



# PUBLIC NOTICE

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## **MEDIA BUREAU PROVIDES GUIDANCE ON THE PROCESSING OF SCHEDULE 318 APPLICATIONS FILED IN THE LPFM WINDOW**

This Public Notice provides an overview of the processing of the Form 2100, Schedule 318 (Schedule 318) applications for Low Power FM (LPFM) new station construction permits (LPFM Applications) filed in the recent December 2023, filing window.<sup>1</sup> Specifically, 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. As announced in the *LPFM Closing Notice*, the Bureau imposed a temporary freeze on the filing of any amendments to new LPFM station applications submitted in the December 2023, filing window.<sup>2</sup> The amendment filing freeze will be lifted at 6:00 pm EST on Wednesday, January 31, 2024.

**General Processing Procedures.** The Media Bureau (Bureau) received 1,336 Schedule 318 LPFM Applications during the December 6 – December 13, 2023, LPFM filing window. The processing of these LPFM Applications will occur in the following manner (discussed more fully below):

- The Bureau is currently identifying acceptable singleton applications.
- The Bureau will subsequently release Public Notices identifying the mutually exclusive (MX) application groups (MX Group PN).
- Effective with the release of an MX Group PN, the MX applicants will have the ability to file technical amendments and/or enter into settlement agreements to resolve application conflicts.
- Following the Bureau's review of technical amendments and agreements filed to remove application conflicts, the Commission will identify, by Public Notices, the tentative selectee(s) from each MX group (Tentative Selectee PN).<sup>3</sup>
- Upon release of a Tentative Selectee PN, up to three tied tentative selectee applicants in an MX group may file a voluntary time-share agreement.

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<sup>1</sup> *Media Bureau Announces Filing Procedures and Requirements for November 1 – November 8, 2023, Low Power FM Filing Window*, Public Notice, DA 23-642 (MB July 31, 2023) (*LPFM Procedures Notice*); *Media Bureau Announces Revised Dates for LPFM New Station Application Filing Window; Window Open from December 6, 2023 to December 13, 2023*, Public Notice, DA 23-984 (MB October 17, 2023).

<sup>2</sup> *Media Bureau Announces Close of LPFM New Station Filing Window and Temporary Filing Freeze on Amendments to Applications Submitted in the December 2023 Filing Window*, Public Notice, DA 23-1165 (MB Dec. 15, 2023) (*LPFM Closing Notice*). Applicants with correctable defects will now be able to file curative amendments pursuant to our established procedures and the guidelines discussed in this public notice. *See also Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776 (1984). Applicants may not amend their applications to increase their comparative point total.

<sup>3</sup> The Commission will compare MX applications under the LPFM point system and tentatively select the application(s) with the highest point total from each MX group for grant. *See* 47 CFR § 73.872.

- The Bureau will analyze any petitions to deny filed against any singleton application or tentative selectee application, 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 over 700 technically acceptable LPFM Applications which are not in conflict with any other application, *i.e.*, singleton applications. The staff has put these applications on Public Notice announcing them as “accepted for filing.” The daily LMS Applications Public Notice announces this action and starts the 30-day period for the filing of petitions to deny (explained below). These notices can be found in the Commission’s *Daily Digest*, available at <http://www.fcc.gov/edocs/daily-digest>.<sup>4</sup>

**Mutually Exclusive Applications.** When the distance between two window applications does not meet the minimum distance separation requirements specified in section 73.807 of the Commission’s rules,<sup>5</sup> 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. The Bureau will identify MX applications in subsequent MX Group PNs. 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, technical amendments, and voluntary time-share agreements (see below).

**Resolution of Application Conflicts.** Upon the release of an MX Group PN, applicants will have a 60-day period to resolve conflicts through two methods - settlement agreements or technical amendments.<sup>6</sup> The filing opportunity will be 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. Applicants in MX groups, which do not submit settlements or technical amendments during the allotted period, will proceed to a comparative point analysis.<sup>7</sup>

**Settlement Agreements.** 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.<sup>8</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 reimbursement restrictions.<sup>9</sup> Specifically, parties must file with the Bureau:

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<sup>4</sup> The majority of the “accepted for filing” LMS Applications Public Notices were released between January 2, 2024 and January 22, 2024.

<sup>5</sup> 47 CFR § 73.807.

<sup>6</sup> Although settlement and technical amendments submitted during the 60-day period will receive expedited processing, MX applicants can continue to submit settlements and technical amendments at any time after the release of an MX Group PN.

<sup>7</sup> See 47 CFR § 73.872.

<sup>8</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 thirty (30) days of this subsequent Public Notice.

<sup>9</sup> 47 CFR § 73.3525.

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 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>10</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>11</sup>

Technical Amendments. Acceptable technical amendments will resolve all conflicts between at least one application and all other applications in the same MX group.<sup>12</sup> Only minor engineering amendments, explained below, will be accepted during the 60-day settlement period. Amended applications must specify rule-compliant facilities. Applicants filing technical amendments should carefully consider all legal, e.g., maintaining eligibility as a “local” applicant,<sup>13</sup> and technical requirements. 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.

*Minor Amendments.* With the exclusion of prohibited amendments mentioned below, starting at 6 pm EST, January 31, 2024, all pending LPFM applicants may only file “minor” amendments, which include: (1) site relocations of 11.2 kilometers or less OR site relocations that involve overlap between the 60 dBu service contours;<sup>14</sup> (2) channel changes of no more than +/- three channels or to an intermediate frequency (+/- 53 or 54) channel; (3) changes in general or legal information; and (4) changes in ownership where the original parties retain more than 50 percent ownership in the application as originally filed, and changes in ownership where the original parties retain 50 percent or less ownership, provided the change is gradual and/or there is no evidence of a takeover concern or significant effect on the organization’s mission.<sup>15</sup>

*Coordinated and Unilateral Technical Amendments.* Applicants filing coordinated technical amendments as part of a settlement agreement must cross-reference all such filings in each amendment. 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

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<sup>10</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>11</sup> See 47 CFR § 73.3525.

<sup>12</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>13</sup> See 47 CFR § 73.853(b).

<sup>14</sup> 47 CFR § 73.871(c)(1).

<sup>15</sup> See 47 CFR § 73.871(c)(3). All ownership changes in a governmental applicant are considered minor. *Id.*

nevertheless submit an affidavit stating whether consideration has been promised to or received by such applicant in connection with its engineering amendment.<sup>16</sup>

*Major Amendments.* Major amendments, such as non-adjacent channel changes and otherwise prohibited site relocations of greater than 11.2 kilometers that do not overlap 60 dBu contours (comparing the amended facilities to the prior proposed facilities), 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 PNs after the 60-day settlement period. 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.

*Prohibited Amendments.* 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 section 73.807 of the Commission's rules.<sup>17</sup>

**Voluntary and Involuntary Time-Share Agreements.** MX applicants may also enter into voluntary time-share agreements. Specifically, if MX applicants have the same highest point total,<sup>18</sup> *no more than three* of the applicants tied for the highest point total may propose to share use of the frequency by electronically submitting, within 90 days of the release of a public notice announcing the tie (the Tentative Selectee PN), a time-share proposal.<sup>19</sup> Such proposals shall be treated as minor amendments to the time-share proponents' applications and shall become part of the terms of the station authorization.

LPFM applicants may begin to communicate and collaborate *at any time* on aggregating their points and entering into voluntary time-sharing agreements.<sup>20</sup> Applicants that enter into voluntary time-sharing agreements prior to the tentative selectee designations, however, must condition the agreement on each applicant subsequently achieving tentative selectee status and each applicant having the basic qualifications to receive grant of its application. Although applicants may collaborate with each other at any time, any time-share proposal may *only* be electronically submitted within 90 days after the release of the Tentative Selectee PN.<sup>21</sup>

Any time-share agreement must be in writing, signed by each time-share proponent, and satisfy

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<sup>16</sup> See 47 CFR §73.3525(b).

<sup>17</sup> 47 CFR §§ 73.807, 73.870(c).

<sup>18</sup> See 47 CFR § 73.872(b). The LPFM point system awards a maximum of six merit points, based on six criteria, with one point awarded under each criterion: (1) established community presence of at least two years; (2) commitment to originate local programming; (3) commitment to maintain a main studio; (4) commitment both to originate local programming and to maintain a main studio; (5) diversity of ownership; and (6) Tribal applicants serving Tribal lands.

<sup>19</sup> 47 CFR § 73.872(c). This limitation on the number of applicants included in voluntary time-sharing agreements also will apply to any time-sharing agreement incorporated in an overall settlement under 47 CFR § 73.872(e).

<sup>20</sup> *Id.*; see also *Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations*, Report and Order, 34 FCC Rcd 12519, 12535 (2019) (*NCE LPFM Report and Order*) (amending the rules to permit LPFM applicants to discuss point aggregation and time-sharing arrangements during the application process). The Commission explained that “by allowing organizations interested in filing an LPFM application the leeway to communicate with other eligible organizations, they can maximize their chances of acquiring LPFM construction permits and explore potential time-share construction and operating efficiencies.” *Id.*

<sup>21</sup> 47 CFR 73.872(c). *NCE LPFM Report and Order*, 34 FCC Rcd at 12535, n.112.

the following requirements:

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.<sup>22</sup>

Following the tentative selectee designations in the Tentative Selectee PNs, if the tied MX applicants do not enter into voluntary time-share agreements within the time allotted, the Commission will assign involuntary time-sharing arrangements<sup>23</sup> to no more than three of the tied applicants in each MX Group.

**Petitions to Deny.** Singleton applications and tentatively-selected MX applications, which satisfy core technical and legal requirements, will be “accepted for filing.” All accepted applications are subject to petitions to deny.<sup>24</sup> A petition to deny must be filed within 30 days of a Public Notice announcing the acceptance for filing of an application and in accordance with the procedures set forth in section 73.3584 of the Commission’s rules.<sup>25</sup> An informal objection may be filed at any time after the application is accepted for filing.<sup>26</sup> Filers of both petitions to deny and informal objections must serve a copy of their filings on the applicant.

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 Bureau.

The Bureau will *not* entertain an objection or petition to deny any application prior to the designated 30-day petition to deny period.

**Dismissed applications.** Consistent with established processing rules, the Bureau must dismiss any LPFM Application that does not comply with the minimum separation requirements provided in section 73.807 of the Commission’s rules.<sup>27</sup> 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.<sup>28</sup> In addition, applications filed by individuals,<sup>29</sup> multiple applications

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<sup>22</sup> 47 CFR 73.872(c)(1).

<sup>23</sup> See 47 CFR § 73.872(d). In the case of involuntary time-sharing, tied MX applicants simultaneously and confidentially submit their preferred time slots to the Commission. These procedures will be explained in detail in future Public Notices.

<sup>24</sup> 47 CFR § 73.870(d).

<sup>25</sup> 47 CFR § 73.3584. An applicant may file an opposition, and the petitioner may file a reply, within the times prescribed by the rules.

<sup>26</sup> 47 CFR § 73.3587.

<sup>27</sup> 47 CFR § 73.807. See, e.g., *LPFM Procedures Notice*, *supra* note 1.

<sup>28</sup> *Id.*

<sup>29</sup> An LPFM station may be licensed to a noncommercial educational organization, to a tribal entity, or a for public safety service. 47 CFR §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).

filed by non-profit educational organizations,<sup>30</sup> and applicants engaged in unauthorized radio operations,<sup>31</sup> cannot be amended to come into compliance with the rules.

LPFM applicants whose applications are dismissed on other grounds will have one opportunity to file a minor curative amendment to its application and a petition for reconsideration, requesting reinstatement of the application *nunc pro tunc*.<sup>32</sup> The amendment and petition for reconsideration must be filed within 30 days of the dismissal of the application. Any amendment must propose minor changes and comply with all relevant rules.<sup>33</sup> The Bureau staff will not reinstate the application of an applicant that is unable to cure *all* the acceptability defects (including any defects not previously identified by the Bureau staff).

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<sup>30</sup> See 47 CFR § 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).

<sup>31</sup> See 47 CFR § 73.854; see also *NCE LPFM Report and Order*, 13 FCC Rcd at 12533 (amending the rules to preclude an applicant dismissed due to unauthorized broadcasting from seeking *nunc pro tunc* reinstatement of its application).

<sup>32</sup> 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.

<sup>33</sup> Applicants may not amend their applications to increase their comparative position.