PUBLIC NOTICE

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MEDIA BUREAU PROVIDES FURTHER GUIDANCE ON THE PROCESSING OF FORM 318 APPLICATIONS FILED IN THE LPFM WINDOW

This Public Notice responds to many inquiries to the Media Bureau (Bureau) regarding the Form 318 applications for new low power FM (LPFM) stations filed in the recently closed window. It provides information on the processing of singleton and mutually exclusive applications; applicants' ability to file amendments, settlements, and time-share agreements; opportunities to file petitions to deny; and options to seek the reinstatement of dismissed applications.

Applications filed in the October 15 – November 14, 2013, filing window: The Bureau received over 2800 Form 318 applications. This includes 21 applications for major modifications of authorized LPFM stations. The states with the greatest number of filings are: Texas (303); California (283); Florida (276): Oregon (91); Georgia (81); and Washington (81). Cities in which 10 or more applications were filed include Los Angeles, Chicago, San Francisco, Houston, Miami, Tampa and Portland, Oregon.

The processing of the Form 318 applications will occur in the following manner (discussed more fully below):

- The Bureau's first priority is the identification of acceptable singleton applications.
- Later this month, the Bureau will release a Public Notice identifying the mutually exclusive application groups.
- Effective with the release of the mutually exclusive application groups' Public Notice, all applicants will have the ability to file certain amendments. Mutually exclusive applicants may immediately file technical amendments and/or enter into settlement and time-share agreements to resolve application conflicts.
- Following the Bureau's review of technical amendments and agreements filed to remove application conflicts, the Commission will identify one or more tentative selectees from each mutually exclusive group. The Bureau will analyze petitions to deny filed against each tentative selectee, and then either grant or dismiss that application. In certain cases, the Commission will identify a successor tentative selectee or selectees. New tentative selectees also will be subject to petitions to deny.

Singleton Applications: The Bureau has identified approximately nine hundred technically acceptable LPFM applications which are not in conflict with any other application, *i.e.*, singleton applications. The staff has begun to change the status of these applications from "received" to "accepted for filing" in CDBS. The daily Broadcast Applications Public Notice announces this action and starts the 30-day period for the filing of petitions to deny (see below). These notices can be found in the Commission's *Daily Digest*, available at http://www.fcc.gov/encyclopedia/daily-digest. The Bureau anticipates that it will begin to issue LPFM new station construction permits to singleton applicants in **January 2014**.

Mutually Exclusive Applications. When the distance between two window applications does not meet the minimum distance separation requirements specified in 47 C.F.R. § 73.807, the applications are treated as mutually exclusive (MX). An MX group consists of all applications which are MX to at least one other application in the group. MX applications will be identified by MX group in a public notice (MX Group PN) in December 2013. MX applicants may communicate with each other at any time before or after the release of the MX Group PN to explore options for resolving application conflicts through settlements and/or technical amendments (see below). Applicants also have the option of entering into partial or universal voluntary time-share agreements (see below).

Amendments: Effective with the release of the MX Group PN, all applicants will have the ability to file certain amendments. During this initial settlement period, applicants may only file "minor" amendments, which include: (1) site relocations of 5.6 kilometers or less; (2) channel changes of no more than +/- three channels or to an intermediate frequency (+/- 53 or 54) channel; (3) partial and universal voluntary time-sharing agreements; (4) changes in general or legal information; (5) changes in ownership where the original parties retain more than 50 percent ownership in the application as originally filed. Site relocation amendments of more than 5.6 kilometers will be permitted to remediate potential third-adjacent channel interference and for time-share proponents[1] to relocate to a common transmitter site.

Major amendments, such as non-adjacent channel changes and otherwise prohibited site relocations of greater than 5.6 kilometers, will only be allowed after the Commission identifies tentative selectees among the MX groups. Tentative selectees will be announced in a series of tentative selectee public notices (Tentative Selectee PN). Major amendments will only be allowed within 90 days of the release of a Tentative Selectee PN and only with respect to the applications listed in the particular Tentative Selectee PN.

Applicants **may not** amend their applications to increase their comparative point total and **may not** amend their applications to come into compliance with the minimum separation requirements provided in 47 C.F.R. § 73.807.

Settlement Agreements: MX applicants may resolve technical conflicts through two methods -- settlements and/or technical amendments.

A settlement must propose the grant of at least one technically acceptable application within a group of mutually exclusive applications and may not create any new application conflicts.[2] Applicants entering into agreements to procure the removal of a conflict between applications by amendment or dismissal of an application must ensure that their settlement agreements comply with the pertinent requirements of Section 73.3525 of the Commission's Rules, including reimbursement restrictions.[3] Specifically, parties must file with the Commission:

1. A copy of their settlement agreement and any ancillary agreement(s);
2. A joint request for approval of such agreement; and

[1] 47 C.F.R. § 73.871(c).

[2] We will process any settlement achieved through technical amendment(s) and/or dismissal(s) which results in our ability to grant at least one singleton application. In the event that the staff determines that a settlement complies with the Commission's Rules, we will issue a Public Notice accepting for filing all applications proposed for grant pursuant to the settlement. Petitions to deny these applications may be filed within thirty (30) days of this subsequent Public Notice.

[3] 47 C.F.R. § 73.3525.

3. An affidavit of each party to the agreement setting forth:
   (a) The reasons why it is considered that such agreement is in the public interest;
   (b) A statement that its application was not filed for the purpose of reaching or carrying out such agreement;
   (c) A certification that neither the applicant nor its principals has received any money or other consideration in excess of the legitimate and prudent expenses of the applicant;[4]
   (d) The exact nature and amount of any consideration paid or promised;
   (e) An itemized accounting of the expenses for which it seeks reimbursement; and
   (f) The terms of any oral agreement relating to the dismissal or withdrawal of its application.[5]

An applicant that unilaterally dismisses its application without having entered into a settlement agreement with another applicant must nevertheless still submit an affidavit stating that no consideration has been promised to or received by such applicant in connection with its dismissal.[6]

Additionally, the Bureau will accept unilateral technical amendments that resolve all conflicts between at least one application and all other applications in the same MX group. Amended applications must specify rule-compliant facilities. Applicants filing technical amendments should carefully consider all legal, e.g., maintaining eligibility as a "local" applicant,[7] and technical requirements. Amended applications must comply with the minimum separation requirements provided in 47 C.F.R. § 73.807. Amendments which create any new application conflicts will be returned. Applicants may file technical amendments as part of a settlement agreement or unilaterally.

Applicants filing coordinated technical amendments as part of a settlement agreement must cross-reference all such filings in each amendment. As noted previously, an applicant that unilaterally files an engineering amendment to procure the removal of conflicts with other applications, without having entered into a settlement agreement with any other applicant, must nevertheless submit an affidavit stating whether consideration has been promised to or received by such applicant in connection with its engineering amendment.[8]

Voluntary Time-Share Agreements: MX applicants may also enter into a partial or universal voluntary time-share agreement. The technical facility or facilities proposed in the time-share agreement may not conflict with any of the remaining proposals in the MX group. Pursuant to 47 C.F.R. § 73.870(c), point aggregation procedures will not apply to time-share agreements submitted prior to the release of the pertinent Tentative Selectee PN. Any time-share agreement must satisfy the following requirements:

[4] "Legitimate and prudent expenses" are those expenses reasonably incurred by an applicant in preparing, filing, prosecuting, and reaching a settlement with respect to the application for which reimbursement is being sought. 47 C.F.R. § 73.3525(i).

[5] *See* 47 C.F.R. § 73.3525(a). Affidavits shall be executed by the applicant, permittee, or licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association. *See* 47 C.F.R. § 73.3525(f). An unsworn declaration under penalty of perjury may be substituted for an affidavit if it uses the wording specified in § 1.16.

[6] *See* 47 C.F.R. §§ 73.3525(c) and 73.3568.

[7] *See* 47 C.F.R. § 73.853(b).

[8] *See* 47 C.F.R. §73.3525(c).

1. The proposal must specify the proposed hours of operation of each time-share proponent;
2. The proposal must not include simultaneous operation of the time-share proponents; and
3. Each time-share proponent must propose to operate for at least 10 hours per week.

Petitions to Deny: An application which is determined to not be in conflict with any other window application and which also satisfies core technical and legal requirements will be "accepted for filing." All accepted applications are subject to petitions to deny.[9] A petition to deny must be filed within 30 days of a Public Notice announcing the acceptance for filing of an application. Petitions to deny must be filed in accordance with the procedures set forth in 47 C.F.R. § 73.3584. An applicant may file an opposition and the petitioner may file a reply within the time periods prescribed by this rule.

Following the completion of the pleading cycle, the Bureau will review the merits of any petition to deny. Applications that are granted will receive a construction permit from the Commission.

The Bureau will NOT entertain an objection or petition to deny an application prior to the release of the public notice accepting for filing such application. This includes situations in which the dismissal of an application would result in the potential grant of an MX application.

Dismissed applications: Pursuant to 47 C.F.R. § 73.870, the Bureau must dismiss any Form 318 application that does not comply with the minimum separation requirements provided in 47 C.F.R. § 73.807. Any application with such a violation cannot be amended to come into compliance with the minimum separation requirements. Such amendments **will not** be accepted under any circumstances. In addition, applications filed by individuals[10] and multiple applications filed by non-profit educational organizations[11] cannot be amended to come into compliance with the rules.

Form 318 applications that are dismissed on other grounds may be amended *nunc pro tunc* to the extent consistent with Commission rules and policies.[12] Under the Commission's *nunc pro tunc* policy,[13] an applicant will have **one** opportunity to file a **minor** curative amendment within 30 days of the initial dismissal and that amendment will be given retroactive effect.

Pursuant to 47 C.F.R. § 1.106, an applicant also may file a petition for reconsideration within 30 days of the dismissal of its application. The petition must state with particularity the respects in which the petitioner believes the dismissal action should be changed.

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[9] 47 C.F.R. § 73.870(d).

[10] An LPFM station may be licensed to a noncommercial educational organization, to a tribal entity, or a for public safety service. 47 C.F.R. §73.853. Individuals are not eligible to own and operate LPFM stations. *See Creation of a Low Power Radio Service,* Report and Order, 15 FCC Rcd 2205, 2215 n.40 (2000). *See also*, Instructions to FCC Form 318, Section II, Question 2, Subsection 2(a).

[11] *See* 47 C.F.R. § 73.855(a) (generally prohibiting the grant of an LPFM application where such grant would result in a party holding an attributable interest in two or more LPFM stations).

[12] *See, e.g.,* 47 C.F.R. §§ 73.870, 73.871; *Applications for Review of Decisions Regarding Six Applications for New LPFM Stations*, Memorandum Opinion and Order, 28 FCC Rcd 13390, 13400 n.88 (2013) (lack of reasonable assurance of transmitter site not cured by amendment specifying new transmitter site).

[13] *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR.2d 776 (1984).

For additional information, contact:

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