



# PUBLIC NOTICE

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## **MEDIA BUREAU IDENTIFIES GROUPS OF MUTUALLY EXCLUSIVE APPLICATIONS SUBMITTED IN THE NOVEMBER 2021, FILING WINDOW FOR NEW NONCOMMERCIAL EDUCATIONAL FM STATIONS**

### **OPENS WINDOW TO ACCEPT SETTLEMENTS AND TECHNICAL AMENDMENTS**

MB Docket No. 20-343

The filing window for applications for new noncommercial educational (NCE) FM new station construction permits closed on Tuesday, November 9, 2021.<sup>1</sup> The Media Bureau (Bureau) received 1,282 applications for new NCE FM stations during the window. The Bureau staff has reviewed the applications to identify (1) applications that must be dismissed due to filing in excess of the 10-application limit;<sup>2</sup> (2) singletons, which are applications that are not mutually exclusive (MX) with any other application filed in the window, and can be accepted for filing;<sup>3</sup> (3) singletons with acceptability defects;<sup>4</sup> and (3) mutually exclusive (MX) groups of applications.<sup>5</sup>

To provide staff time to review the applications and identify singletons and MX groups, the Bureau previously announced a temporary freeze on the filing of any amendments to NCE FM new

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<sup>1</sup> See *Media Bureau Announces NCE FM New Station Application Filing Window; Window Open from November 2, 2021, to November 9, 2021*, Public Notice, MB Docket No. 20-343, DA No. 21-463 (April 21, 2021). The window was available for FM reserved band (channels 201-220) proposals. See 47 CFR § 73.501.

<sup>2</sup> See 47 CFR § 73.503(g); *Media Bureau Announces NCE FM New Station Filing Procedures and Requirements for November 2-9, 2021, Window; Limited Application Filing Freeze to Commence on October 5, 2021*, Public Notice, MB Docket No. 20-343, DA No. 21-885 (July 23, 2021) (July Procedures Notice) (explaining that if “it is determined that any party to an application has an attributable interest in more than 10 applications, the Bureau will retain the 10 applications that were filed first — based on the date of application receipt — and dismiss all other applications.”).

<sup>3</sup> The rule compliant singleton applications have been, or will be, accepted for filing. The acceptance for filing of these singletons starts the 30-day period for filing petitions to deny. See 47 CFR § 73.7004.

<sup>4</sup> The Bureau reviews all applications for compliance with the relevant technical and legal rules and dismisses any application that is unacceptable for filing. A dismissed applicant has *one* opportunity to file a minor curative amendment to its application and a petition for reconsideration, requesting reinstatement of the application *nunc pro tunc*. See *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776 (1984); 47 CFR § 1.106. The amendment and petition for reconsideration must be filed within 30 days of the dismissal of the application. Any such amendment must propose minor changes and comply with all relevant rules.

<sup>5</sup> Conflicting NCE FM applications, which cannot all be granted consistent with the Commission's technical rules, are considered mutually exclusive. A MX group consists of all applications which are MX to at least one other application in the group.

station applications submitted in the November 2021, filing window.<sup>6</sup> This temporary freeze ends at 6:00 pm EST on Monday, November 29, 2021.<sup>7</sup>

**MX Groups.** The Bureau has identified 231 MX groups, comprising 883 applications. The MX groups, and the applications contained within each MX group, are listed in Attachment A. If an applicant believes any application has been erroneously included, or excluded, from one of the MX groups listed in Attachment A, it should notify the Audio Division (Division) as soon as possible, and within 10 days.

**Dismissed MX Applications.** The Bureau does not generally review the MX applications for acceptability defects at this stage. In ascertaining the MX groups, however, the Bureau identified 13 applications with numerous significant and egregious technical defects. These 13 MX applications, listed in Attachment B, are dismissed.<sup>8</sup> Each applicant has one opportunity to file a minor curative amendment and petition for reconsideration, requesting reinstatement of the application *nunc pro tunc*.<sup>9</sup> Any amendments and petitions for reconsideration must be filed within 30 days of the dismissals. In order for an application to be reinstated, the amendment must correct all the application defects, including those not identified in Attachment B, propose only minor changes, comply with all the Commission's relevant rules, and not create any new application conflicts.

**Settlement Period.** By this Public Notice, the Bureau also announces a 60-day period beginning with the release of this Public Notice and ending January 28, 2022, for MX applicants to enter into and file settlement agreements and/or to submit technical amendments to resolve conflicts and expedite the grant of applications filed in the recent NCE FM window. This filing opportunity is limited to settlement agreements, which may include requests to dismiss applications filed in the window, and/or engineering amendments that resolve all technical conflicts between at least one application and all other MX applications filed in the window. The requirements and procedures for filing settlement agreements and technical amendments are explained below.

The Bureau will expedite the processing of all complete and rule-compliant settlement agreements and technical amendments that are filed by January 28, 2022.<sup>10</sup> Applicants in MX groups, which have not submitted settlements or technical amendments during this period, will proceed to a comparative analysis.<sup>11</sup> If applicants in any of the MX groups identified in Attachment A are still

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<sup>6</sup> See *Media Bureau Announces Close of NCE FM New Station Filing Window and Temporary Filing Freeze on Applications Submitted in the November 2021, Filing Window*, Public Notice, MB Docket No. 20-343, DA 21-1408 (Nov. 10, 2021).

<sup>7</sup> *Id.*

<sup>8</sup> The specific application defects are explained in Attachment B.

<sup>9</sup> See *supra* note 4.

<sup>10</sup> Although the Commission's rules permit parties to settle at any time (*see* 47 CFR § 73.7003(d)), we encourage applicants to take advantage of this limited opportunity to enter into settlements. The present window for settlements will provide an opportunity to promptly resolve groups of mutually exclusive applications and permit the expeditious authorization of new broadcast service to these applicants.

<sup>11</sup> The Commission's comparative analysis of MX NCE FM applications generally consists of three main components: (1) for MX groups in which NCE FM applicants propose service to different communities, a threshold fair distribution study pursuant to Section 307(b) of the Communications Act of 1934, as amended (47 U.S.C. § 307(b); 47 CFR § 73.7002); (2) a point system analysis for MX applications proposing to serve the same community, or application conflicts not resolved under the Section 307(b) analysis (47 CFR § 73.7003); and (3) if necessary, a tie-breaker determination, based on application provided data and certifications (47 CFR § 73.7003(c)).

negotiating a settlement after January 28, 2022, they should advise the Division of this fact so the Division can withhold further comparative processing.<sup>12</sup>

Settlement Agreements. 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 must not create *any* new application conflicts.<sup>13</sup> If a settlement involves more than one group, the Bureau will expeditiously process the settlement request only if each group satisfies the requirements set forth in this Public Notice. For example, we will not accept a settlement in which an applicant promises to withdraw from one proceeding in return for the promise of a competing applicant to withdraw from another proceeding, unless the proposed dismissals result in grantable singleton applications in each group.<sup>14</sup> Universal settlements, which resolve the claims of all applications within an MX group, are encouraged, but not required.

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 the reimbursement restrictions.<sup>15</sup> Specifically, parties must file with the FCC:

1. A copy of their settlement agreement and any ancillary agreement(s);
2. A joint request for approval of such agreement; and
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;<sup>16</sup>
  - (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.<sup>17</sup>

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<sup>12</sup> See 47 CFR § 73.7003(d) (“the Commission will withhold further comparative processing for a reasonable period upon such notification.”).

<sup>13</sup> 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 30 days of this subsequent Public Notice.

<sup>14</sup> See, e.g., *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5107, para. 98 (2001).

<sup>15</sup> 47 CFR § 73.3525.

<sup>16</sup> “Legitimate and prudent expenses” are those expenses reasonably incurred by an applicant in preparing, filing, prosecuting, and settling its application for which reimbursement is being sought. 47 CFR § 73.3525(h).

<sup>17</sup> See 47 C.F.R. § 73.3525(a). Affidavits must 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 CFR § 73.3525(f).

Applicants that unilaterally dismiss their application without having entered into a settlement agreement with another applicant must nevertheless still submit an affidavit as to whether or not consideration has been promised to or received by such applicant in connection with their dismissal.<sup>18</sup> A request for dismissal of an application cannot cure a violation of the 10-application limit on NCE FM new station applications filed by any party during the window.<sup>19</sup>

**Technical Amendments.** Acceptable technical amendments will resolve all conflicts between at least one application and all other applications filed in the window.<sup>20</sup> Only minor engineering amendments, *e.g.*, amendments specifying an adjacent channel, a new transmitter site, lower power, modified directional pattern, etc., will be accepted.<sup>21</sup> Amended applications must specify rule-compliant facilities. Applications that are amended and create any new application conflicts, or that worsen any existing conflicts (such as increasing existing overlap), will be dismissed. Applicants may file technical amendments as part of a settlement agreement or unilaterally. Applicants are encouraged to file technical amendments promptly. These amendments will be processed under the NCE first-come, first-served cut-off rule.<sup>22</sup>

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 without having entered into a settlement agreement with any other applicant must nevertheless submit an affidavit as to whether or not consideration has been promised to or received by such applicant in connection with its engineering amendment.<sup>23</sup>

**Filing Procedures.** Joint requests for approval of a settlement, and the above-referenced documents required by section 73.3525 of the rules (the Settlement Package), must be submitted in the form of an amendment to one (or more) of the applicants' pending FCC Form 2100, Schedule 340, Noncommercial Educational Station for Reserved Channel Construction Permit Applications (Schedule 340) in the Bureau's Licensing and Management System (LMS). Specifically, the Settlement Package should be filed by the applicant(s) whose application will survive/continue to be processed, pursuant to terms of the settlement agreement.<sup>24</sup> The designated applicant(s) should label the Settlement Package, attached as an amendment to the pending Schedule 340, as "Settlement Agreement" for easy identification by Bureau staff. The Settlement Package should include a cover page detailing the following:

- The LMS file numbers and Facility Identification Numbers of *all* of the other applications that are parties to the particular settlement agreement;

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<sup>18</sup> See 47 CFR § 73.3525(b).

<sup>19</sup> See *supra* note 2.

<sup>20</sup> A technical amendment is one in which an applicant removes itself from the MX group to achieve a grant by making minor engineering changes to its own application, without affecting the viability of any of the other applicants to compete for a second station.

<sup>21</sup> See 47 CFR § 73.3573.

<sup>22</sup> *Id.* § 73.3573(e).

<sup>23</sup> See 47 CFR § 73.3525(c).

<sup>24</sup> If more than one application in the MX group will survive/continue to be processed pursuant to the terms of the settlement agreement, the Settlement Package should also be filed as an amendment to these additional Schedule 340 applications.

- A brief description of the basic terms of the settlement agreement (referencing any applications that are being dismissed or technically amended and the application(s) which will survive and continue to be processed);
- References to any technical application amendments filed in conjunction with the settlement agreement.

Technical application amendments must also be filed electronically on Schedule 340 through LMS. Paper filed amendments and settlements will not be considered. Applicants are encouraged to deliver a courtesy copy of the Settlement Package via email to James Bradshaw, [James.Bradshaw@fcc.gov](mailto:James.Bradshaw@fcc.gov) and Arthur Doak, [Arthur.Doak@fcc.gov](mailto:Arthur.Doak@fcc.gov).

For assistance logging into LMS or accessing the Schedule 340, please contact the Commission at (877) 480-3201 (Option 2), Monday-Friday, 8:00 am-6:00 pm EST, or submit a request online at <https://www.fccprod.service-now.com/auls?id=esupport>.

For additional information, please contact Amy Van de Kerckhove, [Amy.Vandekerckhove@fcc.gov](mailto:Amy.Vandekerckhove@fcc.gov); Arthur Doak, [Arthur.Doak@fcc.gov](mailto:Arthur.Doak@fcc.gov); Rodolfo Bonacci, [Rodolfo.Bonacci@fcc.gov](mailto:Rodolfo.Bonacci@fcc.gov); or Lisa Scanlan, [Lisa.Scanlan@fcc.gov](mailto:Lisa.Scanlan@fcc.gov), of the Media Bureau, Audio Division, (202) 418-2700. Direct press inquiries to Janice Wise, [Janice.Wise@fcc.gov](mailto:Janice.Wise@fcc.gov), (202) 418-8165.

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