

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Reinstating Class D FM Exemption to Section 73.3527(e)(8)
MB Docket No. 22-240

ORDER

Adopted: June 22, 2022

Released: June 22, 2022

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this Order, we re-codify clarifying language from a Note that was inadvertently eliminated from section 73.3527 of the Commission’s rules (Rules) relating to the online public inspection file obligations of applicants, permittees, or licensees whose existing or prospective facilities are Class D FM stations or whose programming is wholly “Instructional” (referred to collectively herein as “Class D FM stations”). We re-codify the language as text in our Rules to conform to the publishing conventions of the National Archives and Records Administration’s Office of the Federal Register. This amendment to the Rules does not change any regulatory obligations. Instead, section 73.3527 will more accurately state the entities to which it applies, eliminating potential confusion among Class D FM stations.

II. BACKGROUND

2. Section 73.3527 outlines the online public inspection file obligations of noncommercial educational stations. Section 73.3527(e)(8) states that “nonexempt noncommercial education broadcast stations” are required to maintain in their online public inspection files a quarterly “list of programs that have provided the station’s most significant treatment of community issues during the preceding three month period.” However, the Rule does not define “nonexempt” or provide any explanation of which stations are exempt from this requirement.

3. Prior to the adoption of section 73.3527, the Commission had clarified that Class D FM stations are exempt from the requirement that stations maintain in their public files a list of programs addressing problems in the station’s community. Although the Commission required that NCE stations place in their public files such lists, the Commission codified in a Note to its Rules that “[e]xempt licensees include those offering wholly instructional programming and those operating under Class D, 10-watt authorizations.” In 1984, the Commission revisited the requirement for stations to maintain

1 See Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants, Report and Order, 58 FCC 2d 526, 541, para 49 and note 15 (1976) (“Instructional” refers to “programs designed to be utilized by any level of educational institution in the regular instructional program of the institution. In-school, in-service for teachers, and college credit courses are examples of instructional programs.”).

2 47 CFR § 73.3527.

3 47 CFR § 73.3527(e)(8).

4 Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants, Report and Order, 58 FCC 2d 526, para. 48 and n.14 and Appendix A (Note 2 to Section 1.527(a)(7)) (1976).

5 Id.

issues/programs lists.⁶ The *1984 R&O* again noted that Class D FM stations are exempt from the issues/programs lists requirements due to the limited nature of the service they provide.⁷ Although the Commission's order highlighted the exemption for Class D FM stations, the actual text of the new section 73.3527 inadvertently omitted that exemption.⁸

4. Subsequently, the Mass Media Bureau issued an order in 1985 noting that the exemption was inadvertently omitted from the text of section 73.3527 but that Class D FM stations remained exempt from the requirement to maintain program lists.⁹ Accordingly, a Note 2 to section 73.3527 was added: "For purposes of paragraph (a)(7) of this section, exempt applicants, permittees or licensees include those whose existing or prospective facilities are Class D FM stations or whose programming is wholly 'Instructional'" (Class D Note).¹⁰ This revised version of section 73.3527 was published in the Federal Register on March 4, 1985,¹¹ and appears in the Code of Federal Regulations (CFR) editions for 1985, 1986 and 1987.

5. In 1988, the Commission again adopted an order revising the retention of issues/programs lists in section 73.3527(a)(7).¹² The *1988 Order* revised the rule to make it consistent with a change made to the companion rule for commercial stations.¹³ The *1987 NPRM* that preceded that order did not propose any change to the Class D exemption; nor did the *1988 Order* discuss any such change.¹⁴ However, the Class D Note did not appear in the 1988 edition of the CFR, nor in any subsequent edition.

6. Compounding the confusion created by the apparent inadvertent deletion of the Class D Note following the *1988 Order*, the Bureau issued a Forfeiture Order in 2009 where it specifically rejected an argument that Class D FM stations are exempt from the issues/programs list requirement of section 73.3527.¹⁵ Although *UMW* correctly states that the Commission did indeed make Class D FM stations exempt in the *1976 R&O*, it incorrectly held that the Commission did not intend to continue that exemption in effect when it adopted section 73.3527. *UMW* did not address the *1985 Bureau Order* which clarified that Class D FM stations are exempt from section 73.3527, nor did it explain what stations are considered exempt from the issues/programs list requirement.

⁶ *Revision of Program Policies and Reporting Requirements Related to Public Broadcasting Licensees*, Report and Order, 98 F.C.C.2d 746 (1984) (*1984 R&O*).

⁷ *Id.* at 749, para. 7 and n.8.

⁸ *Id.* at Appendix A (Section 73.3527(a)(7)).

⁹ *Oversight of the Radio and TV Broadcast Rules*, Order, 1985 WL 1202761, para. 1(m) (MMB 1985) ("The rule defines as "exempt" FM applicants, permittees or licensees, those whose facilities are designated as "Class D" FM stations. When we drafted the new requirement for the listing and filing of issues and programs, we intended to give the same exemption for issues/programs lists and files to Class D operators as we had historically given them from ascertainment and the listing and filing of problems-programs records. Inadvertently, we failed to do this and the exemption was not written into the rule in the newly adopted Report and Order in public station regulatory relief. That relief is restored herein.") (*1985 Bureau Order*).

¹⁰ *Id.* at Appendix.

¹¹ *Oversight of Radio and TV Broadcast Rules*, 50 Fed. Reg. 8628-01 (Mar. 4, 1985).

¹² *See Revision of Section 73.3527(a)(7) Relating to the Issues-Programs List for Public Broadcasting Licensees*, Report and Order, 3 FCC Rcd 1032 (1988) (*1988 Order*).

¹³ Specifically, rather than five to ten community issues addressed by the station's programming, the rule was revised to require a list of programs that represent the station's most significant treatment of issues that the licensee believed to be of community concern. *Id.* at 1033, para. 10.

¹⁴ *See Revision of Section 73.3527(a)(7) Relating to the Issues-Programs List for Public Broadcasting Licensees*, Notice of Proposed Rulemaking, 2 FCC Rcd 507 (1987) (*1987 NPRM*).

¹⁵ *University of Montana Western*, Forfeiture Order, 24 FCC Rcd 3127, 3130-31, para 12 (MB 2009) (*UMW*).

III. DISCUSSION

7. We find that the omission of the Class D Note from the *1988 Order* and subsequent editions of the CFR was an inadvertent one, unrelated to the proposal addressed in that Order, and re-codify the exemption that relieves Class D FM stations from the requirement to maintain issues/programs lists in their online public inspection file. In reaching this determination, we are guided by the fact that the Commission never proposed to issue, and never issued, an order rescinding the Class D Note or otherwise deleting the Class D Note from section 73.3527. Our reinstatement of the exemption is consistent with the holdings in the *1976 R&O* and *1984 R&O*—as clarified by the *1985 Bureau Order*—that Class D FM stations should be exempt from the issues/programs list requirement. Accordingly, to provide clarity to Class D FM stations and to conform to the publishing conventions of the National Archives and Records Administration’s Office of the Federal Register, we amend section 73.3527(e)(8) as set out in the Appendix by including the text of the Class D Note.¹⁶

8. We find that notice and comment procedures are unnecessary under the “good cause” exception of the Administrative Procedure Act (APA) because re-codifying the inadvertently deleted text of the deleted Class D Note merely restores an exemption to section 73.3527 that the Commission established and has never sought to change in subsequent rulemaking actions.¹⁷ Consequently, we find notice and comment procedures are unnecessary for this action.¹⁸

9. Finally, we disavow the Bureau’s holding in *UMW*. As discussed above, the *1985 Bureau Order* clearly states that Class D FM stations were meant to be exempted from the issues/programs lists requirement of section 73.3527, and no subsequent Commission decision changed that requirement. The removal of the Class D Note from section 73.3527 was not done pursuant to a Commission action, but rather through apparent inadvertence. Therefore, that exemption is still valid, and *UMW* provides an example of the importance of reflecting this exemption within the text of section 73.3527(e)(8).

IV. PROCEDURAL MATTERS

10. *Regulatory Flexibility Act*. Because these rule changes are being adopted without notice and comment, the Regulatory Flexibility Act¹⁹ does not apply.

11. *Paperwork Reduction Act*. This document does not contain any new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA).²⁰ In addition, therefore, it does not contain any new or modified information collection burden for small

¹⁶ The public file requirements contained in section 73.3527(a)(7) were subsequently moved to section 73.3527(e)(8). *Review of the Commission’s Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, MM Docket No. 97-138, Report and Order, 13 FCC Rcd 15961 (1998).

¹⁷ 5 U.S.C. § 553(b)(3)(B) (notice and comment is not necessary “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”).

¹⁸ *See, e.g., Solid Waste Activities Group v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001) (explaining that the “unnecessary” exception of section 553(b)(3)(B) applies “to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public”); *Amendment of Parts 1, 2, 15, 74, 78, 87, 90, and 97 of the Commission’s Rules Regarding Implementation of the Final Acts of the World Radiocommunication Conference (Geneva, 2007) (WRC-07), Other Allocation Issues, and Related Rules Updates*, Order, 27 FCC Rcd 14598, 14657, para. 158 (2012) (holding that there is no need for notice and comment rulemaking procedures when correcting various “grammatical, typographical, and display errors”).

¹⁹ 5 U.S.C. § 601 *et seq.* *See id.* § 601(2).

²⁰ The Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.²¹

12. *Congressional Review Act.* The Bureau has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs that these rules are non-major under the Congressional Review Act, 5 U.S.C. § 804(2). The Bureau will send a copy of this Order to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.²²

V. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Sections 1, 4(i), 4(j), 301, 303, 307, 308, 309, 316, and 319 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 301, 303, 307, 308, 309, 316, and 319, this *Order IS ADOPTED* and **WILL BECOME EFFECTIVE** 30 days after publication in the Federal Register.

14. **IT IS FURTHER ORDERED** that Parts 73 of the Commission's Rules **ARE HEREBY AMENDED** as set forth in the Appendix, effective as of thirty (30) days after the date of publication in the *Federal Register*.

15. **IT IS FURTHER ORDERED** that the Bureau **SHALL SEND** a copy of this *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).

16. **IT IS FURTHER ORDERED** that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 22-240 **SHALL BE TERMINATED** and its docket **CLOSED**.

FEDERAL COMMUNICATIONS COMMISSION

Holly Saurer
Chief, Media Bureau

²¹ The Small Business Paperwork Relief Act of 2002 (SBPRA), Pub. L. No. 107-198, 116 Stat. 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. 3506(c)(4).

²² *See* 5 U.S.C. § 801(a)(1)(A).

APPENDIX

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends Part 73 of Title 47 of the U.S. Code of Federal Regulations 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, 155, 301, 303, 307, 309, 310, 334, 336, 339.

2. Amend § 73.3527 by revising the last sentence of paragraph (e)(8) to read as follows:

§ 73.3527 Online public inspection file of noncommercial educational stations.

* * * * *

(e) * * *

(8) * * * For the purposes of this section, exempt applicants, permittees, or licensees include those whose existing or prospective facilities are Class D FM stations or whose programming is wholly “Instructional.”

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