b) was modified by the Commission in the *Second Report and Order*, with particular attention paid to applications to establish new service in or near urbanized areas, when mutually exclusive with applications for new service to rural or smaller communities, as well as applications to move existing stations from rural and smaller communities to urbanized areas. The Commission outlined new procedures in three related but distinct situations: applications for new AM stations, proposals for new commercial FM allotments, and applications to change the community of license of an existing station.

- *Applications for new AM stations.* Priority (3) (first local transmission service). With regard to proposals for first local transmission service under Priority (3), any new AM station proposal for a community located within an urbanized area, that would place a daytime principal community signal over 50 percent or more of an urbanized area, or that could be modified to provide such coverage, will be presumed to be a proposal to serve the entire urbanized area rather than the proposed community (the “urbanized area service presumption”). This is a slightly modified version of the same standard previously used in determining whether an applicant for a new AM station must provide a showing under *Faye and Richard Tuck* (3 FCC Rcd 5374, 5376 (1988)). The determination of whether a proposed facility “could be modified” to cover 50 percent or more of an urbanized area will be limited to a consideration of rule-compliant minor modifications to the proposal, without changing the proposed antenna configuration or

site, and also limited to spectrum availability as of the close of the filing window. An applicant can rebut the urbanized area service presumption by making a compelling showing (1) that the proposed community is truly independent of the urbanized area, (2) of the community's specific need for an outlet for local expression separate from the urbanized area and (3) the ability of the proposed station to provide that outlet. The required compelling showing may be based on the existing three-pronged *Tuck* test. However, the eight-part test of independence, which is the third prong of the *Tuck* test, will be more rigorously scrutinized than has sometimes been the case in the past. For example, an applicant should submit actual evidence of the number of local residents who work in the community, not merely extrapolations from commute times or observations that there are businesses where local residents could work if they so chose. Similarly, the record should include actual evidence that the community's residents perceive themselves as separate and distinct from the urbanized area, rather than merely self-serving statements to that effect from town officials or business leaders. Moreover, certain of the *Tuck* independence factors have become increasingly anachronistic, and accordingly will not be given as much weight. For example, as local telephone companies have started to discontinue routine distribution of telephone directories, factor five is less meaningful than it once was. Similarly, with the closing of even major city newspapers, the lack of a local newspaper should not necessarily be fatal to a finding of independence, though it is still a relevant factor. The mere existence of a city- or town-posted site on the World Wide Web, however, is not a substitute for evidence of independent media also covering a community, as a means of demonstrating a community's independence from an urbanized area. In addition to demonstrating independence, a compelling showing sufficient to rebut the urbanized area service presumption must also include evidence of the community's need for an outlet for local expression. For example, an applicant may rely on factors such as the community's rate of growth; the existence of substantial local government necessitating coverage; and/or physical, geographical, or cultural barriers separating the community from the remainder of the urbanized area. An applicant will be afforded wide latitude in attempting to overcome the presumption, but a compelling showing will be required. Pursuant to Sections 73.3571(k)(2) and 73.3571(k)(3) of the Commission's Rules (47 C.F.R. § 73.3571(k)(2)-(3)), an AM applicant, licensee, or permittee that receives a dispositive preference under Priority (3) will be prohibited from changing its community of license for a period of four years of on-air operations.

- Priority (4) (other public interest matters). With regard to proposals to be compared under Priority (4), other public interest matters, a new AM applicant proposing third, fourth, and/or fifth reception service to at least 25 percent of the population in the proposed primary service area, as defined in Section 73.182(d) of the Commission's Rules (47 C.F.R. § 182(d)),¹ where the proposed community of license has two or fewer local transmission services, may receive a dispositive Section 307(b) preference under Priority (4). For purposes of this analysis, "community of license" will be considered to be the entire urbanized area if the proposed community of license is subject to the urbanized area service presumption set forth above. Alternatively, the Commission will allow, but not require, new AM applicants not meeting the above-stated 25 percent / two transmission service standard to submit a Service Value Index ("SVI") showing, as set

¹ Pursuant to this rule section, the signal strength required for primary groundwave service is 0.5 mV/m for communities under 2,500 population, and 2.0 mV/m for communities of 2,500 or more. Consequently, communities with populations of 2,500 or more, situated between the 2.0 mV/m and 0.5 mV/m groundwave contours, are not considered to receive service from the AM station or proposal in question.

forth in the case of *Greenup, Kentucky and Athens, Ohio*, Memorandum Opinion and Order, 6 FCC Rcd 1493, 1495 (1991) (“*Greenup*”), in order to receive a dispositive preference under Priority (4). An applicant opting to present a *Greenup* analysis must demonstrate a 30 percent differential in SVI between its proposal and the next-highest ranking proposal before we will award a dispositive Section 307(b) preference under Priority (4). Except for the two types of showings outlined herein, dispositive Section 307(b) preferences will not be granted under Priority (4). An applicant receiving a dispositive Section 307(b) preference under Priority (4) will, of course, be subject to the prohibition on reducing service set forth in Section 73.3571(k)(i) of the Commission’s Rules (47 C.F.R. § 73.3571(k)(i)). These procedures will apply to applications filed in future new and major modification AM filing windows, but will not apply to pending applications filed in the 2004 filing window for AM Auction 84.

- Proposals for FM allotments. Priority (3) (first local transmission service). When submitting a proposal for a new allotment in the FM Table of Allotments (47 C.F.R. § 73.202), the same urbanized area service presumption as set forth under “Applications for new AM stations,” above, will apply. The determination of whether a proposed facility “could be modified” to cover 50 percent or more of an urbanized area will be made based on an applicant’s certification that there are no existing towers in the area to which, at the time of filing, the applicant’s antenna could be relocated pursuant to a minor modification application to serve 50 percent or more of an Urbanized Area. Specifically, a proponent will need to certify that there could be no rule-compliant minor modification on the proposed channel to provide a principal community signal over 50 percent or more of an Urbanized Area, in addition to covering the proposed community of license. In doing so, proponents must consider all existing registered towers in the Commission’s Antenna Structure Registration database, in addition to any unregistered towers currently used by licensed radio stations. Furthermore, applicants and allotment proponents must consider widely-used techniques, such as directional antennas and contour protection, when certifying that the proposal could not be modified to provide a principal community signal over the community of license and 50 percent or more of an Urbanized Area. The Commission will treat such a showing as establishing a rebuttable presumption of an allotment that could not be modified to serve both the majority of an Urbanized Area and the community of license.

- Priority (4) (other public interest matters). If a proposal does not qualify for a first local transmission service preference, the staff will accord greater weight to proposals to provide third, fourth, and/or fifth reception service to more than a *de minimis* population than is currently the case, and will accord greater weight to such proposals than to simple differences in raw population totals. Raw population total differentials will be considered only after other Priority (4) factors that a proponent might present, including the number of reception services available to the proposed communities and reception areas, population trends in the proposed communities of license/reception areas, and/or number of transmission services at the respective communities. Because it is impossible to anticipate every possible competing allotment proposal, any factor, including reception population, may be considered when determining dispositive Section 307(b) preferences in the FM allotment context. However, of all considerations in making new FM allotments, raw reception population totals – of whatever magnitude – will receive less weight than other legitimate service-based considerations. These procedures shall not apply to any non-final FM allotment proceeding as of March 3, 2011, including “hybrid” coordinated application/allotment proceedings, in which the Commission has modified a radio station license or granted a construction permit. Except for these proceedings, the

revised procedures will apply to all pending petitions to amend the FM Table of Allotments, and to all other open FM allotment proceedings and non-final FM allotment orders.

- Proposals to change community of license. Priority (3) (first local transmission service). The Commission will apply the urbanized area service presumption outlined above. The presumption may be rebutted in the same manner as set forth under “Applications for new AM stations,” above, and will be subject to the same determinations, described in “Applications for new AM stations” and “Proposals for FM allotments,” above, as to whether the proposed facility could be modified to cover over 50 percent of an urbanized area.

- Priority (4) (other public interest matters). The Commission will impose an absolute bar to any facility modification that would create white or gray area (that is, would leave a population with no reception services or only one reception service). The Commission will also strongly disfavor any change of community of license that would result in the net loss of third, fourth, or fifth reception service to more than 15 percent of the population in the station’s current protected contour. Additionally, the Commission will strongly disfavor any proposed removal of a second local transmission service from a community with a population of 7,500 or greater, when determining whether a proposed community of license change represents a preferential arrangement of allotments or assignments. Applicants must not only set forth the size of the populations gaining and losing service under their proposals, but must also state the numbers of services those populations will receive if the application is granted, and explain how the proposal advances the revised Section 307(b) priorities. For example, an applicant will not only be required to detail that it is providing 500,000 listeners with a 21st reception service, and removing the sixth reception service from 50,000 listeners, but also to provide a rationale to explain how this service change represents a preferential arrangement of allotments or assignments.² Finally, under Priority (4) applicants may offer any other information they believe to be pertinent to a public interest showing, including the need for further transmission service at the new community, a drop in population justifying the removal of transmission service at the old community, population growth in areas surrounding the proposed new community that can best be met by a centrally located service, or any other changes in circumstance believed relevant to our consideration. These procedures shall apply to any applications to change community of license that are pending as of March 3, 2011.

- **Other Policies and Procedures.** Applications by FM translator stations to move into the reserved band from the non-reserved band, or to move into the non-reserved band from the reserved band, may only be filed by FM translator stations that have filed license applications or are licensed, and that have been operating for at least two years. This prohibition was proposed

² Such explanation need not be a granular accounting of the reception service provided each individual or population pocket in the proposed contour. A detailed summary should suffice, for example, to point out that 50,000 people would receive 20 or more services, 10,000 would receive between 15 and 20 services, 7,000 would receive between 10 and 15 services, etc. The showing should, however, state what service the modified facility would represent to the majority of the population gaining new service, e.g., the 16th service to 58 percent of the population, and the corresponding service that the majority of the population losing service would lose, e.g., 60 percent of the current coverage population would lose the ninth reception service. An applicant should detail new service or service losses to underserved listeners.

in order to prevent certain translator licensees from, for example, filing minor modification applications to move from the non-reserved band to the reserved band, thus taking advantage of the relaxed signal-delivery rules for reserved band translators. The Commission concluded that the filing of such “band-hopping” applications by FM translator stations prior to construction of their facilities wastes staff resources, and potentially precludes the use of those frequencies in future reserved band filing windows for FM translators. This prohibition is now codified at Section 74.1233 of the Commission’s Rules (47 C.F.R. 74.1233).

- The Commission codified the decision in *Nelson Enterprises, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 3414 (2003) (“*Nelson*”), by explicitly providing that the AM nighttime interference standards set forth in Section 73.182(k) of the Commission’s Rules (47 C.F.R. § 73.182(k)) are applicable in determining nighttime mutual exclusivity between applications to provide AM service that are filed in the same window. Section 73.182(k) states that, with respect to the root-sum-square (“RSS”) values of interfering field strengths referred to in that rule section, calculation of nighttime interference-free service is accomplished by considering the signals on the three channels of concern (co-channel and first adjacent channels on either side of the channel of the station being considered) in order of decreasing magnitude, adding the squares of the values and extracting the square root of the sum, excluding those signals which are less than 50 percent of the RSS values of the higher signals already included. The staff will consider two applications to be mutually exclusive if either would be subject to dismissal because it would enter the 25 percent exclusion RSS nighttime limit of the other. The Commission determined that application of these interference standards to new AM proposals will promote the strict interference standard that the Commission determined necessary to revitalize the AM service. This standard is codified as a Note to Section 73.3571 of the Rules (47 C.F.R. § 73.3571).

Licensing:

- Electronic Filing Required: FCC Forms 301, 314, 315, 316, and 340 must still be filed electronically using the Commission’s Consolidated Database System (“CDBS”) Electronic Filing System via the Internet from the Media Bureau’s Web site at: <http://www.fcc.gov/mb/cdbs.html> or http://fjallfoss.fcc.gov/prod/cdbs/forms/prod/cdbs_ef.htm.
- FCC Form 175 must be filed electronically using the Commission’s Integrated Spectrum Auction System (“ISAS”). Filing instructions are provided in pre-auction Public Notices.
- Tribes, tribal consortia, and tribal-owned or controlled entities wishing to apply for noncommercial educational FM broadcast stations in the reserved band, and that wish to employ the Tribal Priority, must use FCC Form 340, which has been modified to include questions regarding eligibility to claim the Tribal Priority.
- Tribes, tribal consortia, and tribal-owned or controlled entities wishing to apply for commercial AM broadcast stations will continue to use FCC Form 175 for their applications. They will claim eligibility for the Tribal Priority when instructed to submit Section 307(b) information, if applicable.
- Tribes, tribal consortia, and tribal-owned or controlled entities wishing to petition to add FM allotments to the Table of Allotments (Section 73.202(b) of the Rules) will continue to do so by submitting Petitions for Rule Making seeking to add an FM allotment. They will claim eligibility for the Tribal Priority in the Petition for Rule Making.