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SMALL ENTITY COMPLIANCE GUIDE

Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations

FCC 19-127

MB Docket No. 19-3

Released December 11, 2019

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 revised rules adopted in the above-referenced Federal Communications Commission (FCC or Commission) rulemaking dockets. This Guide is not intended to replace or supersede these rules, but to facilitate compliance 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 cannot anticipate all situations in which the rules apply. Furthermore, the Commission retains the discretion to adopt case-by-case approaches, where appropriate, that may differ from this Guide. Any decision regarding a particular small entity will be based on the statute and any relevant rules.

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 then 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 it may 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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TABLE OF CONTENTS

I. OBJECTIVES OF THE PROCEEDING1

II. COMPLIANCE REQUIREMENTS2

III. RECORDKEEPING AND REPORTING REQUIREMENTS6

IV. IMPLEMENTATION DATE7

V. INTERNET LINKS7

I. OBJECTIVES OF THE PROCEEDING

In the *Report and Order* in MB Docket No. 19-3, the Commission adopted changes to its rules and procedures to select and license competing applications for new noncommercial educational (NCE) broadcast stations and low power FM (LPFM) stations. The changes are designed to improve the comparative selection procedures, reduce confusion among future applicants, expedite the initiation of new service to the public, and eliminate unnecessary application burdens.

Specifically, in the *Report and Order* the Commission amended its rules and procedures to:

- Eliminate the requirement that NCE applicants amend their governing documents to pledge to maintain localism and diversity in order to receive points for being an “established local applicant” and for “diversity of ownership”;
- Expand the scope of the divestiture policies by recognizing full-service station divestitures for comparative purposes, therefore allowing applicants to maintain continuity of service during the licensing and construction process;
- Improve and expand the NCE tie-breaker process and reduce the need for mandatory time-sharing;
- Establish a mandatory time-share process for mutually exclusive (MX) NCE applicants that are unable to arrive at a voluntary time-share agreement;
- Clarify aspects of the “holding period” rule by which NCE permittees must maintain the characteristics for which they received comparative preferences and points;
- Disallow any LPFM post-filing window change in the applicant’s governing board members or directors as a means of resolving an alleged history of unauthorized operations by a party to the application;
- Clarify the LPFM rules to specifically permit LPFM applicants to discuss their intent to aggregate points and time-share prior to tentative selectee designations and limit the number of applicants that can enter into a time-sharing arrangement to three;
- Establish a process pursuant to which the Media Bureau will resume the processing of any remaining tentative selectees, meaning the applicants tied for the highest point total in an MX group, following the dismissal of a tentatively accepted time-share agreement;
- Classify as “minor” most board changes for nonstock and membership NCE and LPFM applicants;
- Modify the NCE and LPFM application forms to clarify the existing requirement for applicants to obtain reasonable assurance of site availability and add a reasonable assurance of site certification to these forms;
- Toll, meaning temporarily stop the construction clock, NCE and LPFM broadcast construction deadlines without notification from the permittee, based on certain pleadings before, or actions taken, by the agency;
- Support LPFM permittees and licensees by extending the construction period from 18 months to a full three-years; and
- Allow the assignment or transfer of LPFM permits after an 18-month holding period and eliminate the three-year holding period on assigning LPFM licenses.

The changes made in this *Report and Order* are intended to assist NCE and LPFM broadcast applicants by simplifying the requirements for claiming and maintaining qualifications that are used to compare applicants, and minimize the burdens on NCE and LPFM broadcasters, virtually all of whom are small businesses. These changes will further the Commission’s goal of clarifying, simplifying, and otherwise improving its licensing procedures for NCE broadcast and LPFM stations.

II. COMPLIANCE REQUIREMENTS

The *Report and Order* makes several rule changes to clarify, simplify and improve the NCE comparative point-system process, which is used to select among conflicting NCE applications. The changes, which are explained in more detail in the next six paragraphs below, include: (1) eliminating the requirement that NCE applicants amend their governing documents, pledging that localism/diversity be “maintained in the future” in order to receive comparative points as an “established local applicant” and for “diversity of ownership”; (2) establishing uniform divestiture pledge policies; (3) expanding the tie-breaker criteria; (4) revising the procedures for allocating time in NCE mandatory time-sharing situations; and (5) clarifying and modifying the “holding period” in section 73.7005.

Established Local Applicant Requirements (47 CFR § 73.7003(b)(1))

- Under the amended rules, an applicant claiming points as an “established local applicant” is no longer required to (1) amend its governing documents to require that “localism be maintained”; and (2) submit a copy of the amended governing documents to the Commission in the Schedule 340 (the application for a construction permit for a new NCE station).
- An applicant claiming points as an “established local applicant” must continue to submit in its initial Schedule 340 application supporting documentation to illustrate that it has been local and established for at least two years immediately prior to the application filing.
 - This supporting documentation, such as corporate materials from the secretary of state, or lists of names, addresses, and length of residence of board members, must be submitted by the close of the filing window.
- Any prevailing applicant that receives localism points must remain local for at least the period from grant of the construction permit until the station achieves four-years of on-air operation.

Diversity of Ownership Requirements (47 CFR § 73.7003(b)(2))

- Under the amended rules, an applicant claiming points for “diversity of ownership” is no longer required to (1) amend its governing documents to require that “diversity of ownership be maintained”; and (2) submit a copy of the amended governing documents to the Commission in the Schedule 340.
- An applicant claiming points for “diversity of ownership” must continue to submit either a contour map showing no overlap between its existing broadcast stations and the proposed station, or a statement that the applicant holds no attributable interests in any nearby stations.
- Any prevailing applicant that receives diversity of ownership points cannot acquire a station which would overlap the principal community contour of the new NCE station during the period from grant of the NCE construction permit until the station has achieved four years of on-air operations.

Expanded Divestiture Policy (47 CFR § 73.7003(b)(2))

- The *Report and Order* expands the scope of the current divestiture policy. This means that if an applicant for a new NCE station has an interest in any type of broadcast interest (including full service stations) which would overlap the proposed new NCE station, the applicant can still claim “diversity of ownership” points if it pledges to divest the existing broadcast interest. The actual divestiture must be completed by the time the new NCE station begins program test operations.

Expanded Tie-Breaker Criteria (47 CFR § 73.7003(c)(3))

- The *Report and Order* added a third tie-breaker criterion to resolve ties among conflicting applications. Under the NCE point system process, applicants tied with the highest number of points awarded in a MX group (group of conflicting applications) proceed to a tie-breaker round. If neither the first nor second tie-breaker criterion (fewest number of attributable authorizations; fewest number of pending applications) break the tie, the Commission will now apply a third tie-breaker criterion.
- Under this new criterion, the Commission will award the construction permit to the applicant that can demonstrate that:
 - (1) it applied in a previous filing window, and had its application accepted for filing and processed, but subsequently dismissed in favor of an applicant with more points or a tie-breaker showing; and
 - (2) it was in continuous existence as a legal entity at all times from the date of the previous NCE filing window until the present.

Mandatory Time-sharing (47 CFR § 73.7003(c)(5))

- Under the amended rules, if a tie remains among conflicting applications in a MX group after the NCE point selection process and tie-breaker criteria, the Commission will release a public notice or order announcing the tie.
 - The tied applicants will have 90-days to reach a voluntary agreement on how to share the channel and program the station on a part-time basis (time-sharing agreement).
 - The time-sharing agreement must be in writing, signed by each applicant, and specify the hours of operation of each applicant.
- If the applicants cannot reach a voluntary agreement within the 90-day deadline, the Commission will ask each applicant to confidentially select its preferred time slot.
 - The Commission will assign time slots to the applicants so they can share the channel.
 - If there are more than three tied applicants in a MX group, the Commission will dismiss all but the three applicants that have been existing within their proposed communities of license for the longest uninterrupted period of time.

Maintenance of Comparative Qualifications (47 CFR §§ 73.7002(c), 73.7005)

- Under the amended rules, any prevailing applicant under the NCE point system that receives points as an “established local applicant” must remain local in its community of license from grant of the construction permit until the new NCE station achieves four-years of on-air operation.
- Any prevailing applicant under the NCE point system that receives points for “diversity of ownership” cannot acquire a station which would overlap the principal community contour of the new NCE station during the period from grant of the NCE construction permit until the station has achieved four years of on-air operations.
- Mutually exclusive applications that are granted based on a Section 307(b) fair distribution preference must construct and operate technical facilities substantially as proposed in the application for at least four years of on-air operations.

- During this four year period, applicants are permitted to make minor modifications to their authorized facilities, including technical modifications to downgrade, or reduce NCE service, so long as the population losing NCE service is offset by a population gain elsewhere.

The *Report and Order* also makes several rule changes, described in the next three paragraphs below, to improve the LPFM comparative point system process, which is used to select among conflicting LPFM applications.

Prohibit Amendments to LPFM Applications to Cure Unauthorized Operations Violations (47 CFR § 73.854)

- In the Schedule 318 (the application for a construction permit for a new LPFM station), LPFM applicants must certify, under penalty of perjury, that neither the applicant, nor any party to the application, has engaged in any matter in unlicensed operation of any station.
- If an LPFM applicant has its application dismissed due to unauthorized operations, it is prohibited from seeking the reinstatement of its application. In such cases, the applicant is also prohibited from amending its application to remove any board members that have engaged in unauthorized broadcasting. Unauthorized broadcasting is a disqualifying defect.

LPFM Time-Sharing Discussions and Agreements (47 CFR § 73.872(c))

- LPFM applicants are permitted to communicate and collaborate on time-sharing agreements both before and after their application filings, including before the Commission announces the tentative selectees in an MX group.
 - Any agreement must be conditioned on each applicant becoming a tentative selectee, meaning one of the applicants tied for the highest point total, in the MX group.
 - A maximum of three applicants can enter into a time-sharing arrangement.
- Applicants can continue to communicate and collaborate on time-sharing agreements up until the point the Media Bureau implements the involuntary time-share procedures. *See* 47 CFR § 73.872(d).

Procedures in the Event an Accepted LPFM Time-Sharing Agreement is Subsequently Dismissed (47 CFR § 73.872(c)(5))

- If the LPFM point system analysis results in a tie, the tied applicants have 90-days to file voluntary time-sharing agreements. After this 90-day period, in the event that an accepted time-sharing agreement is subsequently dismissed, the Media Bureau will release a public notice to announce a second 90-day period.
 - The Media Bureau will dismiss all pending time-share agreements if/when it releases the public notice to announce the second 90-day settlement period.
 - All remaining applicants tied for the highest point total within the affected MX group will have a further opportunity to enter into either a settlement agreement or voluntary time-share agreement.
 - In the event an acceptable agreement is not reached after the second 90-day period, the Media Bureau will apply the involuntary time-share rules. *See* 47 CFR § 73.872(d).

Finally, in the *Report and Order* the Commission adopted the following new rules and procedures to improve other NCE and LPFM licensing procedures, as described in the three paragraphs below.

NCE and LPFM Board Changes (47 CFR §§ 73.871, 73.3572, 73.3573)

- NCE and LPFM applicants are permitted to make changes to their governing boards while their NCE or LPFM applications are pending before the Commission. The majority of such changes will be considered “minor,” and therefore, will not affect the Commission’s processing of the underlying application. Specifically:
 - If the applicant is a government entity, such as a state government or a public educational agency, board, or institution, the Commission will treat *all* changes to the governing board as minor.
 - If the applicant is a nonprofit educational organization or institution (nonstock and membership applicants), all gradual board changes will be treated as minor by the Commission.
 - For such applicants, the Commission will also treat sudden board changes that take place over the course of less than six months as minor, unless there is evidence that the change in the board is the result of a conflict within the organization, an attempted takeover, or some other change that would change the essence or mission of the organization.
 - Any NCE or LPFM applicant undergoing a change of its governing board must notify the Media Bureau of the changes via an amendment to its application. *See* 47 CFR § 1.65.

Reasonable Site Assurance Requirements (FCC Schedules 318 and 340)

- At the time of filing the FCC Schedule 318 or Schedule 340 for a new LPFM or NCE construction permit, an applicant must now certify that it has obtained reasonable assurance that the transmitter site specified in the application will be available for the construction and operation of the proposed facilities.
 - The applicant must certify that it has obtained reasonable assurance from the tower owner, its agent, or authorized representative that the specified site will be available.
 - The LPFM or NCE applicant must list the name and telephone number of the person contacted, and specify whether the contact is a tower owner, agent, or authorized representative on Schedule 318 or 340, respectively.

Tolling Procedures and Notification Requirements (47 CFR § 73.3598)

- The *Report and Order* simplified the tolling procedures (procedures for temporarily stopping the construction clock) for LPFM and NCE permittees.
- The Commission will now identify and place into a tolling posture any NCE or LPFM construction permit that:
 - Includes a condition on the commencement of operations, and the Commission has a direct licensing role in the satisfaction of the condition;
 - Is subject to administrative or judicial review of the permit grant; or
 - Is subject to international coordination.
- If an LPFM or NCE construction permit is tolled by Commission staff due to one of the three scenarios above, the permittee is *not* required to file updates with the Commission every six months. In such cases, the Commission staff is responsible for ending tolling treatment and notifying the permittee of the end of tolling when the pertinent encumbrance is resolved.

LPFM Construction Period (47 CFR 73.3598(a))

- The *Report and Order* extended the construction period for LPFM permittees from 18 months to a full three-years.
- The new three-year construction period applies to both (1) LPFM permits granted after April 13, 2020, the date the new rules took effect; and (2) existing LPFM permits, which had not expired by April 13, 2020.

Assignment and Transfer of LPFM Authorizations (47 CFR § 73.865)

- The *Report and Order* modified the restrictions on assigning and transferring LPFM permits and licenses.
- LPFM permittees and licensees are now permitted to assign or transfer the LPFM authorization provided the following safeguards are satisfied:
 - The assignment or transfer does not occur prior to 18 months from the date of issue of the initial construction permit;
 - Consideration promised or received does not exceed the legitimate and prudent expenses of the assignor or transferor (“legitimate and prudent” expenses means expenses reasonably incurred by the assignor or transferor in obtaining and constructing the station);
 - The assignee or transferee satisfies all eligibility criteria that apply to a LPFM licensee; and
 - For a period of time commencing with the grant of any permit awarded on the basis of the LPFM comparative point system provisions (47 CFR § 73.872) and continuing until the station has achieved at least four years of on -air operations:
 - The assignee or transferee must meet or exceed those points awarded to the LPFM tentative selectee; and
 - For LPFM stations selected in accordance with the involuntary time-sharing provisions (47 CFR § 73.872(d)), the date the assignee or transferee was “locally established” must be the same as or earlier than the date of the most recently established local applicant in the tied MX group.

III. RECORDKEEPING AND REPORTING REQUIREMENTS

The *Report and Order* contains new information collection and reporting requirements for LPFM and NCE applicants to certify reasonable site assurance in the FCC Schedule 318 and 340.

- Reasonable Site Assurance Certification (FCC Schedule 318 and 340)
 - An applicant for a new NCE or LPFM station must now submit information verifying that it obtained reasonable assurance of site availability.
 - The applicant is required to list the name and telephone number of the person contacted to obtain site assurance, and specify whether the contact is a tower owner, agent, or authorized representative.

IV. IMPLEMENTATION DATE

The following rules in the *Report and Order* became effective on April 13, 2020: 47 CFR §§ 73.854, 73.871, 73.3572, 73.3573, and 73.3598.

The following rules in the *Report and Order* require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act: 47 CFR §§ 73.865, 73.872, 73.7002(c), 73.7003, and 73.7005. These rules shall become effective after the Commission publishes a notice in the Federal Register announcing OMB approval and the relevant effective date.

V. INTERNET LINKS

A copy of the *NCE LPFM Comparative Standards Order*, is available at:

http://apps.fcc.gov/edocs_public/attachmatch/FCC-19-127A1.pdf

A copy of the Federal Register Summary of the *NCE LPFM Comparative Standards Order* is available at:

<https://www.gpo.gov/fdsys/pkg/FR-2020-02-12/pdf/2020-7880.pdf>.