

**FCC FACT SHEET**\*

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

Notice of Proposed Rulemaking – MB Docket No. 19-3

**Background:** Competing applications for the same new noncommercial educational FM and television station (NCE) and low power FM (LPFM) broadcast station channel (otherwise known as “mutually exclusive” (MX) applications) are resolved by applying comparative procedures, which include a point system, for selecting among MX applications. While the NCE and LPFM comparative procedures used in past filing windows facilitated the grant of several thousand new station construction permits, certain rules and procedures confused and frustrated applicants, drew criticism, or delayed or curtailed the initiation of new service. The measures proposed in this *NPRM* are expected to clarify, simplify, and otherwise improve our selection and licensing procedures for new NCE broadcast and LPFM stations, expedite the initiation of new service to the public, eliminate unnecessary applicant burdens, and reduce the number of appeals of our NCE comparative licensing decisions.

**What the Notice Would Do:**

- Propose to eliminate the current requirement that NCE applicants amend their governing documents to pledge that localism/diversity be maintained in order to receive points as “established local applicants” and for “diversity of ownership.”
- Seek comment on ways to improve the NCE tie-breaker process and reduce the need for mandatory time-sharing, and propose to adopt a mandatory time-share resolution process to minimize the drawbacks of mandatory time-sharing.
- Propose to clarify aspects of the “holding period” during which NCE permittees must maintain the characteristics for which they received comparative preferences.
- Propose to modify and 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 establish procedures for LPFM point aggregation time-share agreements that have been accepted, but later deemed invalid.
- Propose to reclassify as “minor” (1) all ownership changes to governmental applicants, provided that the change has little or no effect on such applicant’s mission, and (2) gradual board changes in non-stock and membership LPFM and NCE applicants.
- Propose to eliminate certain tolling notification requirements and toll NCE and LPFM broadcast construction deadlines without notification from the permittee, based on certain pleadings pending before, or actions taken by, the agency.
- Propose to extend the LPFM construction period from 18-months to a full three years.
- Propose to allow the assignment/transfer of LPFM permits after an 18-month holding period and eliminate the three-year holding period on assigning LPFM licenses subject to certain safeguards.

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\* This document is being released as part of a "permit-but-disclose" proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in MB Docket No. 19-3, which may be accessed via the Electronic Comment Filing System (<https://www.fcc.gov/ecfs/>). Before filing, participants should familiarize themselves with the Commission’s *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. *See* 47 CFR § 1.1200 *et seq.*

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

In the Matter of )
)
Reexamination of the Comparative Standards and ) MB Docket No. 19-3
Procedures for Licensing Noncommercial )
Educational Broadcast Stations and Low Power )
FM Stations )

NOTICE OF PROPOSED RULEMAKING\*

Adopted: []

Released: []

Comment Date: (60 days after date of publication in the Federal Register)
Reply Comment Date: (90 days after date of publication in the Federal Register)

By the Commission:

TABLE OF CONTENTS

Heading Paragraph #
I. INTRODUCTION..... 1
II. BACKGROUND..... 4
A. NCE Comparative Process..... 7
B. LPFM Comparative Process ..... 16
III. PROPOSED CHANGES TO THE NCE COMPARATIVE PROCESS..... 20
A. Eliminate Governing Document Requirements for Established Local Applicants..... 20
B. Eliminate Governing Document Requirements for Applicants Claiming Diversity Points..... 28
C. Establish Uniform Divestiture Pledge Policies..... 33
D. Expand Tie-Breaker Criteria..... 36
E. Revise Procedures for Allocating Time in NCE Mandatory Time-Sharing Situations ..... 41
F. Clarify and Modify the "Holding Period" Rule ..... 47
IV. PROPOSED CHANGES TO THE LPFM COMPARATIVE PROCESS ..... 52
A. Prohibit Amendments to Cure Section 301 Violations by Application Parties ..... 52
B. Permit Time-Sharing Agreements Prior to Tentative Selectee Designations ..... 56
C. Establish Procedures for Remaining Tentative Selectees Following Dismissal of
Accepted Point Aggregation Time Share Agreements ..... 62
V. PROPOSED CHANGES TO OTHER LICENSING PROCEDURES ..... 64

\* This document has been circulated for tentative consideration by the Commission at its January 2019 open meeting. The issues referenced in this document and the Commission's ultimate resolutions of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public's ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The Commission's ex parte rules apply and presentations are subject to "permit-but-disclose" ex parte rules. See, e.g., 47 CFR §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. See 47 CFR §§ 1.1200(a), 1.1203.

A. Reclassify Gradual Board Changes as Minor ..... 64  
 B. Clarify Reasonable Site Assurance Requirements..... 73  
 C. Streamline Tolling Procedures and Notification Requirements..... 76  
 D. Lengthen LPFM Construction Period..... 80  
 E. Modify Restrictions on the Transfer and Assignment of LPFM Authorizations..... 82  
 VI. PROCEDURAL MATTERS..... 86  
 VII. ORDERING CLAUSES..... 99

**I. INTRODUCTION**

1. In this Notice of Proposed Rulemaking (NPRM), we commence a proceeding to consider changes to our rules and procedures for comparatively considering competing applications for new and major modifications to noncommercial educational FM radio stations, FM translator stations, and full power television stations (collectively, NCE or NCE broadcast)<sup>1</sup> and low power FM (LPFM) stations. We seek comment on proposals to improve selection procedures, expedite the initiation of new service to the public, and eliminate unnecessary applicant burdens.

2. In October 2007, the Media Bureau (Bureau) opened the first-ever filing window for new NCE FM reserved band stations and major changes to authorized facilities.<sup>2</sup> It received approximately 3,600 applications, almost half of which were mutually exclusive (MX)<sup>3</sup> with at least one other application. The Commission ultimately resolved over 500 MX groups by applying the NCE comparative procedures,<sup>4</sup> which include (1) threshold fair distribution criteria for applications proposing to serve different communities,<sup>5</sup> and (2) a new NCE point system,<sup>6</sup> a simplified, “paper hearing” process<sup>7</sup> for

<sup>1</sup> Channels 201-220 are reserved for noncommercial educational FM broadcasting. *See* 47 CFR § 73.501. Non-reserved FM band channels (Channels 221-300) reserved exclusively for NCE use appear with an asterisk designation in the Table of FM Allotments, Section 73.202 of the rules. *See* 47 CFR § 73.202. TV channels reserved exclusively for NCE use appear with an asterisk designation in the Table of TV Allotments, Section 73.606 of the rules. *See* 47 CFR § 73.606.

<sup>2</sup> *See Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 22 FCC Rcd 6101 (2007) (Commission’s first application of the current NCE point system to then-pending applications following judicial affirmation; directed staff to open filing window for applications for new and major modifications to NCE FM stations) (*NCE Omnibus Order*); *see also Media Bureau Announces NCE FM New Station and Major Change Filing Procedures*, Public Notice, 22 FCC Rcd 15050 (MB 2007) (*NCE FM Filing Procedures Notice*).

<sup>3</sup> *See, e.g., Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the October 2007 Filing Window for Noncommercial Educational FM Stations*, Public Notice, 23 FCC Rcd 3914 (MB 2008).

<sup>4</sup> *See, e.g., Threshold Fair Distribution Analysis of 32 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 23 FCC Rcd 10213 (MB 2008); *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 1681 (2010) (*59 Group Comparative Order*).

<sup>5</sup> *See* 47 U.S.C. § 307(b); 47 CFR § 73.7002(a).

<sup>6</sup> *See* 47 CFR § 73.7003 (point system selection procedures); *see also* 47 CFR § 74.1233(e)(3) (explaining that for mutually exclusive reserved band FM translator applications “the FCC will apply the same point system identified for full service reserved band stations in § 73.7003(b)”).

<sup>7</sup> *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Notice of Proposed Rulemaking, 10 FCC Rcd 2877 (1995), *further rules proposed*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21167 (1998) (*NCE FNPRM*), *rules adopted*, Report and Order, 15 FCC Rcd 7386 (2000) (*NCE Report and Order*), *vacated in part on other grounds sub nom., National Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001), *clarified*, Memorandum Opinion and Order, 16 FCC Rcd 5074 (2001) (*NCE MO&O*), *Erratum*, 16 FCC Rcd 10549, *recon. denied*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002) (*NCE*

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selecting among MX NCE applications. In 2010, the Commission opened a window for 67 vacant allotments reserved for NCE FM use. It resolved 63 MX groups, comprising over 300 applications under the same NCE FM point system.<sup>8</sup> Subsequently, in 2012, the Commission modified the licensing rules it had used during the initial four-part 2000-2001 LPFM national filing window.<sup>9</sup> Over 2,800 new and major change LPFM applications were filed in the ensuing October 2013 window.<sup>10</sup> The Commission identified 859 MX LPFM applications, comprising 286 MX groups,<sup>11</sup> and disposed of these applications pursuant to the similar LPFM point system.<sup>12</sup> As a result of this extensive evaluation of hundreds of NCE and LPFM applications, we are now positioned to re-evaluate these comparative licensing procedures.<sup>13</sup>

3. The NCE and LPFM comparative procedures used in these past windows facilitated the efficient grant of several thousand new station construction permits. However, certain rules and procedures confused and frustrated applicants, drew criticism, or delayed or curtailed the initiation of new service. Some rules appeared counterproductive or imposed undue burdens on applicants; others appeared to omit necessary guidance. The Commission also identified certain inconsistencies between the rules and the forms. We expect that future NCE and LPFM windows will face the same constraints of high demand for new station licenses, limited spectrum, and an inherently adversarial comparative process. Accordingly, based on experience gained from the conduct of the NCE and LPFM filing windows, we believe it is necessary to consider changes to clarify, simplify, and otherwise improve our licensing procedures for new NCE broadcast<sup>14</sup> and LPFM<sup>15</sup> stations.

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*Reconsideration Order*), *aff'd sub nom.*, *American Family Ass'n v. FCC*, 365 F.3d 1156 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1000 (2004).

<sup>8</sup> See *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, Public Notice, 24 FCC Rcd 12621 (MB 2009). See also *Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the February 2010 and October 2007 Filing Window*, Memorandum Opinion and Order, 26 FCC Rcd 7008 (2011) (*37 Group NCE Point Order*); *Comparative Consideration of 33 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 9058 (2011).

<sup>9</sup> See *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402 (2012) (*LPFM Sixth Report and Order*).

<sup>10</sup> See *Media Bureau Announces Availability of Revised FCC Form 318 and the Filing Procedures for October 5 – October 29, 2013, Low Power Filing Window*, Public Notice, 28 FCC Rcd 8854 (MB 2013) (*LPFM Procedures Notice*).

<sup>11</sup> See, e.g., *Commission Identifies Tentative Selectees in 111 Groups of Mutually Exclusive Applications Filed in the LPFM Window*, Public Notice, 29 FCC Rcd 10847 (2014).

<sup>12</sup> See 47 CFR § 73.872.

<sup>13</sup> The licensing of new full power television stations, including NCE stations, was first frozen to accommodate the digital television transition, and most recently, continued to accommodate the Commission's first-ever incentive auction. See *Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes*, Public Notice, 19 FCC Rcd 14810 (2004); *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014) (*Incentive Auction R&O*), *affirmed*, *National Ass'n of Broadcasters v. FCC*, 789 F.3d 165 (D.C. Cir. 2015). Accordingly, since the 2000 adoption of the *NCE Report and Order*, the Commission has employed the NCE point system to compare and evaluate only a few groups of MX applications for new NCE full power television stations. See, e.g., *Iowa Public Broadcasting Board*, Memorandum Opinion and Order, 18 FCC Rcd 22730 (2003); *La Dov Educational Outreach, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 12457 (2008); *Oral Roberts University*, Memorandum Opinion and Order, 23 FCC Rcd 17440 (2008).

<sup>14</sup> The NCE point system (47 CFR § 73.7003) was adopted to apply equally to applications for NCE FM and NCE full power television stations.

## II. BACKGROUND

4. The Commission accepts applications for new NCE and LPFM stations, or major changes to authorized NCE and LPFM stations, during specified filing windows announced by public notice. Due to the finite nature of and high demand for spectrum, the Commission cannot authorize an NCE or LPFM station to every qualified applicant. Accordingly, after the close of an NCE or LPFM filing window, the Commission examines all timely and complete applications to determine whether any two or more proposals are mutually exclusive.<sup>16</sup> Applicants identified as MX with other applicants are given the opportunity to file settlements or technical amendments to resolve the conflicts.<sup>17</sup> If conflicts remain, the Commission currently uses, *inter alia*, a point system to select among the mutually exclusive applications.<sup>18</sup>

5. The Commission's comparative review of MX applications is based on applicant-provided information. The NCE new station application, FCC Form 340, and the LPFM application, FCC Form 318,<sup>19</sup> are each certification-based, but require applicants to document certain of their claims by submitting supporting information. Point claims are only credited when such required documentation is timely submitted.

6. Qualifications for points are initially established at the close of the filing window, *i.e.*, the application deadline. This common reference date ensures a level competitive field for applicants.<sup>20</sup> Any changes made after the close of the filing window may potentially diminish, but cannot enhance, an applicant's comparative position and point total. To expedite the licensing of new NCE and LPFM stations, the Commission relies on applicant certifications and documentation and does not independently confirm their accuracy during the review process. Rather, the Commission relies on the petition to deny process to verify the accuracy of the points claimed and the certifications.<sup>21</sup>

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<sup>15</sup> On May 18, 2017, we commenced a separate proceeding to seek comment on which media rules should be modified or eliminated as unnecessary or burdensome. *See Commission Launches Modernization of Media Regulation Initiative*, Public Notice, MB Docket No. 17-105 (2017) (*Modernization of Media Regulation Initiative*). We note that several LPFM applicants, including REC Networks (REC), filed comments in MB Docket No. 17-105, proposing several changes to LPFM service and technical rules. *See, e.g.*, REC Comments (June 26, 2017). We consider the REC comments that relate to the scope of this proceeding. *See* REC Comments at 41, 43-45, paras. 72-73, 78-80. The LPFM comments from MB Docket No. 17-105 that are outside the scope of this current proceeding will not be addressed herein, but may be considered in future proceedings.

<sup>16</sup> Conflicting NCE applications, which cannot all be granted consistent with the Commission's technical rules, are considered mutually exclusive. LPFM applications are considered mutually exclusive when the distance between the facilities proposed in two window-filed applications does not meet the minimum distance separation requirements specified in 47 CFR § 73.807. An MX group consists of all applications which are MX to at least one other application in the group.

<sup>17</sup> *See, e.g., Window Opened to Expedite Grant of New NCE Station Construction Permits*, 22 FCC Rcd 19438 (MB 2007); *Media Bureau Provides Further Guidance on the Processing of Form 318 Applications Filed in the LPFM Window*, Public Notice, 28 FCC Rcd 16366, 16367-68 (MB 2013).

<sup>18</sup> 47 CFR §§ 73.872, 73.7003.

<sup>19</sup> *See* Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station (FCC Form 340); Application for Construction Permit for a Low Power FM Broadcast Station (FCC Form 318). References to form numbers contained herein also include any successor forms that the Bureau develops and releases in the future.

<sup>20</sup> *See, e.g., NCE MO&O*, 16 FCC Rcd at 5082-83, paras. 23-24.

<sup>21</sup> *See NCE MO&O*, 16 FCC Rcd at 5104, para. 87. The applications of each tentative selectee (the applicant(s) with the highest point total from each MX group) are accepted for filing, triggering a 30-day period for the filing of any petitions to deny.

### A. NCE Comparative Process

7. On April 4, 2000, the Commission adopted the current simplified point system to select among applicants competing to construct NCE broadcast stations,<sup>22</sup> thereby eliminating the lengthy and resource intensive evidentiary hearings it had employed for the preceding 30 years.<sup>23</sup> The Commission's analysis of MX NCE applications generally consists of three main components. First, for non-allotment groups (in which NCE FM applicants can propose service to different communities)<sup>24</sup>, the Bureau performs a threshold fair distribution study pursuant to Section 307(b) of the Communications Act of 1934, as amended (the Act).<sup>25</sup> Second, application conflicts not resolved under this "fair distribution" analysis<sup>26</sup> are compared under an NCE point system.<sup>27</sup> Third, if necessary, the Commission makes a tie-breaker determination, based on applicant-provided data and certifications. These combined steps, which were first widely employed in the 2007 *NCE Omnibus Order*,<sup>28</sup> are described in greater detail below.

8. Section 307(b) – Threshold Fair Distribution Study. When mutually exclusive applications for permits to construct NCE FM stations propose to serve different communities, the Bureau determines, pursuant to Section 307(b), whether grant of any of the applications would best further the fair, efficient, and equitable distribution of radio service among communities.<sup>29</sup> An NCE FM applicant is eligible to receive a Section 307(b) preference if it would provide, within the proposed station's 60 dBu contour, a first or second reserved band channel NCE aural service to at least ten percent of the population (in the aggregate), provided that such service is to at least 2,000 people.<sup>30</sup> If more than one applicant in a mutually exclusive group qualifies for a Section 307(b) preference, the Bureau compares each applicant's first service population coverage totals.<sup>31</sup> If no applicant is entitled to a first service preference, the Bureau considers combined first and second NCE aural service population totals. The process ends when the Bureau determines that none of the remaining applicants can be selected or eliminated based on a Section 307(b) preference, or that each remaining applicant proposes to serve the same community. At that stage, the Section 307(b) analysis is done, and the remaining applicants proceed to a point system analysis.

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<sup>22</sup> Applicants for NCE stations must meet basic eligibility requirements, which we do not propose to change. *See* 47 CFR §§ 73.503, 73.621.

<sup>23</sup> *See NCE Report and Order, supra* note 7.

<sup>24</sup> Applicants for vacant FM allotments in the non-reserved portion of the FM band that have been reserved for NCE use must show that they satisfy the "third reserved allotment showing." Specifically, such applicants must justify the use of the proposed non-reserved band channel by making a required population showing. The third reserved allotment showing is a basic qualifying test, not a comparative standard. *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691, 6703-05, paras. 29-38 (2003); *see also* 47 CFR § 73.202(a)(1)(ii).

<sup>25</sup> *See* 47 U.S.C. § 307(b).

<sup>26</sup> *See* 47 CFR § 73.7002 (procedures for selecting among mutually exclusive applications for reserved band FM stations proposing to serve different communities). Mutually exclusive applications for full power television stations and vacant FM allotments reserved for NCE use proceed directly to the point system analysis.

<sup>27</sup> *See id.* § 73.7003 (point system selection procedures).

<sup>28</sup> *See supra* note 2.

<sup>29</sup> *See* 47 U.S.C. § 307(b); 47 CFR § 73.7002(a).

<sup>30</sup> *See* 47 CFR § 73.7002(b).

<sup>31</sup> *See id.* § 73.7002(b).

9. Point System Selection Process. The Commission compares mutually exclusive groups of NCE applications under the point system set forth in Section 73.7003 of the rules.<sup>32</sup> The NCE point system awards a maximum of seven merit points, based on four distinct criteria.<sup>33</sup>

10. *Established Local Applicant.* First, three points are awarded to applicants that certify that they have been local and established for at least two years immediately prior to the filing of their application. Applicants with a headquarters, campus, or 75 percent of their board members residing within 25 miles of the reference coordinates of the community of license are considered local. A governmental unit is considered local within its area of jurisdiction. Section 73.7003(b)(1) of the rules and the FCC Form 340 certification for “established local applicant” dictate that to receive the three localism points, an applicant’s governing documents must require that “such localism be maintained.”<sup>34</sup> The applicant also must certify that it has placed documentation supporting its certification in a local public inspection file, and that it has submitted that documentation to the Commission.

11. *Diversity of Ownership.* Second, two points are awarded for local diversity of ownership if the principal community contour of the applicant’s proposed station does not overlap with those of any other station in which any party to the application holds an attributable interest.<sup>35</sup> To be awarded such points, an applicant’s governing documents must include a provision requiring that such diversity of ownership be maintained in the future.<sup>36</sup> An applicant awarded diversity of ownership points must submit and place in its public file copies of pertinent governing documents to support its certification. An applicant that proposes an NCE FM station that would replace an attributable FM translator may exclude the translator for purposes of calculating diversity points if it has pledged to request cancellation of the translator authorization upon the new station’s commencement of operations.<sup>37</sup> Similarly, the Commission allows NCE FM applicants to exclude Class D (10 watt) FM stations and LPFM stations that will be replaced by the proposed full service NCE station.<sup>38</sup> NCE television applicants are permitted to exclude Low Power Television (LPTV) stations and TV translators in determining diversity points.<sup>39</sup>

12. *State-wide Network.* Third, two points are awarded for certain state-wide networks providing programming to accredited schools. These points are available only to applicants that cannot claim a credit for local diversity of ownership.<sup>40</sup>

13. *Technical Parameters.* Fourth, an applicant that proposes the best technical proposal in the group (*i.e.*, proposes service to the largest population and area, excluding substantial areas of water) may receive up to two points. The applicant receives one point if its proposed service area and population are ten percent greater than those of the next best area and population proposals, or two points if both are 25 percent greater than those of the next best area and population proposals, as measured by each

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<sup>32</sup> See *id.* § 73.7003.

<sup>33</sup> See *id.* § 73.7003(b).

<sup>34</sup> See *id.* § 73.7003(b)(1); FCC Form 340, Section IV, Question 1.

<sup>35</sup> See 47 CFR § 73.7003(b)(2).

<sup>36</sup> Applicants that are organized pursuant to state charters that cannot be amended without legislative action are permitted to base the governing document component of their local diversity certifications on other safeguards that reasonably assure that board characteristics supporting any points claimed by the applicant will be maintained. See *NCE MO&O*, 16 FCC Rcd at 5095, para. 58.

<sup>37</sup> *Id.* at 5102-03, paras. 84-85.

<sup>38</sup> See *NCE Omnibus Order*, 22 FCC Rcd at 6120, para. 47 (Class D); *37 Group NCE Point Order*, 26 FCC Rcd at 7012, para. 8, n.24 (LPFM).

<sup>39</sup> See *NCE MO&O*, 16 FCC Rcd at 5103, para. 85.

<sup>40</sup> See 47 CFR § 73.7003(b)(3). The statewide network credit is an alternative for applicants that use multiple stations to serve large numbers of schools and, therefore, do not qualify for the local diversity of ownership credit.

proposed station's predicted 60 dBu signal strength contour.<sup>41</sup> If the best technical proposal does not meet the 10 percent threshold, no applicant is awarded points under this criterion.

14. Finally, the Commission tallies the total number of points awarded to each applicant. The applicant with the highest score in a group is designated a "tentative selectee." All other applicants are eliminated.

15. *Tie-Breaker Criteria.* Any applicants tied for the highest number of points awarded in a group proceed to a tie-breaker round.<sup>42</sup> The first tie-breaker for NCE applicants is the number of station authorizations attributable to each applicant.<sup>43</sup> The applicant with the fewest attributable authorizations prevails. If the tie is not broken by this first factor, the Commission applies a second tie-breaker: the number of pending new and major change station applications in the same service attributable to each applicant.<sup>44</sup> The applicant with the fewest pending applications prevails. If that second factor fails to break the tie, we use mandatory time-sharing as the tie-breaker of last resort.<sup>45</sup>

## B. LPFM Comparative Process

16. In January 2000, the Commission adopted rules establishing the LPFM service,<sup>46</sup> including basic ownership and eligibility restrictions and a point system for resolving mutual exclusivity among LPFM applicants.<sup>47</sup> In 2012 the Commission modified a number of the LPFM licensing and service rules to implement the Local Community Radio Act<sup>48</sup> and otherwise promote a more sustainable community radio service.<sup>49</sup> Among other changes, the Commission modified the point system used to select from among conflicting LPFM applications. The revised selection procedures, which were utilized during the 2013 LPFM filing window, are described below.

17. Point System Selection Criteria. The Commission compares mutually exclusive groups of LPFM applications under the point system set forth in Section 73.872 of the Commission's rules.<sup>50</sup> 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

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<sup>41</sup> *Id.* § 73.7003(b)(4).

<sup>42</sup> *Id.* § 73.7003(c).

<sup>43</sup> *Id.* § 73.7003(c)(1). Radio station applicants are required to count commercial and noncommercial AM, FM, and FM translator stations, other than fill-in stations. Television applicants count UHF, VHF, and Class A stations. Our rules do not require television stations to count LPTV or TV translator stations when reporting attributable commercial or noncommercial television stations. *See NCE MO&O*, 16 FCC Rcd at 5103, para. 85.

<sup>44</sup> *See NCE Omnibus*, 22 FCC Rcd at 6123, para. 55.

<sup>45</sup> Mandatory time-sharing means the tied applicants are required to share the channel and program the station on a part-time basis. Specifically, if a tie among applicants in a MX group remains following application of the second tie-breaker criterion, the Commission directs the staff to provide the tied applicants 90 days in which to reach a time-sharing agreement among themselves. If the applicants are unable to reach a voluntary time-sharing agreement, the Commission has directed the staff to "designate the applications for hearing on the sole issue of an appropriate timesharing agreement." *See, e.g. Comparative Consideration of 32 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 5013, 5037, para. 94 (2010) (*32 Group NCE Point Order*).

<sup>46</sup> *Creation of Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205 (2000) (*LPFM Report and Order*).

<sup>47</sup> *See* 47 CFR §§ 73.853, 73.872.

<sup>48</sup> Pub. L. No. 111-371, 124 Stat. 4072 (2011).

<sup>49</sup> *See LPFM Sixth Report and Order*, *supra* note 9.

<sup>50</sup> 47 CFR § 73.872.



to originate local programming; (3) commitment to maintain a main studio; (4) commitment to originate local programming *and* maintain a main studio; (5) diversity of ownership; and (6) Tribal applicants serving Tribal lands.

18. The Commission tallies the total number of points awarded to each mutually exclusive applicant. Each of the applicants with the highest score in an MX group is designated a “tentative selectee.” Applicants tied for the highest point total in an MX group are subject to voluntary and involuntary time-sharing.

19. Tied Applicants: Voluntary and Involuntary Time-Sharing. When mutually exclusive applications have the same point total, the Commission gives the tied applicants a 90-day opportunity to propose voluntary time-sharing arrangements. Where proposals include all tied applications, each applicant is treated as a tentative selectee. Alternately, any two or more of the tied applicants in each MX group may propose to share use of the frequency by filing a voluntary time-share agreement and aggregating their points.<sup>51</sup> However, only applicants tied for the highest point total in an MX group may enter into a time-sharing agreement and aggregate their points.<sup>52</sup> If the applicants do not enter into a voluntary time-sharing agreement, the Commission assigns involuntary time-sharing arrangements to no more than three of the tied applicants in each MX group.<sup>53</sup>

### III. PROPOSED CHANGES TO THE NCE COMPARATIVE PROCESS

#### A. Eliminate Governing Document Requirements for Established Local Applicants

20. *Background.* Under our point system selection process, established local applicants are awarded three points, the single highest point criterion. To qualify, an applicant must certify that it has been “local” and “established,” as defined in Section 73.7000 of the rules,<sup>54</sup> continuously for at least two years immediately prior to the application filing.<sup>55</sup> A non-governmental applicant must have a physical headquarters, campus, or 75 percent of its governing board members residing within 25 miles of the reference coordinates of the proposed community of license to receive points.<sup>56</sup> A governmental unit is considered local within its jurisdictional boundaries.<sup>57</sup>

21. An applicant claiming points as an established local applicant must also place documentation supporting its certification in a local public inspection file and submit copies to the Commission in the initial FCC Form 340 application by the close of the filing window.<sup>58</sup> Acceptable documentation to illustrate how an applicant qualifies as local and established may include the following: “corporate materials from the secretary of state, lists of names, addresses, and length of residence of board members, copies of governing documents requiring a 75 percent local governing board, and course

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<sup>51</sup> The proposal is treated as minor amendments to the time-share proponents’ applications and becomes part of the terms of the station authorization. 47 CFR § 73.872(c).

<sup>52</sup> See 47 CFR § 73.872(c) (explaining the procedures for *tied* applicants to propose voluntary time-sharing arrangements and aggregate their points). Applicants aggregating points must specify the same frequency.

<sup>53</sup> *Id.* § 73.872(d).

<sup>54</sup> *Id.* § 73.7000.

<sup>55</sup> See *id.* § 73.7003(b)(1); see also FCC Form 340, Instructions at 9, Section IV, Question 1.

<sup>56</sup> See 47 CFR § 73.7000. A local headquarters must be the applicant’s primary place of business and not, for example, a post office box or branch office, which are more easily feigned and present less opportunity for meaningful contact with the community. A primary residence is a domicile, and not for example, a vacation home or a student’s temporary school address. See *NCE Report and Order*, 15 FCC Rcd at 7410, para. 54; see also FCC Form 340 at Worksheet #4, Items 1.b and 1.c.

<sup>57</sup> See 47 CFR § 73.7000.

<sup>58</sup> See, e.g., FCC Form 340, Instructions at 9, Section IV, Question 1.

brochures indicating that classes have been offered at a local campus for the preceding two years.”<sup>59</sup> While there is some flexibility in the type of documentation an applicant may provide, the failure to submit any documentation by the close of the filing window is fatal to an established local applicant point claim.<sup>60</sup>

22. Further, Section 73.7003(b)(1) of the Commission’s rules and the FCC Form 340 certification dictate that to receive the three localism points, an applicant’s governing documents must require that “such localism be maintained” (Localism Governing Document Requirement).<sup>61</sup> The rule makes no distinction between applicants relying on headquarters, campus location, 75 percent local governing board residences, or governmental entities within their area of jurisdiction, to qualify for localism points. Rather, the plain text of the rule requires that *all* applicants claiming points as an established local applicant amend their governing documents to satisfy the Localism Governing Document Requirement.

23. In contrast, the Worksheets and Instructions<sup>62</sup> to FCC Form 340, as well as the orders adopting the current NCE point system, limit the rule’s applicability. Specifically, Worksheet #4 to FCC Form 340 directs that only applicants relying on governing board residences must amend their governing documents to “require that this 75% local characteristic of the governing board be maintained for future boards as well.”<sup>63</sup> The FCC Form 340 Worksheet #4 does not discuss or require applicants relying on alternate local criteria to satisfy the Localism Governing Document Requirement. Similarly, in the orders adopting the NCE point system, the Commission stated: “an applicant relying on a local board residence to claim points as an established local applicant must demonstrate that its governing documents, *i.e.*, by-laws, require that such localism be maintained for at least four years of station operations.”<sup>64</sup> The Bureau’s practice has been to require only “board residence” applicants to satisfy the Localism Governing Document Requirement.<sup>65</sup>

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<sup>59</sup> *Id.* See also, *e.g.*, *Comparative Consideration of 52 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 8793, 8797, para. 11, n.27 (2010) (*52 Group NCE Point Order*).

<sup>60</sup> See, *e.g.*, *Comparative Consideration of Seven Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations Filed in the February 2010 Filing Window*, Memorandum Opinion and Order, 30 FCC Rcd 5135, 5140, para. 14 (2015) (*Seven Group Comparative Order*); *32 Group NCE Point Order*, 25 FCC Rcd at 5017, para. 11 (“applicant submitting no timely documentation at all cannot be found to have made a valid certification”).

<sup>61</sup> See 47 CFR § 73.7003(b)(2); FCC Form 340, Section IV, Question 1.

<sup>62</sup> Worksheets and Instructions were created to “provide additional information regarding Commission rules and policies.” FCC Form 340, Instructions at 2, Part K.

<sup>63</sup> See FCC Form 340 at Worksheet #4, Items 1.a through 1.d; see also Instructions to FCC Form 340 at 9 (requiring governing documents to ensure that applicant maintain “local” characteristics of governing board).

<sup>64</sup> *NCE Reconsideration Order*, 17 FCC Rcd at 13134, para. 8, n.10; *NCE Report and Order*, 15 FCC Rcd at 7419, para.78 (“so that points awarded to an applicant based on the composition of its governing board will remain meaningful, despite anticipated board changes, we will award points only to organizations whose own documents, (e.g., by-laws, constitution, or their equivalent) establish requirements for maintaining the characteristics of the board for which it claims credit”). See also, *e.g.*, *52 Group NCE Point Order*, 25 FCC Rcd at 8795, para. 5 (explaining that “[t]o qualify for localism points based on board composition, the applicant must certify that its governing documents require that such local board composition be maintained.”).

<sup>65</sup> See, *e.g.*, *Black Media Works*, Letter, 27 FCC Rcd 6397, 6401 (MB 2012) (finding applicant’s physical location within community of license sufficient to demonstrate that it would maintain its local headquarters); *Terre Haute Bible Baptist Church*, Letter, 27 FCC Rcd 12296, 12299 (MB 2012) (explaining that localism governing documents are not necessary to demonstrate that an applicant will maintain local headquarters).

24. The documentation discrepancy between the rules and the FCC Form 340 instructions and orders adopting the NCE point system created undue confusion and generated considerable litigation among applicants during the 2007 and 2010 NCE FM filing windows.<sup>66</sup> In fact, the Commission recently concluded that it must either “amend Section 73.7003(b)(1) by the time of the next NCE application window to specify that an applicant is not required to include in its governing documents a requirement that its headquarters be maintained within 25 miles of the proposed community of license, ...[or] instruct the Bureau to change the Instructions to Form 340 and Worksheet #4 to Form 340 to conform with the plain meaning of Section 73.7003(b)(1).”<sup>67</sup>

25. *Discussion.* We do not propose a change in the requirement to maintain localism for a specified period of time.<sup>68</sup> However, to improve the fair and efficient award of points under this valuable criterion,<sup>69</sup> we propose to eliminate the current Section 73.7003(b)(1) requirement that governing documents include a localism provision.<sup>70</sup> Localism has historically been considered the lynchpin of excellent NCE service, and accordingly, the Commission chose localism as the single most important factor in our NCE point system. The Commission purposefully adopted both a narrow definition of “established local” entities and stringent requirements to increase the likelihood that the organizations most knowledgeable, responsive, and accountable to their local community would be awarded licenses, to keep such points meaningful, and to avoid potential abuses.<sup>71</sup>

26. The Localism Governing Document Requirement is designed to ensure that local boards retain their local character notwithstanding inevitable board changes over time. We believe, however, that any benefits derived from the governing document mandate have been outweighed by the confusion and delay the requirement has engendered in the licensing process. Specifically, we believe that this rule has caused unnecessary difficulties for organizations seeking to obtain NCE stations and attempting in good faith to follow the Commission’s rules. Following the 2007 and 2010 NCE FM filing windows, the Commission received numerous petitions to deny, questioning whether the tentative selectee was required to satisfy the Localism Governing Document Requirement to merit the three localism points, or debating whether the form and specific language in an applicant’s amended governing documents sufficiently demonstrated that localism would be maintained.<sup>72</sup> Accordingly, multiple applicants spent time and

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<sup>66</sup> See, e.g., *Comparative Consideration of Seven Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 30 FCC Rcd 5161, 5179-81, paras. 55-62 (2015) (*NCE Comparative Reconsideration Order*).

<sup>67</sup> *Id.* at 5181, para. 62.

<sup>68</sup> Applicants are currently required to maintain localism for four years. See also para. 50, *infra* (seeking comment on whether four years is the appropriate amount of time).

<sup>69</sup> We propose no change to our definition of “local” and “established” and limitation of localism points to applicants with a headquarters, campus, or 75 percent of their board members residing within 25 miles of the reference coordinates of the community of license, and governmental entities within their area of jurisdiction. Further, to qualify for the three established local applicant points, we will continue to require each applicant to submit documentation establishing its bona fides, such as, *inter alia*, corporate materials from the secretary of state, and lists and names, addresses, and length of residence of board members, to verify that it has been local and established for at least two years immediately prior to the application filing. Finally, all prevailing applicants awarded points as an established local applicant must continue to satisfy at least one of the four “local” criteria set forth in the rule for at least four years of on-air operations, or as otherwise determined in this proceeding.

<sup>70</sup> See 47 CFR § 73.7003(b)(2).

<sup>71</sup> See *NCE MO&O*, 16 FCC Rcd at 5091, para. 47 (“an organization that has already been local for two years or more ... can thus ‘hit the ground running’”). Thus, the Commission has denied points to an organization with a mere paper existence where principals conducted only unrelated business at the claimed applicant “headquarters.” See *Calvary Chapel of Honolulu*, Memorandum Opinion and Order, 30 FCC Rcd 14910, 14912, para. 4 (2015) (*Calvary Honolulu*).

<sup>72</sup> See *supra* notes 65, 66. The Bureau staff resolved the majority of these petitions in unpublished staff letters.

money debating these issues, the Bureau staff expended time and resources reviewing and resolving the petitions, and the public was deprived of the expeditious initiation of new NCE FM service.

27. We seek comment on our proposed elimination of this specific documentation requirement for *all* categories of applicants seeking to qualify for localism points. Is this a reasonable approach, or would eliminating the current Localism Governing Document Requirement create other problems? In lieu of the Localism Governing Document Requirement, we propose to safeguard our localism goals by incorporating into the current Holding Period rule<sup>73</sup> a new provision explicitly requiring *any* prevailing applicant that receives localism points during the point system analysis to maintain localism during the period from the grant of the construction permit until the station has achieved four years of on-air operations.<sup>74</sup> Is this, along with a certification pledging to maintain localism at the time of filing the Form 340 application, sufficient to safeguard the “established local applicant” criterion? Are there any other means to safeguard this vital criterion? Alternatively, should we retain the Localism Governing Document Requirement solely for the category of applicants relying on their governing board member residences to qualify as local, and accordingly, amend our rules to clarify that *only* applicants relying on board members’ residences must satisfy the Localism Governing Document Requirement? We invite comment on these proposals, and any other suggestions to clarify, simplify, and safeguard the “established local applicant” criterion.

**B. Eliminate Governing Document Requirements for Applicants Claiming Diversity Points**

28. *Background.* Under our point system selection process, we award two points for local diversity of ownership if the principal community contour of the applicant’s proposed NCE station does not overlap with those of any other station in which either the applicant or any party to the application holds an attributable interest.<sup>75</sup> To qualify for diversity points, an applicant must certify that: (1) neither it nor any party to the application currently has such an interest; (2) the organization’s governing documents, *i.e.*, its “by-laws, constitution, or their equivalent,” require maintenance of diversity into the future; and (3) it has placed documentation of its diversity qualifications in a local public inspection file and has submitted copies of the documentation to the Commission.<sup>76</sup>

29. To document current diversity, an applicant must submit either a contour map showing no overlap with the proposed station, or a statement that the applicant holds no attributable interests in any nearby radio stations.<sup>77</sup> This initial step was not problematic for applicants during the 2007 and 2010 NCE FM filing windows. In contrast, the next step, the documentation of future diversity, created widespread confusion. To document future diversity, the Commission requires an applicant to file a copy of its pertinent corporate governance documents, showing that it properly amended its governing documents to require the maintenance of such diversity (the Governing Document Requirement). Applicants, such as state universities that are governed by state charters and statutes, which cannot be amended without legislative action, are permitted to base the governing document component of their

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<sup>73</sup> See 47 CFR § 73.7005.

<sup>74</sup> See *infra* Section III.F., “Clarify and Modify the ‘Holding Period’ Rule.”

<sup>75</sup> See 47 CFR § 73.7003(b)(2). Radio applicants count commercial and noncommercial AM, FM, and FM translator stations, other than fill-in stations. Television applicants count UHF, VHF, and Class A stations.

<sup>76</sup> See FCC Form 340, Section IV, Question 2. See also, *e.g.*, *Comparative Consideration of 26 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 11108, 11112, para. 11 (2010) (26 Group NCE Point Order).

<sup>77</sup> See FCC Form 340, Instructions to Section IV, Question 2.

diversity certification on alternative safeguards (the Legislative Exception).<sup>78</sup> For such applicants and those without official traditional governing documents, the Commission requires specificity and exactitude in supporting diversity documentation and explicit mechanisms to clearly communicate the diversity requirements to current and future board members and enforce such requirements.<sup>79</sup> The Commission adopted the Governing Document Requirement and the Legislative Exception (collectively, the Diversity Governing Document Requirement) to help ensure that an applicant will maintain the diversity characteristics for which it received credit, despite inevitable changes in board composition.<sup>80</sup>

30. As has been the case with the Localism Governing Document Requirement, we have found that this Diversity Governing Document Requirement has had the unintended effect of frustrating and confusing many applicants. Although an applicant entity had the flexibility to word the “commitment to maintain diversity” pledge as it deemed best for the organization,<sup>81</sup> multiple applicants, otherwise qualified and legitimate, lost diversity points because of ministerial mistakes and the failure to include certain “magic language” in their governing documents<sup>82</sup> or alternative safeguard showings, or the failure to comprehend the requirement to submit documentation to demonstrate a commitment to maintain diversity in the future. During the 2007 and 2010 NCE FM filing windows, the Commission denied diversity points to a significant number of applicants due to the lack of any, or adequate, supporting documentation.<sup>83</sup> Further, following each window, the Commission received numerous petitions to deny, challenging whether the language the tentative selectee relied on to satisfy the Diversity Governing Document Requirement was sufficient to merit diversity points.<sup>84</sup> While applicants debated the adequacy of the language, and often nitpicked particular words and phrases, the initiation of new NCE FM service was inevitably delayed or curtailed.

31. *Discussion.* We propose to eliminate both (1) the requirement that applicants amend their governing documents, or provide an alternative safeguard showing, to pledge that “diversity be maintained,” and (2) the requirement to submit such documents to the Commission and place the documentation in the local public inspection file. It is uncontroverted that the diversity of ownership criterion is a critical factor in the point system analysis because it enables the public to hear a variety of

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<sup>78</sup> The Commission initially intended this exception to apply to the limited case of state entities whose governing documents cannot be amended without legislative action. *See NCE MO&O*, 16 FCC Rcd at 5095, para. 58. The Commission subsequently extended this exception to entities without traditional governing documents. *See, e.g., Seven Group Comparative Order*, 30 FCC Rcd at 5148, para. 35.

<sup>79</sup> *See, e.g., Comparative Consideration of 3 Groups of Mutually Exclusive Applications to Construct New, Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 31 FCC Rcd 8007 (2016) (*Three Group NCE Order*).

<sup>80</sup> *See NCE MO&O*, 16 FCC Rcd at 5095, paras. 56-58.

<sup>81</sup> *Id.* at 5095, para. 58.

<sup>82</sup> *See, e.g., Three Group NCE Order*, *supra* note 79 (finding language in an alternative showing, which simply prohibits the applicant organization itself from holding an attributable interest, insufficient because it failed to also prohibit the parties to the application from holding attributable interests in nearby radio stations).

<sup>83</sup> *See, e.g., 26 Group NCE Point Order* (denying diversity points to over 25 percent of the applicants certifying credit for diversity of ownership due to insufficient supporting documentation); *37 Group NCE Point Order*, *supra* note 8 (same).

<sup>84</sup> *See, e.g., Three Group NCE Order*, *supra* note 79; *Open Arms Community of El Paso*, Memorandum Opinion and Order, 31 FCC Rcd 12185 (2016) (*Open Arms*) (finding an applicant’s commitment to comply with the entire relevant rule evidences an intent to bind any party to the applicant organization, to honor the applicant’s diversity commitment); *NCE MX Group 389*, Letter Order, 27 FCC Rcd 7670 (MB 2010) (finding the commitment to maintain diversity present in a resolution which provided that applicant “commits itself to maintain ... ‘diversity of ownership’ ... as set forth in the FCC Rules.”); *Talking Inf. Ctr.*, Letter Order, 22 FCC Rcd 11120 (MB 2007) (accepting alternative showing under the Legislative Exception).

viewpoints from different NCE broadcasters.<sup>85</sup> However, we believe that the benefits of the Diversity Governing Document Requirement have been far outweighed by the costs – namely, the caprice and unpredictability the requirement has introduced to the licensing process, the burdens placed on applicants and Commission staff, and the disqualification of otherwise legitimate applicants that failed to comprehend the requirement. We invite comments on our proposal to eliminate this documentation requirement for all applicants seeking to qualify for diversity points. Is this a reasonable approach, or are there potential harms in eliminating the Diversity Governing Document Requirement?

32. In lieu of the Diversity Governing Document Requirement, we propose to safeguard our diversity goals by incorporating into the current Holding Period rule<sup>86</sup> a new provision prohibiting any prevailing applicant that receives diversity points during the point system analysis from acquiring a radio or full power or Class A television station, which would overlap the principal community contour of its new NCE FM or NCE television station, during the period from the grant of the construction permit until the station has achieved four years of on-air operations.<sup>87</sup> The restriction would apply to the applicant itself, any parties to the application, and any party that acquires an attributable interest in the permittee or licensee during this period. Further, we propose to add an additional question to FCC Form 340, FCC Form 314, and FCC Form 315,<sup>88</sup> requiring applicants to certify that the proposed acquisition would comply with the subject authorization's diversity condition.<sup>89</sup> We seek comment on whether these are effective means to safeguard our diversity goals, and invite comments on any alternative measures. We invite comment on the proposals discussed above and any alternative or additional suggestions to clarify, simplify, and safeguard the diversity of ownership criterion.

### C. Establish Uniform Divestiture Pledge Policies

33. *Background.* To receive diversity of ownership points in our NCE point system analysis, an applicant must certify, *inter alia*, that the principal community contour of its proposed station does not overlap with those of any other station in which any party to the application holds an attributable interest.<sup>90</sup> As discussed above, the Commission examines the applicants' qualifications for points as of the close of the filing window. The Commission has held that, generally, a contingent pledge to divest an attributable broadcast interest or resign from an attributable positional interest (collectively, the Divestiture Pledge) is an ineffective mechanism to avoid the attribution of broadcast interests that are held

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<sup>85</sup> See, e.g., *NCE Report and Order*, 15 FCC Rcd at 7400, para. 33.

<sup>86</sup> See 47 CFR § 73.7005.

<sup>87</sup> See *infra* Section III.F., “Clarify and Modify the ‘Holding Period’ Rule.”

<sup>88</sup> See Application for Consent to Assignment of Broadcast Station Construction Permit or License (FCC Form 314); Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License (FCC Form 315).

<sup>89</sup> Applicants proposing a modification to a station received through the award of diversity points in the point system analysis would similarly be required to certify that the proposed modification would not create overlap with any authorized commercial or noncommercial AM, FM, or non-fill-in FM translator station (or for TV, any UHF, VHF, or Class A station) in which the applicant, or any party to the application, has an attributable interest. Similarly, applicants proposing modifications to any attributable radio or full-power or Class A television station must certify that the modification will not create overlap with any of its attributable NCE FM or NCE television stations received through the award of diversity points in the point system analysis.

<sup>90</sup> See 47 CFR § 73.7003(b)(2); see also Section III.B, *supra*.

at the close of the filing window.<sup>91</sup> Rather, diversity points are only awarded when the applicant completes the pledged action prior to the close of the filing window.<sup>92</sup>

34. The Commission, however, has carved out three exceptions to this general policy and will accept contingent Divestiture Pledges for: (1) non-fill-in translator stations if the applicant pledges to request the cancellation of the translator authorization upon the new NCE FM station's commencement of operations;<sup>93</sup> (2) Class D stations if the applicant commits to divesting the Class D station license prior to the commencement of operations by a same-area full service NCE FM station;<sup>94</sup> and (3) LPFM stations if the applicant/party commits to divesting its interest in the LPFM station license prior to commencement of program tests by the new NCE FM station.<sup>95</sup> During the 2007 and 2010 NCE FM filing windows, the Commission denied requests to utilize contingent Divestiture Pledges<sup>96</sup> to exclude full service stations from the diversity of ownership consideration.<sup>97</sup> In response, some applicants requested that we revisit and expand the scope of our divestiture policies to recognize full service station Divestiture Pledges for comparative purposes.<sup>98</sup>

35. *Discussion.* We propose to revise our current strict policy by crediting *all* contingent Divestiture Pledges that are made and submitted in the application by the close of the filing window. The current policy can be unduly burdensome considering that (1) the divestiture may never be required, *i.e.*, the applicant may not become a tentative selectee, and (2) our diversity concerns do not ripen regarding a tentative selectee until after a construction permit is issued and station construction is completed, a process that could take several years from the close of the window. Accordingly, we tentatively conclude that the public interest is better served by permitting applicants and parties to maintain continuity of service to the public during the licensing and construction process. We also propose to mandate that the actual divestiture or resignation be completed by the time the new NCE station commences program test

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<sup>91</sup> See *NCE MO&O*, 16 FCC Rcd at 5085, n.24 (“Applicants may not enhance their position based on matters that require additional Commission or applicant action.”); see also *Media Bureau Announces Filing Window for Vacant FM Allotments for Noncommercial Educational Use*, Public Notice, 24 FCC Rcd 12621, 12624 (MB 2009).

<sup>92</sup> See, e.g., *NCE Omnibus Order*, 22 FCC Rcd at 6120, paras. 44-45.

<sup>93</sup> See *NCE MO&O*, 16 FCC Rcd at 5102-03, paras. 84-85.

<sup>94</sup> See *NCE Omnibus Order*, 22 FCC Rcd at 6120, para. 47 (noting that the contingent pledge to divest the Class D station “would promote the Commission’s long-term policy to migrate Class D stations to full service facilities”).

<sup>95</sup> See, e.g., *52 Group NCE Point Order*, 25 FCC Rcd at 8798, paras. 12-13 (explaining that this would avoid the “unintended, potential loss” of existing LPFM service for up to three years during the construction of the new NCE FM station).

<sup>96</sup> See, e.g., *NCE Omnibus Order*, 22 FCC Rcd at 6120, paras. 44-45 (rejecting board member’s contingent pledge to divest ownership interest in full service FM station).

<sup>97</sup> Unlike NCE applicants, the Commission specifically permits an LPFM applicant with any type of attributable broadcast interest to qualify for the one point for diversity of ownership (the new entrant point) if it submits in its LPFM application, prior to the close of the filing window, a commitment to divest all its existing media interests (both owned and attributable) before the commencement of operations of its new LPFM station. We propose no changes to this current policy in the LPFM context. See *Creation of Low Power Radio Service*, Sixth Order on Reconsideration, 28 FCC Rcd 14489, 14492, n.26 (2013) (*LPFM Sixth Order on Reconsideration*); see also *Commission Identifies Tentative Selectees in 79 Groups of Mutually Exclusive Applications Filed in the LPFM Window*, Public Notice, 29 FCC Rcd 8665, 8667 (2014). The Commission has clarified that failure to include a divestiture pledge by the close of the filing window is not a fatal eligibility issue. See, e.g., *Cnty Radio of Decorah, Postville and Northeast Iowa*, Memorandum Opinion and Order, 31 FCC Rcd 12180 (2016) (*Decorah*); 47 CFR § 73.860. To qualify for the new entrant point, however, the divestiture pledge must be submitted by the close of the filing window. See, e.g., *LPFM Sixth Order on Reconsideration*, 28 FCC Rcd at 14492, n. 26.

<sup>98</sup> See, e.g., *NCE Comparative Reconsideration Order*, 30 FCC Rcd at 5178, para. 50.

operations.<sup>99</sup> We invite comment on these proposals. Is this new divestiture policy reasonable? Should the actual divestiture or resignation requirement be tied to the commencement of program tests, or another specific point in time? Are there any compelling reasons to continue to limit acceptable Divestiture Pledges for NCE applicants to *only* secondary service interest holdings?

#### D. Expand Tie-Breaker Criteria

36. *Background.* Under our NCE point system process, applicants tied with the highest number of points awarded in a MX group proceed to a tie-breaker round.<sup>100</sup> The first tie-breaker is the number of radio or television station authorizations attributable to each applicant.<sup>101</sup> The applicant with the fewest attributable authorizations prevails. If the tie is not broken by this first factor, we apply a second tie-breaker: the number of pending same service station applications attributable to each applicant.<sup>102</sup> The applicant with the fewest pending applications prevails. If the second factor fails to break the tie, we use mandatory time-sharing<sup>103</sup> as the tie-breaker of last resort for full service NCE stations.<sup>104</sup> For NCE FM translator stations, if a tie is not broken by the second factor, we select the first application received.<sup>105</sup>

37. The Commission initially considered adopting a first come, first served final tie-breaker for full power NCE stations, but rejected this approach, explaining that “a reward of the first to file could result in a rush for all vacant NCE channels.”<sup>106</sup> In adopting the current tie-breaker process, the Commission acknowledged the concern that the last option, mandatory time-sharing, “can be difficult for applicants with different missions, philosophies, or formats”<sup>107</sup> as well as “confusing to audiences and

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<sup>99</sup> When an applicant relies on a divestiture pledge to qualify for diversity points, and the construction permit is awarded through the point system process, we propose that the Bureau staff include a condition on the permit, requiring the applicant to divest the overlapping attributable interest by the time the new station commences program test operations.

<sup>100</sup> See 47 CFR § 73.7003(c). The tie-breaker determination is based on applicant-provided data and certifications contained in Section V of FCC Form 340 and FCC Form 349. An applicant’s maximum tie-breaker standing is established at the close of the filing window, but can be reduced due to subsequent events. See *NCE MO&O*, 16 FCC Rcd at 5083, para. 25.

<sup>101</sup> See 47 CFR § 73.7003(c)(1). NCE FM applicants are required to count all attributable existing full service commercial and NCE radio authorizations (licenses and construction permits) and FM translator authorizations (other than fill-in translator authorizations). An NCE FM applicant may exclude fill-in translators and any translator that it seeks to replace with its full-service proposal filed in the window. See *NCE MO&O*, 16 FCC Rcd at 5102-03, para. 85. NCE television applicants are required to count all attributable existing UHF, VHF, and Class A stations. An NCE television applicant may exclude any LPTV and TV translator stations. See *NCE MO&O*, 16 FCC Rcd at 5103, para. 85.

<sup>102</sup> See *id.* § 73.7003(c)(2). Applicants are required to include new and major change same service applications, the application at issue, as well as all other applications filed within the window.

<sup>103</sup> If NCE applicants remain tied, and are unable to settle among themselves, the tied applicants are required to share the channel and program the station on a part-time basis. This is called mandatory time-sharing. The Bureau staff first provides the tied applicants 90 days to reach a voluntary time-sharing agreement among themselves. See, e.g., *32 Group NCE Point Order*, 25 FCC Rcd at 5037, para.94.

<sup>104</sup> See *NCE Report and Order*, 15 FCC Rcd at 7416, para. 74; 47 CFR § 73.7003(c)(3).

<sup>105</sup> See *NCE MO&O*, 16 FCC Rcd at 5077, para. 7; see also Instructions to Application for Authority to Construct or Make Changes in an FM Translator or FM Booster Station (FCC Form 349) at 14.

<sup>106</sup> *NCE FNPRM*, 13 FCC Rcd at 21180, para. 25. In contrast, it speculated that “a filing rush is unlikely for FM translators, which lack several advantages of full service stations.” *NCE Report and Order*, 15 FCC Rcd at 7426, para. 100.

<sup>107</sup> *NCE MO&O*, 16 FCC Rcd at 5100, para. 78.



potentially inefficient to listeners.”<sup>108</sup> We, however, ultimately adopted the current tie-breaker criteria, stating that “the petitioners suggest no better alternatives.”<sup>109</sup>

38. During the 2007 and 2010 NCE FM filing windows, hundreds of MX groups resulted in ties following the point system analysis and proceeded to the tie-breaker round.<sup>110</sup> The Commission resolved almost 50 percent of the mutually exclusive reserved allotment groups from the 2010 window by applying the tie-breaker criteria.<sup>111</sup> Sixteen of these MX groups resulted in the unpopular last resort tie-breaker option, mandatory time-sharing.<sup>112</sup>

39. We anticipate more ties in future NCE FM filing windows because: (1) applicants have more time to establish themselves as local and thus merit the three localism points; (2) qualifying for a fair distribution preference in non-allotment groups will likely be more challenging<sup>113</sup> because of the increase in new NCE FM stations from prior windows; and (3) fewer claimed points will be rejected due to ministerial mistakes and omissions if we revise and simplify the diversity and localism criteria as proposed herein.<sup>114</sup>

40. *Discussion.* We seek comment on our current tie-breaker system and whether it is the most efficient and effective means of resolving mutual exclusivity among tied NCE applicants. To minimize resorting to the final mandatory time-sharing option, are there further tie-breaking measures we should use if a tie is not broken after the second tie-breaker? If so, what would they be? Should additional considerations be taken into account only if a tie remains between three or more applicants? To encourage more voluntary settlements or time-sharing among tied applicants, should we amend the reimbursement restrictions of Section 73.3525<sup>115</sup> of our rules to specify that the restrictions do not apply to applicants which remain tied after the second tie-breaker criterion? Besides mandatory time-sharing, are there any other problematic aspects of our current tie-breaker system? We invite comments on any proposals for supplemental tie-breakers that will be practical, fair, and effective and/or ways to improve and apply the current tie-breaker process.

#### **E. Revise Procedures for Allocating Time in NCE Mandatory Time-Sharing Situations<sup>116</sup>**

41. *Background.* As discussed above, in adopting the NCE point selection process, the Commission established that in cases where the new point selection process and tie-breakers resulted in more than one remaining mutually exclusive application, it would impose mandatory time-sharing on the

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<sup>108</sup> *NCE FNPRM*, 13 FCC Rcd at 21180, para. 26.

<sup>109</sup> *NCE MO&O*, 16 FCC Rcd at 5101, paras. 78-79.

<sup>110</sup> *See, e.g., 32 Group NCE Point Order*, *supra* note 45 (11 MX groups resolved by the tie-breaker criteria).

<sup>111</sup> *See supra* note 8.

<sup>112</sup> *Id.* Almost half of these mandatory time-sharing MX groups contained three or more applicants.

<sup>113</sup> *See* 47 U.S.C. § 307(b). An NCE FM applicant is eligible to receive a Section 307(b) preference if it would provide, within the proposed station’s 60 dBu contour, a first or second reserved band channel NCE aural service to at least ten percent of the population (in the aggregate), provided that such service is to at least 2,000 people.

<sup>114</sup> *See supra* Sections III.A and III.B.

<sup>115</sup> 47 CFR § 73.3525(a)(3).

<sup>116</sup> This section is premised on retaining mandatory time-sharing, the current tie-breaker of last resort for full service NCE FM and full power NCE television stations. To the extent that the Commission decides to end mandatory time-sharing, the questions posed in this section would become moot.

remaining applicants.<sup>117</sup> The Commission, however, did not provide a mechanism for allocating time to each applicant. Rather, in such situations, the Commission directed the Bureau staff to provide the tied applicants 90 days to reach a voluntary time-sharing agreement. The Commission advised applicants that, if they were unable to reach a voluntary time-sharing agreement within 90 days, it would designate their applications for hearing solely on the issue of allotting time in accordance with Section 73.561(b)(2) of the rules.<sup>118</sup>

42. The amorphous 90-day deadline and the mere prospect of a hearing to allocate time among mandatory time-share applicants has resulted in delayed construction of facilities and commencement of service. Notably, no mutually exclusive group of applicants has ever actually been designated for hearing. Rather, the Bureau has relied on applicants to reach agreement, a result achieved in some cases many years after the Commission concluded the point selection process.<sup>119</sup> The process of contacting applicants to ascertain the status of time-share or settlement negotiations is burdensome, and applicants have expressed their frustration at being unable to promptly comply with this requirement and begin construction of their facilities. Finally, if such a case was designated for hearing, it would present a significant financial cost to applicants and consume limited Commission resources.<sup>120</sup>

43. Subsequently, while revising its rules for the LPFM service, the Commission adopted a specific deadline for submitting voluntary time-share agreements, explicit requirements for the voluntary time-share proposals, and a detailed process for allocating time to mutually exclusive LPFM tentative selectees that are unable to reach a voluntary time-share agreement.<sup>121</sup> This process eliminated any need for a hearing and resulted in an expedient resolution of groups of mutually exclusive LPFM applications.<sup>122</sup> Under the involuntary time-share rules adopted in the *LPFM Sixth Report & Order*, if a tie among mutually exclusive applications is not resolved through voluntary time-sharing procedures

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<sup>117</sup> *NCE Report and Order*, 15 FCC Rcd at 7416, para. 74 (“As a final tie breaker for full service stations we will impose mandatory time sharing.”). See also 47 CFR §73.7003(c)(3) (“each of the remaining applicants will be identified as a tentative selectee, with the time divided equally among them”).

<sup>118</sup> 47 CFR § 73.561(b)(2). See, e.g., *32 Group NCE Point Order*, 25 FCC Rcd at 5038, para. 94 (“If the applicants are unable to reach a voluntary time-sharing agreement, the staff shall designate the applications for hearing on the sole issue of an appropriate time-sharing arrangement.”).

<sup>119</sup> For example, on August 3, 2010, the Commission identified the applications of Community Broadcast Services and St. Joseph’s Catholic School, Inc., as tentative selectees on a time-share basis. See *26 Group NCE Point Order*, 25 FCC Rcd at 11135, para. 88. The applicants were unable to arrive at a time-share agreement. Over two years later, the applicants reached a settlement agreement, over five years after the filing window. See *Broadcast Actions*, Public Notice, Report No. 47912 (MB Jan. 25, 2013) (approving settlement agreement). On May 3, 2011, the Commission identified the applications of Terre Haute Seventh-Day Adventist Church, The Light House Missions Ministries, Inc., and Terre Haute Bible Baptist Church, Inc. as tentative selectees on a time-share basis. The Bureau resolved a petition to deny filed against one of the tentative selectees in October of 2012, but no time-share agreement was reached until February of 2016, six years after the close of the filing window. See *NCE Reserved Allotment Group 29*, Letter Order, 27 FCC Rcd 12296 (MB 2012) (denying petition to deny tentative selectee); *Broadcast Actions*, Public Notice, Report No. 48679 (MB Feb. 26, 2016) (approving settlement agreement).

<sup>120</sup> Section 73.561(b) also requires an NCE FM station to time-share if it does not operate for 12 hours each day, and a competing new station application is filed. The rule requires the Commission to designate the incumbent’s license renewal and competing new station applications for hearing on the time-share issue when the applicants fail to agree on time-sharing terms. Although beyond the scope of this proceeding, we note that this requirement appears to have been equally unworkable in the license renewal context. See, e.g., File No. BRED-20050512AFK (license renewal application granted more than 11 years after filing following the voluntary dismissal of competing new station time-share application).

<sup>121</sup> See *LPFM Sixth Report and Order*, 27 FCC Rcd at 15475-76, para. 197.

<sup>122</sup> The most recent LPFM filing window closed in November of 2013, and by the end of 2016, all mutually exclusive groups had been resolved.

within a designated amount of time, or if a tie still remains following the submission of competing voluntary time-sharing arrangements, up to three applicants with tied, grantable applications are eligible for equal, concurrent, non-renewable license terms.<sup>123</sup> If there are more than three tied and grantable applications, the Commission dismisses all but the applications of the three applicants that have been local for the longest uninterrupted periods of time.<sup>124</sup> The remaining applicants are able to select their preferred time slots, with preference given to the longest established applicants.<sup>125</sup> If an applicant fails to designate its preferred time slot, the Commission staff selects a time slot for the applicant.

44. *Discussion.* We seek comment on whether to adopt similar mandatory time-share rules and procedures for mutually exclusive NCE applicants, including a rule to delineate an explicit deadline for submitting voluntary time-share agreements and detailed steps to allocate time to NCE tentative selectees that are unable to arrive at a voluntary time-share agreement within the allotted deadline. Specifically, the LPFM rules delineate a 90-day deadline to submit voluntary time-share agreements and require the proposals to be in writing, signed by each time-share proponent, and specify the hours of operation of each time-share proponent.<sup>126</sup> Although Section 73.561(b)(1)<sup>127</sup> of our rules similarly details the requirements for voluntary NCE time-share proposals, there is no parallel rule mandating an explicit deadline for submitting voluntary NCE time-share agreements. Should we codify a 90-day timeframe for submitting voluntary NCE time-share agreements, therefore requiring tied applicants to file any time-share agreements within 90 days of the release of a public notice or order announcing the tie? Would this process provide for expedient resolution of mutually exclusive groups and commencement of new service? Is there another process that would provide for the expedient submission of voluntary time-share agreements and the resolution of these ties? In the event of a tie between three or more applicants, should we amend our rules to permit, as we do in the LPFM context, voluntary point aggregation time-share agreements?<sup>128</sup>

45. If mutually exclusive tied NCE applicants are unable to reach a voluntary time-share agreement, the last resort option is to designate the applications for hearing on the sole issue of an appropriate time-sharing arrangement. In contrast, the LPFM rules contain strict, concise mechanisms for allotting time to such applicants, as described above. Should we adopt similar procedures for tied mutually exclusive NCE applicants, modeled after the current LPFM rules, which have worked effectively to resolve mutual exclusivities and expedite new service to the public? Specifically, in the LPFM context, if a tie among mutually exclusive applicants is not resolved through voluntary time-sharing, under the involuntary time-sharing rules, tied, grantable applications are eligible for concurrent, non-renewable license terms. Moreover, under the LPFM involuntary time-sharing rules, tied, mutually exclusive groups are limited to three applicants. Should we adopt a similar process for the NCE broadcast service and limit the number of mandatory time-share applicants to three? For LPFM, if there are more than three tied and grantable applications, we dismiss all but the applications of the three applicants that have been local for the longest uninterrupted periods of time. To effectuate this process, we require each applicant to provide, as part of its initial application, its date of establishment. If we impose a limit on the number of mandatory NCE time-share applicants, would a similar cut-off mechanism work for the NCE

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<sup>123</sup> 47 CFR § 73.872(d)(1). Applicants can convert their licenses into renewable licenses if they file voluntary time-sharing agreements. 47 CFR § 73.872(d)(4).

<sup>124</sup> *Id.* § 73.872(d)(3).

<sup>125</sup> *Id.* § 73.872(d)(2).

<sup>126</sup> *See* 47 CFR § 73.872(c)(1).

<sup>127</sup> 47 CFR § 73.561(b).

<sup>128</sup> As part of the LPFM voluntary time-sharing procedures, the point aggregation rule, 47 CFR § 73.872(c), permits tied tentative selectees to jointly submit a time-sharing agreement, and a new aggregated point total is then assigned to the group. *See* paragraphs 56-63 *infra*, for further discussion of the point aggregation procedures in the LPFM context.

service, where, unlike LPFM, many of the applicants are long-established universities and governmental entities? If we use the date of establishment as the cut-off mechanism, and an applicant subsequently assigns or transfers the NCE authorization received pursuant to these new procedures, should we require the date the new assignee or transferee was “locally established” to be the same as, or earlier than, the date of the most recently established local applicant in the tied MX group? In lieu of the date of establishment, is there an alternative cut-off mechanism that would be more effective for the NCE service?

46. For the LPFM service, when there are three remaining tied applicants, we assign each applicant one of the following time slots: 2 a.m.-9:59 a.m., 10 a.m.-5:59 p.m., and 6 p.m.-1:59 a.m. If there are only two applicants, we assign each one of the following time slots: 3 a.m.-2:59 p.m., or 3 p.m.-2:59 a.m. The staff allows the LPFM applicants to confidentially select their preferred time slots, giving preference to the applicant that has been local for the longest uninterrupted period of time. In the event an applicant neglects to designate its preferred time slot, the Commission staff selects a time slot for the applicant. Finally, to ensure that there is no gamesmanship, we require the applicants to certify that they have not colluded with any other applicants in the selection of time slots. Should we adopt the same time slots and selection procedures for the NCE service, or are there alternatives that would be more appropriate and effective for the NCE service? We seek comment on these proposals. We also invite suggestions for any alternative plans or variations on these plans, including an analysis of the pros and cons in promoting our goals of expediting new service to the public and expanding the diversity of voices available to radio audiences.

#### F. Clarify and Modify the “Holding Period” Rule

47. *Background.* The Commission adopted Section 73.7005 of its rules (the Holding Period Rule) to ensure that applicants selected through the NCE comparative process maintain the characteristics that formed the basis of their selection for a period of four years of on-air operations.<sup>129</sup> The “holding period” restrictions, which commence with the award of a construction permit and continue until the facility has achieved four years of on-air operations, apply to NCE construction permits awarded pursuant to the point system or a decisive Section 307(b) preference.<sup>130</sup> The Commission explained that the purpose of its Holding Period Rule is to uphold the integrity of the comparative selection system, prevent speculation, and ensure the public receives the benefits of the best proposal.<sup>131</sup>

48. The Holding Period Rule currently contains two separate components. The “Technical” component of the rule dictates that any NCE FM applicant receiving a decisive Section 307(b) preference must “construct and operate technical facilities substantially as proposed, *and cannot downgrade service to the area on which the preference is based*” during the four-year holding period.<sup>132</sup>

49. Second, the “Assignments/Transfers” component of the Holding Period Rule states that NCE stations awarded by use of the point system<sup>133</sup> are “subject to a holding period.” In fact, the Holding Period Rule name and this restriction are something of a misnomer. Specifically, the rule permits transfers and assignments during the first four years of on air operations when: (1) the proposed buyer would qualify for at least the same number of points as the applicant originally received; and (2) consideration received and/or promised does not exceed the assignor’s or transferor’s legitimate and

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<sup>129</sup> See *id.* § 73.7005. See *NCE Report and Order*, 15 FCC Rcd at 7407, para. 48; *NCE MO&O*, 16 FCC Rcd at 5090, para. 44.

<sup>130</sup> See 47 CFR § 73.7005(a)-(b).

<sup>131</sup> See *NCE Report and Order*, 15 FCC Rcd at 7407, 7424-25, paras. 48; 92-94; *NCE MO&O*, 16 FCC Rcd at 5090, para. 44.

<sup>132</sup> See 47 CFR § 73.7005(b) (emphasis added); see also *id.* § 73.7002(c).

<sup>133</sup> See *id.* § 73.7003.

prudent expenses.<sup>134</sup> The non-technical component of the rule does not include a parallel provision, similar to the technical component, requiring the applicant selected through the NCE comparative process to maintain particular comparative qualifications during the four-year holding period.<sup>135</sup>

50. *Discussion.* We propose both stylistic and substantive changes to the Holding Period Rule to clarify and promote its laudable goal of ensuring that our selection process is meaningful by mandating that applicants maintain comparative characteristics for a minimum period.<sup>136</sup> As an initial matter, we propose to rename Section 73.7005 of the rules “Maintenance of Comparative Qualifications.”<sup>137</sup> Second, we propose to add a new provision to Section 73.7005 to establish, for the first time, specific timing requirements for maintaining comparative qualifications. Specifically, we propose that NCE permittees and licensees issued authorizations under comparative procedures maintain their comparative qualifications from the grant of the construction permit until the station has achieved at least four years of on-air operations. We invite comments on this proposal. Is this proposed maintenance period sufficient to establish meaningful service for the community, and deter license speculators, without unduly burdening the licensee? Should we require such applicants to maintain the factors for which points were awarded for a longer, or shorter, period? If commenters believe a different period is warranted, how long should it be? If we adopt a different maintenance period than grant of the construction permit until four years of on-air operations, should we make a conforming change to the holding period in the Assignments/Transfers component of the rule?<sup>138</sup>

51. Third, we propose to relax Section 73.7005(b) and the parallel provision in Section 73.7002(c) of our rules (Fair distribution of service on reserved band FM channels) to eliminate the current absolute bar<sup>139</sup> on any preference-related service downgrade.<sup>140</sup> Specifically, we propose to allow minor modifications, provided that any potential loss of first and/or second NCE FM service is offset by first and, separately, combined first and/or second NCE FM service population gain(s).<sup>141</sup> We believe that this change would give permittees and licensees reasonable flexibility to implement facility modifications while also preserving the core purpose of these rules: to sharply limit service losses to areas in which the NCE FM station is providing Section 307(b)-preferred service. We seek comment on this proposal. Should we also require such applicants proposing minor modifications to demonstrate that

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<sup>134</sup> See *id.* § 73.7005(a).

<sup>135</sup> See *supra* Sections III.A and III.B. As explained above, we propose to eliminate the current Localism and Diversity Governing Documentation Requirements and incorporate, for the first time, the maintenance of localism and diversity requirements into the current Holding Period Rule.

<sup>136</sup> See *NCE Report and Order*, 15 FCC Rcd at 7424, para. 93; See also *NCE Reconsideration Order*, 17 FCC Rcd at 13134, para. 6 (“forward-looking holding period requires a reserved channel licensee that was selected by the point system to adhere to those commitments on which its comparative qualifications were established.”).

<sup>137</sup> We propose no changes to the substance of the current Holding Period Rule regarding assignments/transfers during the four-year period. See 47 CFR § 73.7005(a).

<sup>138</sup> See 47 CFR § 73.7005(a).

<sup>139</sup> See, e.g., *Univ. of Okla.*, Letter Order, 20 FCC Rcd 11984 (MB 2005), *modification denied*, *Letter to James. P. Pappas*, Ref. 1800B3-ALV (MB May 17, 2007) (dismissing modification application for new NCE FM station where proposed service area did not include the entire area on which a first service preference was based); *Jeffrey D. Southmayd, Esq.*, Letter Order, 24 FCC Rcd 5672 (MB 2009).

<sup>140</sup> 47 CFR §§ 73.7005(b), 73.7002(c). By their terms, Sections 73.7005(b) and 73.7002(c) do not allow applicants the discretion to downgrade even if the population losing service would be minimal or offset by a population gain elsewhere, or if the applicant would have still qualified for a decisive Section 307(b) preference.

<sup>141</sup> Any potential loss of service in first and second NCE service must be offset by at least equal first, and, separately, combined first and second NCE service population gains.

they would continue to qualify for a decisive Section 307(b) preference?<sup>142</sup> Finally, we seek comment generally on methods to promote compliance with Section 73.7005 of our rules and appropriate sanctions for licensees that fail to comply and fulfill their comparative commitments. For example, should stations that fail to maintain their comparative qualifications be subject to mandatory time-share proposals as part of the license renewal process, or should the Commission refuse to renew the licenses of stations that fail to maintain their comparative qualifications for the required period of time? We invite comments on each of these proposals and any alternative or additional suggestions to clarify Section 73.7005.

#### IV. PROPOSED CHANGES TO THE LPFM COMPARATIVE PROCESS

##### A. Prohibit Amendments to Cure Section 301 Violations by Application Parties

52. *Background.* When the Commission established the LPFM service in 2000, it provided that applicants that had engaged in unlicensed broadcasting could disclose this violation without affecting their LPFM eligibility if they had ceased such operations.<sup>143</sup> However, Section 632(a)(1)(B) of the subsequently enacted Making Appropriations for the Government of the District of Columbia for Fiscal Year 2001 Act “prohibit[s] any applicant from obtaining a low power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934.”<sup>144</sup> Thus, Congress specifically directed that past participation in unlicensed broadcasting in violation of Section 301 be treated as disqualifying conduct for LPFM applicants.<sup>145</sup>

53. Section 73.854 of the Commission’s rules and FCC Form 318 implement this mandate by requiring an LPFM applicant to certify under penalty of perjury that neither the applicant nor any party to the application has engaged in any manner in unlicensed operation of any station in violation of Section 301 of the Act.<sup>146</sup> Any application that lacks such a certification, or any application that falsely makes such a certification, is dismissed.<sup>147</sup> The Bureau has held that an LPFM applicant dismissed pursuant to

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<sup>142</sup> In examining new levels of first and second NCE FM service, the Commission looks back to a snap-shot date (*i.e.*, the date the mutually exclusive applications were initially filed) without consideration of inevitable, subsequent shifts in population and number of stations authorized. *See, e.g., NCE MO&O*, 16 FCC Rcd at 5083, para. 26.

<sup>143</sup> *See LPFM Report and Order*, 15 FCC at 2226, para. 54.

<sup>144</sup> *See* Pub. L. No. 106-553, 114 Stat. 2762 (2000) (Appropriations Act), amended by Pub. L. No. 111-371, 124 Stat. 4072 (2011). *See also Creation of a Low Power Radio Service*, Second Report and Order, 16 FCC Rcd 8026, 8030, paras. 10-11 (2001) (*LPFM Second Report and Order*); 47 CFR § 73.854; *Ruggiero v. FCC*, 278 F.3d 1323 (D.C. Cir. 2002), *rev'd en banc*, 317 F.3d 239 (D.C. Cir. 2003).

<sup>145</sup> *See LPFM Second Report and Order*, 16 FCC Rcd at 8030-31, para. 12 (“The amendment of the unlicensed operation rule is a non-discretionary action that merely codifies a Congressional requirement.”).

<sup>146</sup> *See LPFM Report and Order*, 15 FCC Rcd at 2226, para. 54 (“certifications will be made with respect to the applicant as well as all parties to the application (*i.e.*, any party with an attributable interest in the applicant)”; *LPFM Second Report and Order*, 16 FCC Rcd at 8030, para. 11; 47 CFR § 73.854; FCC Form 318, Section II, Questions 3 (Parties to the Application) and 8 (Unlicensed Operation) (requiring applicants to certify that neither the applicant *nor any party to the application* has engaged in any manner in the unlicensed operation of any station); *see also* Instructions for FCC Form 318, § II.H.

<sup>147</sup> *See LPFM Second Report and Order*, 16 FCC Rcd at 8030, para. 11 (“We note that the statutory language is not limited to applicants and licensees that have been found to have engaged in unauthorized operations by the Commission. Accordingly, an applicant will be held ineligible to hold an LPFM license if it has engaged in unlicensed operation regardless of whether the Commission has made a specific finding that the party has engaged in such conduct. An applicant that responds “Yes” to Question 8 . . . but which is subsequently determined to have engaged in unlicensed station operations will be dismissed and subject to additional enforcement actions.”). *See, e.g., WKMJ Radio Live the People Station*, Memorandum Opinion and Order, 30 FCC Rcd 13779 (2015) (affirming Bureau dismissal of LPFM construction permit application where applicant’s president had engaged in unauthorized broadcasting, but applicant certified “Yes” to Question 8).

the Appropriations Act and Section 73.854 may not regain its eligibility to hold an LPFM authorization by removing the board member associated with unauthorized broadcasting.<sup>148</sup> The Commission itself, however, has never addressed the issue.

54. Generally, the Commission permits minor board changes in LPFM applicants and also gives dismissed applicants a single opportunity to file an amendment to cure defects in their applications, unless prohibited by a specific rule or clearly established policy.<sup>149</sup> There is no explicit rule precluding an LPFM applicant dismissed for violations of the Appropriations Act and Section 73.854 from seeking *nunc pro tunc* reinstatement by amending its application to remove any board members that have engaged in unauthorized broadcasting. Similarly, other than the Bureau precedent described above, no rule or processing policy specifically bars an LPFM applicant from making a minor board of directors change to cure an “unauthorized broadcasting” ownership defect.

55. *Discussion.* We propose to codify Bureau precedent and amend our rules to preclude an LPFM applicant dismissed pursuant to the Appropriations Act and Section 73.854 from seeking *nunc pro tunc* reinstatement of its application and to disallow any change in directors as a means of resolving the applicant’s basic qualifications under Section 73.854 of our rules. The corrective amendment issue typically arises in cases where the LPFM applicant falsely certifies “Yes” to Question 8 even though one or more of the parties to the application has engaged in unauthorized broadcasting.<sup>150</sup> This could be because the person submitting the application knowingly submitted a false certification, did not do sufficient due diligence about the parties to the application, or conducted some due diligence, but received false information from one or more parties to the application. We believe that a restriction on corrective amendments to resolve basic qualification issues under Section 73.854 would be in keeping with the intent of the Appropriations Act and reflect the seriousness with which the Commission treats unauthorized broadcasting. We invite comment on this proposal.

#### **B. Permit Time-Sharing Agreements Prior to Tentative Selectee Designations**

56. *Background.* As discussed more fully above, if the LPFM point analysis results in a tie, the Commission first employs voluntary time-sharing as the initial tie-breaker.<sup>151</sup> The point aggregation rule permits tied tentative selectees to jointly submit a time-sharing agreement. A new aggregated point total is then assigned to the group.<sup>152</sup> The group with the highest number of aggregated points prevails.<sup>153</sup> The point-aggregation rule “increas[es] participation by a variety of local community organizations in the

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<sup>148</sup> See *Takilma Cmty Assoc., Inc.*, Letter Order, 20 FCC Rcd 12005, 12007 (MB 2005) (“Neither the Appropriations Act, the *LPFM Second Report and Order*, nor Section 73.854 permits LPFM applicants to retain their basic qualifications simply by removing the principals that participated in the unlicensed operation of a radio station.”).

<sup>149</sup> 47 CFR § 73.871(c)(3) (minor amendments to LPFM applications include limited changes in board membership); *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR 2d 776 (1984) (*Nunc Pro Tunc Public Notice*). For example, Section 73.870(c) of our rules provides that LPFM applicants dismissed pursuant to Section 73.807 are not entitled to *nunc pro tunc* reinstatement. See 47 CFR §§ 73.807, 73.870(c); *Christian Charities Deliverance Church*, Memorandum Opinion and Order, 30 FCC Rcd 10548, 10549-50, para. 5 (2015).

<sup>150</sup> The mere allegation of unauthorized broadcasting itself is not sufficient to disqualify an LPFM applicant. See, e.g., *Public Media of New England, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd 14922, 14925, para. 7 (2015) (rejecting argument that LPFM application should be dismissed pursuant to Section 73.854 where applicant’s principal had engaged in lawful unlicensed operation pursuant to Part 15 of the rules); *Casa de Oracion Getsemani*, Memorandum Opinion and Order, 23 FCC Rcd 4118, 4125, para. 15 (2008) (same).

<sup>151</sup> See *supra* at para. 19.

<sup>152</sup> 47 CFR § 73.872(c).

<sup>153</sup> *Id.*

operation of LPFM stations” and “increas[es] the number of new broadcast voices.”<sup>154</sup> Each prevailing time share proponent is treated as a separate licensee, issued a separate authorization for its station, and entitled to its own distinct call sign.<sup>155</sup> Each time share licensee retains ultimate control over its station’s programming, operations, and management. Our procedures for voluntary time-share agreements have generally been an efficient and effective means for resolving mutual exclusivity among tied LPFM applicants. There has, however, been some confusion as to whether LPFM applicants can communicate and collaborate with each other, either pre- or post-application filing, with the goal of potentially aggregating points.<sup>156</sup>

57. *Discussion.* We tentatively conclude that Section 73.872(c) should be modified to specifically permit point aggregation discussions and agreements at any point before the Bureau implements the involuntary time-share procedures, including prior to tentative selectee designations, if any such agreement is conditioned on each of the parties subsequently achieving tentative selectee status.<sup>157</sup> Currently, there is no rule that prohibits LPFM applicants from each filing a separate LPFM application with the intended goal of arriving at a time-sharing agreement, if the agreement is conditioned on each applicant becoming a tentative selectee. With one exception, there are no anti-collusion rules applicable to the LPFM comparative selection process.<sup>158</sup> We believe organizations interested in filing an LPFM application should have leeway to communicate with other eligible organizations about maximizing their chances to acquire LPFM construction permits and to explore potential time-share construction and operating efficiencies. We believe this type of cooperation can help ensure increased service to the public.

58. We seek comment on this proposed new rule. Would such a rule eliminate confusion over the ability of applicants to collaborate and communicate with each other? Does the proposed rule go too far by allowing collaboration at any time during the LPFM application process prior to the Bureau implementing the involuntary time-share procedures, thereby promoting gamesmanship?

59. While we recognize that there is the potential for gamesmanship, we believe it is limited. Any collaboration among applicants prior to the Commission’s identification of the tentative selectees is an inherently tentative process. The identity of competing applicants is only determined after the close of the filing window. Claimed points may be rejected by the Commission or challenged by other applicants in the MX group. Our proposed rule would negate agreements between tentative selectees and non-tentative selectees. In such circumstances, a losing applicant would be dismissed and cannot join a

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<sup>154</sup> *LPFM Report and Order*, 15 FCC Rcd at 2263, paras. 147-148.

<sup>155</sup> *See, e.g., Urban Media One*, Memorandum Opinion and Order, 31 FCC Rcd 13759, para. 2 (2016) (parties to a time-share agreement granted separate construction permits).

<sup>156</sup> *See Applications for New Low Power FM Stations in Philadelphia, PA*, Memorandum Opinion and Order, 30 FCC Rcd 13983, 13984, para. 2 (2015) (applicants were permitted to discuss time-sharing agreement prior to filing applications), *aff’d Nueva Esperanza, Inc. v. FCC*, No. 15-1500 (D.C. Cir. July 2, 2017).

<sup>157</sup> Although organizations may collaborate with each other at any time before the Bureau implements the involuntary time-share procedures set forth in Section 73.872(d)(2), this proposed rule change does not change the requirement that time-share proposals may only be submitted after the release of the public notice announcing the tie. 47 CFR § 73.872(c). Thus, point aggregation procedures will not apply to time-share agreements submitted prior to the release of the public notice announcing the tie.

<sup>158</sup> There are some limits to communications in the event of an *involuntary* time-share. In the case of involuntary time-sharing arrangements, applicants simultaneously and confidentially submit their preferred time slots to the Commission. To ensure that there is no gamesmanship, applicants must certify that they have not colluded with any other applicants in the selection of time slots. 47 CFR § 73.872(d)(2); *LPFM Sixth Report and Order*, 27 FCC Rcd at 15475-76, para. 197.



winning LPFM application.<sup>159</sup> Further, we believe the potential for gamesmanship is limited because each party to the prevailing time-share agreement is required to operate and manage its respective proposed station if its application is granted. Nonetheless, should we consider limiting the number of organizations that can enter into a time-share agreement, so that applicants cannot “stack the deck” in their favor?<sup>160</sup>

60. We recognize the possibility that some applicants could enter into a time-share arrangement in order to aggregate their points without the intent to build and operate their LPFM stations.<sup>161</sup> Currently, following the award of voluntary time-share construction permits, if one of the participants in a voluntary time-sharing arrangement does not construct, or surrenders its station license after commencing operations, the remaining time-share participants are free to apportion the vacant air-time as they see fit. We previously considered this issue and made no changes to our current policy of allowing the remaining time-share licensees to reapportion the remaining airtime.<sup>162</sup>

61. In light of our proposed rule explicitly allowing applicants to communicate and collaborate on time sharing arrangements, should we reconsider the current process for reapportioning time following the surrender or expiration of a construction permit or license of a time-share party? We solicit comments on ways to reduce the potential for abuse of the air-time reapportionment policy. As proposed previously, should we open a “mini-window” for the filing of applications for the abandoned air-time?<sup>163</sup> Should we limit the period during which reapportionment policies would apply, e.g., the first four years of on-air operations? Should we limit eligibility to unsuccessful applicants from the same mutually exclusive group in the initial window?<sup>164</sup> Are there other procedures or policies the Commission should adopt to deter abuses and promote the fair and efficient use of air time following the cancellation of a time-share authorization?

### **C. Establish Procedures for Remaining Tentative Selectees Following Dismissal of Accepted Point Aggregation Time Share Agreements**

62. *Background.* As discussed above, in the event the LPFM point system analysis<sup>165</sup> results in a tie, the Commission releases a public notice that initiates a 90-day period for the filing of point-aggregating voluntary time-sharing arrangements.<sup>166</sup> However, under the rules, an accepted point-

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<sup>159</sup> See Instructions for FCC Form 318, Section IIC (applicants must list all parties to the application). See also 47 CFR § 73.855(a) (LPFM applicants can file only one application).

<sup>160</sup> In the case of involuntary time-shares, we have concluded that “time share situations involving more than three parties may prove cumbersome.” *LPFM Sixth Report and Order*, 27 FCC Rcd at 15475, para. 197.

<sup>161</sup> A construction permit application is effectively a representation that the applicant intends to build its proposed station. See *Meredith Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 7015, 7016, para. 13 (1990); *Land O’ Lakes Broad. Corp.*, Memorandum Opinion and Order, 4 FCC Rcd 344, 348, para. 31 (1989).

<sup>162</sup> *LPFM Sixth Report and Order*, 27 FCC Rcd at 15477, para. 198 (we did not receive any substantive comments regarding changing the current policy of allowing the remaining time-share licensees to reapportion the remaining airtime and determined that a solution of a “mini-window” would pose a great administrative burden on Commission staff).

<sup>163</sup> *Creation of a Low Power Radio Service*, Fifth Report and Order, Fourth Notice of Proposed Rulemaking, and Fourth Order on Reconsideration, 27 FCC Rcd 3315, 3341, para. 65 (2012) (*LPFM Fifth Report and Order*).

<sup>164</sup> As previously explained in the *LPFM Fifth Report and Order*, we believe that limiting the applicant pool to unsuccessful applicants from the same MX group will provide organizations with an incentive to participate in the LPFM licensing process at the earliest opportunity (*i.e.*, during the initial filing window). See *LPFM Fifth Report and Order*, 27 FCC Rcd at 3341, para. 65.

<sup>165</sup> 47 CFR § 73.872. See also *LPFM Report and Order*, 15 FCC Rcd at 2258-2264, paras. 136-149.

<sup>166</sup> These time-share proposals function as tie-breakers in two different ways. See 47 CFR § 73.872(c); *LPFM Report and Order*, 15 FCC Rcd at 2263, para. 147. First, *all* the tied applicants in an MX group may participate in

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aggregation time-share amendment/agreement may subsequently be found to be invalid due to a basic or comparative qualifications defect in the application of a time-share party, or as a result of changed circumstances.<sup>167</sup> This situation can arise, for example, if a tentatively accepted point claim is rejected or a technical amendment by a non-time share party results in a party's application becoming a singleton. The current rules do not establish procedures for the further processing of the remaining tentative selectees in an affected MX group.

63. *Discussion.* We propose to codify a procedure under which the Bureau would resume the processing of the remaining tentative selectees following the dismissal of a tentatively accepted time-share agreement. Following such dismissal, the Bureau would release a public notice that would initiate a second 90-day period, affording *all* remaining tentative selectees within the affected MX group<sup>168</sup> a further opportunity to enter into either a universal settlement or a voluntary point-aggregating time-share arrangement in accordance with Sections 73.872(c) and (e).<sup>169</sup> Under this proposal, the Bureau would dismiss all pending point aggregation amendments/agreements when it releases the public notice commencing the new settlement period. We believe that these proposed procedural changes would be fair to all applicants while also promoting core LPFM service goals. We invite comment on this proposal, as well as on other approaches to address this issue in an efficient manner.

## V. PROPOSED CHANGES TO OTHER LICENSING PROCEDURES

### A. Reclassify Gradual Board Changes as Minor

64. *Background.* Under our current rules, changes in the composition of the governing board of an NCE or LPFM applicant can lead to the dismissal of the pending application. Applicants can make "minor" changes to their application at any time, but a "major" change outside of a filing window will result in dismissal.<sup>170</sup> An ownership change is considered "major" unless at least one of the original parties to the application retains an ownership interest exceeding 50 percent.<sup>171</sup> Many NCE and LPFM applicants are nonstock or membership organizations. Under the Commission's rules, members of the

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the time-share proposal, in which case the staff reviews and processes all tied applications. *Id.* Second, *some* of the tied applicants may submit a time-share proposal under our point aggregation procedures. *Id.*

<sup>167</sup> See, e.g., *Applications for New Low Power FM Stations in Baltimore, Maryland*, Memorandum Opinion and Order, 30 FCC Rcd 10540 (2015) (*MX Group 198*). In the case of *MX Group 198*, the Commission identified five tentative selectees (CEM, BSB, UWA, JHU, and St. Joseph's), all of which were entitled to five comparative points. Three (JHU, BSB, and St. Joseph's) of the five tentative selectees filed a time-share agreement in which they aggregated their points for a total of 15 points. The time-share agreement was later rejected when St. Joseph's LPFM application was granted as a singleton, and the Commission determined that it had tentatively awarded JHU a comparative point in error. CEM, BSB, and UWA were then given an opportunity to submit point-aggregation time-share agreements.

<sup>168</sup> This group would include all applicants that are a party to the dismissed time-share agreement, but still remain tied for the highest number of points in the affected MX group.

<sup>169</sup> 47 CFR § 73.872(c) and (e).

<sup>170</sup> See *id.* §§ 73.871(a),(c) (Section 73.871); 73.3572(b); 73.3573(b)(1), (3) (Section 73.3573). See, e.g., *KBOO Found.*, Memorandum Opinion and Order, 31 FCC Rcd 1358, 1360, para. 6 (2016) (*KBOO*) (dismissing NCE application); *Cocoa Minority Educ. Media Ass'n*, Memorandum Opinion and Order, 30 FCC Rcd 14889, 14890, para. 3, n.12 (2015) (affirming dismissal of LPFM application). The rules governing NCE applications require renumbering of applications with major changes. 47 CFR § 73.3573(b)(3). The effect of assigning a new file number after the close of a filing window is that the application is no longer considered to have been timely filed within the window.

<sup>171</sup> 47 CFR §§ 73.871(c)(3), 73.3573(a)(1). A minority interest party may become a majority interest party, including obtaining a 100 percent interest, without engaging in a major change so long as at least one party to the application at the time of original filing retains more than 50 percent of the total ownership interests. *J. Geoffrey Bentley, Esq.*, Letter, 27 FCC Rcd 13377, 13379 (MB 2012).

governing board of such entities are generally treated as “owners” and, therefore, are listed as parties to the original application.<sup>172</sup> The prohibition on major ownership changes to pending broadcast applications pre-dates the adoption of filing windows and, historically, was intended to promote orderly processing, treat competing applicants fairly, and avoid costly and potentially prejudicial delays necessitated by repetitive application reprocessing.<sup>173</sup>

65. The governing board of a nonstock or membership organization is accountable ultimately to the entity's general members, who typically hold the power to vote any board member out of office. A change in the composition of the board generally does not alter the power of the entity's general members, nor does it affect the nature of the entity itself. We would expect the entity's representations to the Commission and all of its contracts to be unaffected and the entity's function and structure to remain the same, so long as its written organizational document is not changed. Also, the governing board must continue to operate the entity in accordance with the entity's organizational document.<sup>174</sup> For these reasons, the Commission has frequently treated a transfer of control of a licensee or permittee resulting from even a sudden change in the majority of the governing board of an NCE organization as “insubstantial,” and therefore requiring the filing of an FCC Form 316 “short form” associated with minor changes in ownership, rather than an FCC Form 315 “long form” associated with major changes in ownership.<sup>175</sup>

66. The NCE and LPFM new station application processes, on the other hand, are governed by Sections 73.3572, 73.3573, and 73.871, respectively, each of which define as a “major change in ownership” any application where the original party or parties to the application do not retain more than 50 percent ownership interest in the application as originally filed. Therefore, while the consequence of classifying a board change as a major or minor change in ownership for a permittee or licensee is simply the need to choose whether to file a Form 315 or 316, as appropriate, classifying a board change for an NCE or LPFM new facility *applicant* as a major change in ownership, and consequently a major change outside a filing window, is potentially fatal to the application.<sup>176</sup> To address this problem for applicants,

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<sup>172</sup> See FCC Form 318, Question II(3) (LPFM); FCC Form 340, Question II(6) (NCE). A “party” is one with an ownership or positional interest sufficient to be attributable under the Commission's multiple ownership rules. See 47 CFR §§ 73.858, 73.7000, 73.3555.

<sup>173</sup> See *Alegria I, Inc. v. FCC*, 947 F.2d 986, 987-88 (D.C. Cir. 1991).

<sup>174</sup> See *Transfers of Control of Certain Non-Stock Entities*, Notice of Inquiry, 4 FCC Rcd 3403, 3405, para. 16 (1989) (*Transfers of Control NOI*) (guidelines for identifying when transfers of control occur for certain licensed non-stock entities, and procedures to be followed/forms to be filed when such transfers are proposed). We note, however, that these guidelines are only tentative conclusions, which do not bind the Commission or the Bureau. See *KBOO*, 31 FCC Rcd at 1360, para. 5, n. 19 (“That some applicants may have relied upon the tentative conclusions contained in the *NOI* does not alter the fact that such conclusions do not constitute binding precedent.”).

<sup>175</sup> *Transfers of Control NOI*, 4 FCC Rcd at 3404-6, paras. 8, 14-15 (citing 47 U.S.C. § 309). For NCE permittees and licensees, the Commission's policy on board changes is not codified; rather, it has been based on proposals that were initially set out—albeit never adopted—in the *Transfers of Control NOI*, which relies on definitions rather than waivers. In simplest terms, NCE board changes for a permittee or licensee may be defined as “not a transfer of control,” “an insubstantial transfer of control,” or “a substantial transfer of control” based on certain criteria. Outside the pending application context, the result dictates whether the permittee or licensee must file only an ownership report, a “short form” FCC Form 316, or a “long form” FCC Form 315, respectively.

<sup>176</sup> The severity of this consequence has caused Commissioners in recent years to question application dismissals that appear to be based on routine organizational functioning and/or potentially subjective or *ad hoc* assessments relating to the governance of the relevant organization. See, e.g., *KBOO*, 31 FCC Rcd at 1363, Statement of Commissioner Ajit Pai (“[i]t is not the Commission's job to micromanage the governance of nonprofit organizations” and noting that the policy put applicants in the position of either “preventing routine turnover on their boards of directors or rendering an NCE FM application defective.”); *La Casa Dominica de Hazleton, Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 4236, 4239 (2016), Concurring Statement of Commissioner Mignon L. Clyburn (dismissal of an application in which the applicant's governing board had undergone a majority change

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the Commission has routinely granted waivers for gradual (although not sudden) majority board changes occurring while a new station application is pending.<sup>177</sup> In the 2007 *NCE Omnibus Order*, the Commission indicated that a waiver could be warranted when the applicant's board change was "routine and inevitable," occurred gradually over time, pursuant to state law, and not as an "outgrowth of the party's desire to gain control over the NCE station application."<sup>178</sup> In making such determinations, the Commission has generally looked at the overall pattern of change in ownership and not at the motivations or specific circumstances surrounding the removal of individual board members.<sup>179</sup> On the other hand, we have taken seriously real-party-in-interest ("takeover") issues involving outside entities, especially if the applicant's board change occurs suddenly. For example, in a case where an NCE applicant entered into an agreement whereby its entire board of directors was replaced with board members of another entity, the Bureau denied a waiver request and dismissed the subject application.<sup>180</sup>

67. *Discussion.* We tentatively conclude that we should amend Sections 73.871, 73.3572, and 73.3573 of the rules to classify as a "minor" change in ownership board changes in nonstock and membership NCE and LPFM applicants which occur gradually over time and have little or no effect on such organization's mission, even when they result in a change in the majority of such organization's governing board.<sup>181</sup> This proposal would allow those applicants to implement gradual board changes outside a filing window without disqualifying their pending applications.<sup>182</sup> The current system of waivers regarding NCE and LPFM board changes, by its nature, requires staff to analyze the specific circumstances of each subject board change. In practice, this non-standardized approach has led to uncertainty for NCE and LPFM applicants undergoing board changes as a regular or natural part of their organizational function. We also propose to treat all ownership changes in a governmental applicant as minor, provided that the change has little or no effect on such applicant's mission.

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allegedly as a result of a conflict within the organization represented a lost opportunity to "enhance viewpoint diversity that is so desperately needed in our country.").

<sup>177</sup> See, e.g., *Calvary Honolulu*, 30 FCC Rcd at 14912, para. 5 (waiving Section 73.3573 to allow a gradual change in the majority of an NCE FM station's governing board); *Center for Community Arts*, Memorandum Opinion and Order, 20 FCC Rcd 11164, 11165 (2005) (waiving Section 73.871 to allow a gradual change in the majority of an LPFM station's governing board); see generally, *NCE Omnibus Order*, 22 FCC Rcd at 6123-25, paras. 56-60 (granted waivers to prevent the dismissal of pre-2007 NCE FM applications where the overall pattern of board turnover was gradual).

<sup>178</sup> *NCE Omnibus Order*, 22 FCC Rcd at 6124-25, paras. 57 et seq.

<sup>179</sup> See, e.g., *Calvary Honolulu*, 30 FCC Rcd at 14912, para. 5 ("[T]he circumstances of the director's departure were not shown to be an outgrowth of any party's desire to gain control and, thus, are immaterial"); *Harry F. Cole, Esq.*, Letter, 27 FCC Rcd 9295, 9300 (MB 2012) (granting waiver of Section 73.3573(a) where a gradual change occurred but the last departing director was allegedly fired).

<sup>180</sup> *Donald E. Martin, Esq.*, Letter, 27 FCC Rcd 6081, 6084 (MB 2012); see also *NCE Omnibus Order*, 22 FCC Rcd at 6128, paras. 67-68 (dismissing a pending application where the applicant underwent two sudden and complete ownership changes as well as reconstitution as a new corporate entity).

<sup>181</sup> We seek comment herein only on how to treat board changes in NCE and LPFM entities, which are applicants for authorizations. We do not seek comment on board changes with respect to commercial entities. Further, other than the discussion of LPFM permittees and licensees in paragraphs 71-72, *infra*, we do not seek comment on board changes in permittees or licensees.

<sup>182</sup> However, in accordance with existing policy, gradual board changes could result in a decrease, but not increase, in the number of points for which the applicant originally qualified. For example, an applicant that originally qualified for localism points based on board members' residences would no longer receive such points if it replaced its original members with a non-local board. Subsequent to the grant of the application, changes in board membership would be subject to the holding period. For example, during the holding period, an applicant which received its authorization based, in part, on its board members' local residences could not replace the board with new non-local members even if the change was gradual.

68. Notwithstanding our view that gradual changes in boards will not impact the nature of an NCE or LPFM applicant, we remain concerned that sudden board changes are more indicative of gamesmanship and inconsistent with our processing system. Therefore, we propose to continue to treat sudden majority board changes for full service NCE and LPFM applicants as major changes. We seek comment on these proposals. We also seek comment on the appropriate definitions of “gradual” and “sudden” in this context.<sup>183</sup> Finally, we request comment on the costs and benefits of the proposed rule changes and, alternatively, on retaining the current major change rule for such entities and continuing to consider Section 73.3572, Section 73.3573, and Section 73.871 waiver requests on a case-by-case basis.

69. Commenters supporting the proposed rule change should also address the circumstances, if any, in which even a gradual ownership change (or series of changes) may constitute a break in continuity of control and therefore still be treated as a major ownership change for application purposes.<sup>184</sup> If there are gradual changes that should be treated as a major ownership change, to what extent, if any, should we retain or codify elements of our existing waiver policy? For example, should the Commission attempt to assess whether board changes are “routine” or “non-routine,” and if so, under what standard? Would relevant factors to such an analysis include whether the change occurred pursuant to an annual or special election, revealed hostile or amicable relationships among members of the board, or were part of an effort to address wrongdoing on the part of a board member? Should the Commission assess as part of this analysis whether board changes were taken in accordance with an organization’s bylaws and applicable state law? Should we consider whether a board change represented an attempt to gain control of an NCE or LPFM board by an outside entity? Could this concern be adequately addressed by our real-party-in-interest policies and precedents?<sup>185</sup> Should we take steps to prevent in-house “factions” or members with opposing views from attempting to “gain control” of the applicant? If so, how can we meaningfully distinguish legitimate elections from illicit attempts to “gain control”? For pending applications, what amendment information, if any, should we require from applicants to demonstrate that a board change should be treated as minor? Would a certification be enough? Should we require exhibits or documents that can be verified by competing applicants and, if so, what information should be included?

70. Finally, we also ask how our ownership proposal might alter, either positively or negatively, the potential for gamesmanship and unfair advantage in the comparative consideration process. When the Commission first proposed to award points to NCE applicants with local governing boards, commenters were concerned that applicants might feign local qualifications by “renting” local citizens or using “strawmen” local incorporators to be replaced with non-local parties after grant.<sup>186</sup> Are there similar concerns about substitution of board members for pending NCE and LPFM applications?

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<sup>183</sup> See, e.g., *Transfers of Control NOI*, 4 FCC Rcd at 3405, para. 15 (considering treating a sudden change as a change occurring at one time or within a short period of time, and noting that “[i]t appears to us that a change in the majority of a governing board, which occurred over a period of less than one year, would effectively break continuity in the board and should therefore be treated as having taken place within a ‘short period of time’”).

<sup>184</sup> To the extent that an ownership change is not solely board-related, however, we are not proposing to alter our current standards for “major” changes. For example, we would continue, absent a rule waiver, to dismiss an application if the applicant were to reorganize as a new entity with a major change of control, or if its parent entity were to assign the applicant entity to an unrelated entity. See, e.g., *State of Ore.*, Letter Order, 22 FCC Rcd 17643, 17645 (MB 2007) (waiver involving transfer of broadcast responsibilities to different nonprofit entity supporting university activities); see generally *NCE Report and Order*, 15 FCC Rcd at 7425-26, para. 95 (discussing, in context of NCE holding period, donations of stations to other entities).

<sup>185</sup> See, e.g., *Edwin L. Edwards, Sr.*, Memorandum Opinion and Order and Notice of Apparent Liability, 16 FCC Rcd 22236, 22248, para. 20 (2001), *aff’d sub nom. Rainbow PUSH Coalition v. FCC*, 330 F.3d 539 (D.C. Cir. 2003). In assessing the locus of control, the Commission examines who establishes an entity’s basic operating policies with respect to programming, personnel, and finances.

<sup>186</sup> See *NCE MO&O*, 16 FCC Rcd at 5093, para. 52.

To the extent that we are proposing allowing modifications to pending applications in a comparative consideration process, and thus potentially affecting an applicant's position in the ranking queue, we seek comment on whether existing safeguards adequately address such concerns.<sup>187</sup>

71. *LPFM-specific transferability issues for permittees and licensees.* When the LPFM service was first created in 2000, the Commission prohibited all assignments and transfers of control except those which were involuntary or “less than substantial.”<sup>188</sup> Soon thereafter, the Commission clarified that the gradual change of a governing board for licensees or permittees to the point that a majority of its members are new since the authorization was granted did not, by itself, constitute a prohibited transfer of control.<sup>189</sup> In 2001, the Commission adopted Section 73.871, limiting minor amendments to pending applications to “[c]hanges in ownership where the original party or parties to an application retain more than a 50 percent ownership interest in the application as originally filed.”<sup>190</sup> In 2005, the Commission adopted Section 73.865(e) in response to industry feedback that its policy of allowing gradual board changes, while prohibiting sudden board changes, caused LPFM licensees “unnecessary complications” and failed to “take into account that [sudden] changes in governing boards are part of the nature of existence of such groups.”<sup>191</sup> Section 73.865(e) provides that transfers of control involving a sudden change of more than 50 percent of an LPFM licensee's governing board are not considered a prohibited “substantial change in ownership and control.” Procedurally, the Commission instructed LPFM licensees to file a *pro forma* FCC Form 316 for a sudden majority board change.<sup>192</sup> At the same time that it adopted Section 73.865(e), the Commission amended Section 73.865 to allow LPFM entities to freely assign or transfer control of licenses after a three year “holding period.”<sup>193</sup> The Commission retained the original prohibition on assignment and transfers of licenses during the holding period as well as for all construction permits.<sup>194</sup>

72. *Implementation of Section 73.865(e).*<sup>195</sup> We propose to clarify how board changes impact LPFM licensees and permittees in rule 73.865. Although Section 73.865(e) permits sudden changes in control of LPFM boards, the current language of Section 73.865(d) prohibits the “assignment or transfer

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<sup>187</sup> The Commission has the following safeguards in place: (1) a policy that an applicant's maximum points are established at the time of filing so that the applicant can decrease, but not increase, its comparative position while the application is pending (*see* 47 CFR §§ 73.871(b), 73.7003(e)); and (2) a holding period in which the applicant cannot transfer or assign its authorization to an entity which would have garnered fewer points (*Id.* at §§ 73.865(c) (3 years for LPFM), 73.7005 (4 years for NCE)); *see also supra* at Sections III.A. and III.B (seeking comment on additional safeguards).

<sup>188</sup> *LPFM Report and Order*, 15 FCC Rcd 2205, Appendix A.

<sup>189</sup> *Creation of a Low Power Radio Service*, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 19208, 19248, para. 104 (2000).

<sup>190</sup> *LPFM Second Report and Order*, 16 FCC Rcd at 8028.

<sup>191</sup> *LPFM Second Order on Reconsideration*, 20 FCC Rcd at 6771, para. 17; *Creation of a Low Power Radio Service*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912, 21917-18, paras. 11-13 (2005) (*LPFM Third Report and Order*); 47 CFR § 73.865(e) (Section 73.865(e)).

<sup>192</sup> *LPFM Third Report and Order*, 22 FCC Rcd at 21921, para. 20 (“We will apply the [*Transfers of Control NOI*] to appropriate LPFM licensees, and thus, will interpret a sudden change of a governing board's majority as an insubstantial transfer for which approval must be sought on an FCC Form 316 (“short form”) broadcast application.”).

<sup>193</sup> *Id.*, 22 FCC Rcd at 21920, para. 16; 47 CFR § 73.865(c).

<sup>194</sup> *LPFM Third Report and Order*, 22 FCC Rcd at Appendix A; 47 CFR §§ 73.865(c),(d).

<sup>195</sup> *See infra* Appendix A, Proposed Rule Changes. As noted therein, we propose to modify Section 73.865 of the rules to, *inter alia*, remove paragraph (d) and re-designate current paragraph (e) as (d). The paragraph references herein refer to the current rule.

of an LPFM construction permit at any time,” with no reference to an exception for either sudden or gradual majority board changes. Similarly, the language of Section 73.865(c) states that an LPFM licensee may not engage in a transfer or assignment during the three-year holding period from the date of issuance of the license. Neither Section 73.865(c) nor 73.865(d) cross-references Section 73.865(e). For these reasons, we are concerned that the intended relief regarding sudden board changes for LPFM entities has not been fully realized since Section 73.865(e) was adopted. Therefore, we propose to clarify that Section 73.865(e) applies to LPFM permittees and licensees at all times, including during any relevant permit or license holding period.<sup>196</sup> To do so, we propose to modify the language of Section 73.865(e) to state that it applies “notwithstanding” the other provisions of Section 73.865 provided the requirements in Section 73.865(a) are satisfied and the entity’s mission remains the same. We also propose to clarify that LPFM permittees and licensees that are required under Section 73.865(e) to file an FCC Form 316 in response to a sudden change in the majority of the governing board must file such form within 30 days of the final event that caused the LPFM permittee or licensee to exceed the 50 percent threshold (for example, within 30 days of the election of a third new board member out of five within a year).<sup>197</sup> We seek comment on these proposals.

## **B. Clarify Reasonable Site Assurance Requirements**

73. *Background.* When an NCE or LPFM applicant files its initial application, it must have reasonable assurance that its specified site will be available for the construction and operation of its proposed facilities. It is well established that the specification of a transmitter site in an application is an implied representation that the applicant has obtained reasonable assurance of the site’s availability.<sup>198</sup> Despite the fact that reasonable assurance of the applicant’s proposed site is a prerequisite to filing an application, NCE and LPFM station applicants have never been required to certify the availability of proposed transmitter sites<sup>199</sup> in the FCC Form 340 or Form 318 application.<sup>200</sup>

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<sup>196</sup> See *infra* Section V.E. We propose to eliminate both the absolute prohibition on the assignment and transfer of LPFM construction permits and the three-year holding period for LPFM licenses. Although we propose an 18-month holding period on the assignment or transfer of LPFM construction permits, we propose that sudden changes in the control of the LPFM board will be permitted during this period, and accordingly, such changes will *not* result in revocation of the LPFM construction permit.

<sup>197</sup> See 47 CFR § 73.3541 (providing 30 days after the occurrence of a death or legal disability for a permittee or licensee to file a Form 316).

<sup>198</sup> See, e.g., *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427, para. 7 (1974) (*Wallace*); *South Florida Broad. Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 842, para. 3 (1984). While some latitude is afforded “reasonable assurance,” there must be, at a minimum, a “meeting of the minds resulting in some firm understanding as to the site’s availability.” See *Genesee Commc’ns, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595 (1988). Although an applicant does not need to have a binding agreement or absolute assurance of a proposed site, a mere possibility that the site will be available is not sufficient. See *Wallace*, 49 FCC 2d at 1427, para. 6.

<sup>199</sup> We note that in 1985 the Commission added a site certification to the FCC Form 301 as a component of the “hard look” processing approach to deter carelessly prepared and speculative applications. When the Commission adopted its competitive bidding procedures in 1998, it repealed the requirement that commercial broadcast applicants certify the availability of the transmitter site. The Commission reasoned that the competitive bidding process minimizes the incentive for insincere application filings and provides a strong stimulus for timely station construction. See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15963, paras. 174-75 (1998). We do not propose any changes, or seek comment on, the reasonable site assurance policies in the competitive bidding context.

<sup>200</sup> See, e.g., *Carnegie-Mellon Student Gov. Corp.*, Hearing Designation Order, 7 FCC Rcd 3914 (MB 1992).

74. In the Public Notices announcing the NCE FM filing windows, the Bureau reminded applicants of the site availability requirement.<sup>201</sup> The Bureau did not, however, similarly explain the reasonable site assurance requirement when it announced the 2013 LPFM filing window.<sup>202</sup> Further, the Instructions to the FCC Form 318 and FCC Form 340 do not explain the Commission's site availability requirements or remind applicants that reasonable site assurance is a prerequisite to application filing.<sup>203</sup> Accordingly, some LPFM and NCE applicants were under the false assumption that reasonable site assurance was not required.<sup>204</sup> Applicants routinely and successfully filed petitions to deny against competing applicants for lack of site assurance, a potentially decisional allegation because the failure to obtain such assurance prior to application filing is not a curable application defect.<sup>205</sup> These filings led, in turn, to processing delays while the Bureau staff reviewed these allegations, frequently solicited additional information from applicants, and dismissed multiple applications due to the failure to obtain reasonable assurance of site availability prior to the application filing.<sup>206</sup>

75. *Discussion.* We tentatively conclude that certain application form and instruction changes for NCE and LPFM applicants are necessary to promote compliance with the reasonable site assurance requirement and the efficient processing of applications. Accordingly, we propose to amend the FCC Form 340 and Form 318 to require an applicant to certify that it has obtained reasonable assurance from the tower owner, its agent, or authorized representative that the specified site will be available. We also propose to update the FCC Form 340 and 318 Instructions to explain the requirement of obtaining reasonable site availability prior to the application filing. Further, we propose to require NCE and LPFM applicants to retain and submit to the Commission, upon request, information and material documentation to establish the basis on which reasonable assurance has been obtained, including, for example, the name and telephone number of the person contacted, and whether the contact is a tower owner, agent, or authorized representative. Alternatively, should this substantiating information be required as part of the FCC Form 340 or Form 318 filing? Would the requirement to provide such detailed information create an unnecessary burden on applicants, or prove useful in expediting the processing of applications? Is the requirement necessary in light of the difference between these processes and the financial incentives associated with applications subject to auction bidding and payment

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<sup>201</sup> See *NCE FM Filing Procedures Notice*, 22 FCC Rcd at 15053 (explaining that “at the time its application is filed, an applicant must have reasonable assurance that its specified site will be available ... [and] should be prepared to submit supporting documentation upon Commission request.”); *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, 24 FCC Rcd 12621, 12625 (2009) (same); *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, Public Notice, 29 FCC Rcd 9530, 9532 (2014) (same).

<sup>202</sup> See *LPFM Procedures Notice*, *supra* note 10.

<sup>203</sup> In contrast, the Instructions to both the FCC Form 301, Application for Construction Permit for a Commercial Broadcast Station, and FCC Form 349, Application for Authority to Construct or Make Changes in an FM Translator or FM Booster Station, underscore the requirement, emphasizing that “[a]ll applicants for broadcast facilities must have a reasonable assurance that the specified site will be available **at the time they file FCC Form 301 [or 349]**.” See Instructions to FCC Form 301 and Form 349 at 2 (emphasis in originals).

<sup>204</sup> See, e.g. *Second Samoan Congregational Church Newport Beach*, Letter Order, 23 FCC Rcd 16630 (2008).

<sup>205</sup> See, e.g., *NCE MX Group 430 Marfa Public Radio*, Memorandum Opinion and Order, 31 FCC Rcd 4241 (2016); *Los Angeles Social Justice Radio Project*, Memorandum Opinion and Order, 31 FCC Rcd 7506 (2016); *Open Arms*, *supra* note 84; *Cnty of El Paso*, Memorandum Opinion and Order, 31 FCC Rcd 12185 (2016); *Legion of Christ Coll., Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 4219 (2014); *Sacred Heart Roman Catholic Parish*, Memorandum Opinion and Order, 27 FCC Rcd 8375 (2012); *Mark Van Bergh, Esq.*, Letter Order, 26 FCC Rcd 15135 (MB 2011).

<sup>206</sup> See, e.g., *Antonio Cesar Guel*, Letter, 29 FCC Rcd 5264 (2014) (requesting additional information from applicants on site availability and ultimately dismissing 11 applications due to, *inter alia*, failure to show applicant had reasonable assurance to use the specified site when it filed its application).



procedures? We seek comments on these proposals and invite comments on other methods to minimize frivolous applications and deter site availability challenges.

### C. Streamline Tolling Procedures and Notification Requirements

76. *Background.* Broadcast construction permits terminate and, thus, are forfeited, if the permittee does not complete construction and file a covering license application prior to expiration.<sup>207</sup> The Commission will, however, “toll” the broadcast construction period, *i.e.*, temporarily stop the “construction clock,” upon prompt notification that an original construction permit<sup>208</sup> is encumbered by one of five circumstances beyond the permittee’s control: (1) natural disaster; (2) administrative or judicial review of the permit grant; (3) litigation relating to any necessary governmental requirement for construction or operation; (4) failure of a Commission-imposed condition precedent to commencement of operation; and/or (5) a request for international coordination.<sup>209</sup> Tolling treatment is not automatic but, rather, notification-based.<sup>210</sup> Thus, absent a permittee notification, the construction period will continue to run. The notification requirement applies even when the permit is encumbered by circumstances involving the Commission itself, such as when a petition for reconsideration of the grant of a permit is pending, or when a new station permit condition ties program test authority to the initiation of program tests by a second affected station.<sup>211</sup>

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<sup>207</sup> 47 CFR § 73.3598(e). *See* 47 U.S.C. § 319(b). For commercial and NCE full power television and FM stations, low power television, television translator, and Class A television station construction permits, the construction period ends three years from the date of grant. The LPFM construction period is half as long (18 months) because LPFM stations are generally simpler to build. Nevertheless, the Commission has recognized that some LPFM permittees will face difficulties and, therefore, the Commission will provide one 18-month extension upon an LPFM permittee’s showing of good cause prior to the original expiration date. *Id.*; *LPFM Third Report and Order*, 22 FCC Rcd at 21928, para. 40. We discuss REC’s proposal to extend the construction period for LPFM permits from 18-months to three years below. *See* paras. 80-81, *infra*.

<sup>208</sup> Tolling applies to the “period of construction for an original construction permit” and not, for example, to difficulties experienced in connection with modifications at an alternate site. *See* 47 CFR § 73.3598(b); *Steven Wendell*, Memorandum Opinion and Order, 28 FCC Rcd 4857, 4857, para. 3 (2013).

<sup>209</sup> *See* 47 CFR § 73.3598(b); *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17540, para. 39 (1999). Tolling based on a condition precedent is currently embodied in case law rather than in the rules, and we propose herein to add it to the rules. In other “rare and exceptional circumstances” of a comparable magnitude, permittees can request waivers of the Section 73.3598(a) construction period. *Id.* at 17541, para. 42.

<sup>210</sup> *See* 47 CFR § 73.3598(c); *Birach Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 3141, 3144, para. 9 (2008) (*Birach*). Following notification of a qualifying tolling event, a permittee is not required to construct. Some permittees, however, choose to build as authorized, at their own risk. *See, e.g., Patrick Vaughn, Esq.*, Letter Order, 28 FCC Rcd 10115, 10116, n.3 (MB 2013).

<sup>211</sup> There are two instances where the Commission’s tolling provisions are not applied. First, low power television and TV translator stations (LPTV/translator) that have not yet completed their transition to digital may seek an extension of their digital transition construction permit. *See* 47 CFR § 74.788(c). However, after March 13, 2021, LPTV/translator stations will only be able to obtain additional time to complete construction of their digital facilities via the tolling provisions in 47 CFR § 73.3598(b). *See Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television and Television Translator Stations*, Third Report and Order and Fourth Notice of Proposed Rulemaking, 30 FCC Rcd 14927, 14934, para. 13 (2015). Second, full-power and Class A television stations assigned to a new channel as a result of the incentive auction reorganization of spectrum may seek one extension, of up to 180 days, for the construction permit for their post-auction channel. *See Incentive Auction R&O*, 29 FCC Rcd at 6804, para. 580; 47 CFR § 73.3700(b)(5). Any additional time to complete construction of the station’s post-auction channel facilities may only be obtained via the tolling provisions in 47 CFR § 73.3598(b). *Id.*

77. Tolling begins on the date of the encumbrance, provided that the permittee promptly notifies the Commission, usually by a simple letter, within 30 days of the tolling event.<sup>212</sup> If notification is untimely, Commission practice is to look back 30 days from notification and to begin tolling on that later date (*i.e.*, substitute a date that would make the notification timely).<sup>213</sup> In each case, the Bureau staff adds a publicly viewable “tolling code” to the station’s record in the broadcast database, allowing the public to ascertain whether and why the construction period is tolled. Staff practice is to grant tolling treatment in six-month increments, with permittees providing update notifications at the end of each six-month period to keep their construction permits in a tolling posture.<sup>214</sup> The construction period begins to run again upon resolution of the encumbrance (again with a requirement that the permittee notify the Commission within 30 days),<sup>215</sup> or upon failure to request continued tolling, whichever is earlier. The staff then removes the tolling code from the database and adds a revised, recomputed construction deadline.

78. *Discussion.* We propose to modify our tolling procedures for NCE and LPFM permittees, including *inter alia*, the current tolling notification requirements for these services. The Commission recently characterized tolling notification requirements as an unnecessary bureaucratic hurdle for LPFM permittees with limited resources, including situations in which the Commission has direct knowledge of the facts that otherwise would be sufficient to toll the construction deadline.<sup>216</sup> We recognize that NCE and LPFM permittees often fail to notify the Commission within 30 days of a tolling event because they are inexperienced with tolling procedures or are attempting to complete the licensing process without legal counsel. Such permittees may lose substantial construction time or forfeit their authorizations altogether despite a willingness to construct once encumbrances beyond their control are resolved. The resulting potential loss of unique local voices is especially troubling when the Commission can independently verify the tolling event for which the permittee would be eligible to receive additional time. We note that in such circumstances a key rationale for the contemporaneous notification requirement – eliminating the possibility of *post hoc* permittee temporizing<sup>217</sup> – is inapplicable.

79. Accordingly, we propose to modify our tolling procedures for NCE and LPFM permittees as follows.<sup>218</sup> The Commission will identify and place into a tolling posture any original NCE or LPFM construction permit: (1) that includes a condition on the commencement of operations and the Commission has a direct licensing role in the satisfaction of this condition; or (2) that is subject to administrative or judicial review of the permit grant.<sup>219</sup> In such situations, the staff would add appropriate tolling codes to the broadcast database. We tentatively conclude that permits tolled by staff under these revised procedures should not be subject to the six-month update requirement. The Commission also would be responsible for ending tolling treatment upon the resolution of the pertinent encumbrance, again limited to NCE and LPFM permittees. Although we cannot know how such events may affect a

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<sup>212</sup> 47 CFR § 73.3598(c).

<sup>213</sup> See *Pamplin Broad., Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 649, 656, para.17 (2008), *set aside on other grounds*, 23 FCC Rcd 2571 (2008). See also *Lauren A. Colby, Esq.*, Letter Order, 21 FCC Rcd 1260, 1262 (MB 2006).

<sup>214</sup> *E.g.*, *Cram Commun., LLC*, Letter Order, 20 FCC Rcd 17153, 17156 (MB 2005).

<sup>215</sup> See 47 CFR § 73.3598(d).

<sup>216</sup> See generally *Decorah*, 31 FCC Rcd at 12181, n.13 (failure to request tolling during administrative review).

<sup>217</sup> See *Birach*, 23 FCC Rcd at 3144, para. 9.

<sup>218</sup> We do not propose any changes, or seek comment on, the current tolling procedures and rules for non-NCE and non-LPFM permittees.

<sup>219</sup> We do not propose to alter notification requirements for other types of administrative or judicial review outside the Commission’s direct purview. For example, tolling treatment involving a necessary local, state, or non-FCC federal requirement, would continue to require notification to the Commission.

permittee's plans, we do not believe that these proposed rule changes will have any negative impact on the few NCE or LPFM permittees that may nevertheless decide to construct despite a non-final construction permit grant or an unsatisfied condition precedent to commencement of operations. Further, we believe that our proposal would be manageable with existing agency resources because it is limited to aiding NCE and LPFM stations, services which have more commonly encountered challenges with the current tolling procedures.<sup>220</sup> We seek comment on these proposed changes.

#### D. Lengthen LPFM Construction Period

80. *Background.* In the *LPFM Report and Order*, the Commission established an eighteen-month construction period for LPFM permittees based on the belief that LPFM permittees would be able to construct their stations in a shorter period of time than permittees of full power FM stations, which are afforded three years (36 months) to build.<sup>221</sup> Noting that many LPFM permittees encountered difficulties completing construction in this amount of time, the Commission subsequently considered a proposal to extend the construction period to a full three years.<sup>222</sup> The Commission, however, ultimately rejected such a blanket extension of the construction period in order to encourage prompt construction of facilities and discourage the warehousing of spectrum.<sup>223</sup> Instead, the Commission adopted a proposal to allow LPFM permittees to request one 18-month extension to complete construction of their facilities upon a showing of good cause.<sup>224</sup> This is now codified in Section 73.3598(a) of the rules.<sup>225</sup>

81. *Discussion.* We propose to lengthen the construction period for LPFM permittees to a full three years. Specifically, we propose to apply the extended construction period to both existing LPFM permits, which have not yet expired as of the effective date of the new rule, if adopted,<sup>226</sup> and prospectively to new permits granted after the proposed new rule takes effect. In comments filed in the *Modernization of Media Regulation Initiative* docket,<sup>227</sup> REC noted that 48 percent of applicants issued permits following the 2013 LPFM filing window have requested an 18-month extension and that many LPFM permittees face construction challenges similar to those of full service FM permittees.<sup>228</sup> We agree that LPFM permittees have encountered more challenges than initially anticipated and have often been

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<sup>220</sup> See, e.g., *Decorah*, 31 FCC Rcd at 12181, n.13. NCE and LPFM organizations may experience more challenges with this requirement due to a lack of resources and sophistication. The challenges are less prevalent among commercial broadcasters, who are often more able to hire outside counsel to guide them through the requirements. See generally, *1998 Biennial Regulatory Review, Streamlining of Radio Technical Rules*, First Report and Order, 14 FCC Rcd 5272, 5276, para. 5 (1999).

<sup>221</sup> *LPFM Report and Order*, 15 FCC Rcd at 2278, paras. 188-89 (finding that shorter construction period was warranted for LPFM facilities as they are generally technically simpler to construct).

<sup>222</sup> *Creation of Low Power Radio Service*, LPFM Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 6763, 6774-75, paras. 26-27 (2005) (*LPFM Order on Reconsideration*).

<sup>223</sup> *LPFM Third Report and Order*, 22 FCC Rcd at 21928, para. 40.

<sup>224</sup> *Id.*

<sup>225</sup> 47 CFR § 73.3598(a).

<sup>226</sup> We tentatively propose to direct Bureau staff to manually re-issue any unexpired LPFM permits with the new expiration dates upon the effective date of the new rules, if adopted.

<sup>227</sup> MB Docket 17-105, *supra* note 15.

<sup>228</sup> REC Comments at 43-45, paras. 78-80 (proposing to extend the construction period for LPFM permittees to a full three years). REC asserts that "With the realities of today's LPFM service, because of second adjacent channel waivers, the original thought of a 2000-era "easy" LP-100 installation is just not plausible." REC recently reiterated these comments in its June 13, 2018, Petition for Rulemaking to Amend Parts 73 and 74 to Further Implement the Local Community Radio Act of 2010 and Make Other Improvements to the Low Power Radio Service (REC Petition for Rulemaking). See REC Petition for Rulemaking at 39-41, paras. 67-69.

unable to construct within 18 months.<sup>229</sup> The Commission based the original 18-month construction period on the initial technical simplicity of LPFM stations. However, as REC notes, stations operating pursuant to second adjacent channel waivers, made possible by the Local Community Radio Act of 2011 (LCRA), can be more technically complex to build.<sup>230</sup> Additionally, we have found that many permittees have requested construction extensions in order to raise additional funds and deal with local zoning and siting complications. LPFM applicants, who are often inexperienced with the intricacies of broadcasting, can be ill-prepared to handle such challenges in an 18-month period. Accordingly, we seek comment on this proposal to lengthen the LPFM construction period. Would amending our rules to provide LPFM permittees a full three-year construction period provide relief to LPFM permittees struggling to complete construction of their stations and eliminate the administrative burdens associated with filing waiver requests?

#### **E. Modify Restrictions on the Transfer and Assignment of LPFM Authorizations**

82. *Background.* When the Commission established the LPFM service, it initially prohibited the transfer and assignment of LPFM authorizations.<sup>231</sup> In an FNPRM accompanying the *LPFM Order on Reconsideration*, the Commission expressed its belief that this restriction was detrimental to the LPFM service, and accordingly, sought comments on whether it should eliminate this restriction.<sup>232</sup> In the *LPFM Third Report and Order*, the Commission determined that although it would maintain the prohibition on the assignment or transfer of LPFM construction permits, it would allow the assignment and transfer of LPFM licenses, subject to the conditions that: (1) licenses could not be sold for consideration exceeding the depreciated fair market value of the physical equipment and facilities of the station; (2) assignees and transferees must satisfy all eligibility criteria at the time they applied for the LPFM license; and (3) licenses were subject to a three-year holding period during which they could not be assigned or transferred.<sup>233</sup>

83. In recent comments filed in the *Modernization of Media Regulation Initiative*,<sup>234</sup> REC argues that the three-year holding period for LPFM licenses and the prohibition on the assignment and transfer of LPFM permits should be eliminated.<sup>235</sup> REC notes that several applicants awarded construction permits following the 2013 LPFM window were unable to construct and attempted to assign their permits to prevent expiration, but were unable to do so because of the Section 73.865(d)

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<sup>229</sup> The Bureau has granted 1986 permits from applications filed during the 2013 LPFM window and received 938 requests for extension of time.

<sup>230</sup> Pub. L. No. 111-371, 124 Stat. 4072 (2011). Section 3(b)(2)(A) of LCRA authorized the Commission to waive the second-adjacent spacing requirements set forth in Section 73.807 of the rules where an LPFM station establishes, “using methods of predicting interference taking into account all relevant factors, including terrain-sensitive propagation models,” that its proposed operations “will not result in interference to any authorized radio service.” LCRA § 3(b)(2)(A); see also 47 CFR § 73.807; *LPFM Sixth Report and Order*, 27 FCC Rcd at 15424-33, paras. 69-85 (implementing Section 3(b)(2)(A)). The LCRA was adopted a decade after the *LPFM First Report and Order*.

<sup>231</sup> *LPFM Report and Order*, 15 FCC Rcd at 2269, para. 163.

<sup>232</sup> *LPFM Order on Reconsideration*, 20 FCC Rcd at 6769-72, paras. 16-20.

<sup>233</sup> *LPFM Third Report and Order*, 22 FCC Rcd at 21919-20, paras. 15-17. See also 47 CFR §§ 73.865(a)(1) (“No party may assign or transfer an LPFM license if [c]onsideration promised or received exceeds the depreciated fair market value of the physical equipment and facilities”); 73.865(c) (three-year holding period for LPFM licenses); 73.865(d) (prohibiting assignment or transfer of an LPFM construction permit).

<sup>234</sup> MB Docket 17-105.

<sup>235</sup> REC recently reiterated this argument in its June 13, 2018, Petition for Rulemaking. See REC Petition for Rulemaking at 34-37, paras. 56-63.

restriction.<sup>236</sup> REC believes that allowing the assignment of construction permits that are at risk of expiring would enable the permits to be “assigned to parties that will be able to construct and provide service.”<sup>237</sup> As a safeguard, however, REC proposes that an 18-month holding period apply to the assignment and transfer of original construction permits. Following 18 months from the issuance of the original construction permit, REC proposes that LPFM permittees be allowed to assign or transfer the permit to a party that, in cases where the permittee obtained the permit through the comparative points process, meets or exceeds the assignor’s point total.<sup>238</sup> Finally, to promote continuation of service where a licensee is no longer willing or able to operate the station, REC proposes to eliminate the three-year holding period on assigning and transferring LPFM licenses.<sup>239</sup> REC recommends, however, to (1) maintain the current prohibition on receiving consideration beyond the depreciated fair market value of the station’s equipment and facilities and (2) for stations that have been licensed for less than 4 years, and that were awarded the initial permit based on the comparative points process (as opposed to a singleton), to require the proposed assignee organization to meet or exceed the same point value awarded to the assignor.<sup>240</sup>

84. *Discussion.* We tentatively conclude that we should eliminate both the absolute prohibition on the assignment and transfer of LPFM construction permits and the three-year holding period for LPFM licenses. Specifically, we propose to permit parties to assign or transfer LPFM permits and station licenses, provided that the following safeguards are satisfied: (1) the assignment or transfer does not occur prior to 18 months from the date of issue of the initial construction permit; (2) consideration promised or received does not exceed the legitimate and prudent expenses<sup>241</sup> of the assignor or transferor;<sup>242</sup> (3) the assignee or transferee satisfies all eligibility criteria that apply to a LPFM license; and (4) for a period of time commencing with the grant of any permit awarded on the basis of the

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<sup>236</sup> REC Comments at 39, para. 68. *See, e.g., San Marcos Voice and San Marcos Texas Comm’y Radio Ass’n*, Letter Order, 30 FCC Rcd 1976 (MB 2015) (denying assignment of LPFM construction permit where permittee no longer desired to build LPFM station).

<sup>237</sup> REC Comments at 40, para. 70.

<sup>238</sup> *Id.* at 41-42, para. 74. REC also proposes that if the permit was issued based on a points tie-breaker, the assignee or transferee must have a “community presence date” that meets or exceeds the youngest granted station in the original MX group. *Id.* *See also* 47 CFR §§ 73.872(b); 73.872(d)(3) (comparative points and tie breakers).

<sup>239</sup> REC Comments. at 40-41, para. 71.

<sup>240</sup> *Id.* at 41, paras. 72-73. As with construction permits, REC also proposes that if the original permit was issued based on a points tie-breaker, the assignee or transferee of a license must have a “community presence date” that meets or exceeds the youngest granted station in the original MX group. *Id.* at 41, para. 73.

<sup>241</sup> In light of our proposal to now allow the assignment and transfer of both LPFM permits and licenses, we intend to use the same consideration standard that we apply to full service NCE FM stations. Specifically, we intend to track the parallel standard in the full service NCE rule, 47 CFR § 73.7005(a), and restrict consideration received or promised to the assignor’s or transferor’s “legitimate and prudent expenses.” Legitimate and prudent expenses are those expenses reasonably incurred by the assignor or transferor in obtaining and constructing the station (*e.g.*, expenses in preparing an application, in obtaining and installing broadcast equipment to be assigned or transferred, etc.). In the LPFM context, we propose that the “legitimate and prudent expenses” guideline will also encompass the current rule regarding consideration restrictions and therefore include the depreciated fair market value of the station’s equipment and facilities. Thus, these proposed restrictions will retain the prohibition on the for-profit sale of LPFM authorizations to any buyer.

<sup>242</sup> Unlike full service NCE FM stations, the consideration restriction will not cease at the end of the four-year holding period. *See, e.g., LPFM Third Report and Order*, 22 FCC Rcd at 21918, para. 15 (“The for-profit sale of LPFM authorizations to any buyer is fundamentally inconsistent with the Commission’s desire to promote local, community-based use and ownership of LPFM stations. Transfers of control or assignments for consideration will create a market for LPFM licenses and may facilitate trafficking in licenses by those who have no interest in providing LPFM services to the public.”).

comparative point system provisions of Section 73.872 of the rules,<sup>243</sup> and continuing until the station has achieved at least four years of on air operations, (a) the assignee or transferee must meet or exceed those points awarded to the LPFM tentative selectee, and (b) for LPFM stations selected in accordance with the involuntary time-sharing provisions of Section 73.872(d) of the rules,<sup>244</sup> 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.

85. We invite comments on these proposed changes and safeguards. Would allowing the assignment and transfer of LPFM construction permits increase the likelihood that these permits will be constructed and thus provide new service to communities? Would eliminating the three-year holding period for LPFM licenses make these stations more viable and prevent the loss of LPFM service? Conversely, would such changes create significant opportunities for gamesmanship? If so, what additional safeguards would be effective to ensure that the LPFM service retains its noncommercial, non-profit, hyperlocal character and deter speculation in LPFM authorizations?

## VI. PROCEDURAL MATTERS

86. *Initial Regulatory Flexibility Act Analysis.* --- With respect to this *NPRM*, an Initial Regulatory Flexibility Analysis (IRFA) is contained in Appendix B. As required by Section 603 of the Regulatory Flexibility Act of 1980, as amended,<sup>245</sup> the Commission has prepared an IRFA of the expected impact on small entities of the proposals contained in the *NPRM*. Written public comments are required on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM*. The Commission will send a copy of the *NPRM*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>246</sup>

87. *Paperwork Reduction Act.* --- This document contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002,<sup>247</sup> we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”<sup>248</sup>

88. *Ex Parte Rules.*---*Permit-But-Disclose.* The proceeding this *NPRM* initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>249</sup> Persons making *ex parte* presentations must file a copy of any written presentation or memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or

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<sup>243</sup> See 47 CFR § 73.872.

<sup>244</sup> 47 CFR § 73.872(d).

<sup>245</sup> See 5 U.S.C. § 603.

<sup>246</sup> 44 U.S.C. § 3506(c)(4).

<sup>247</sup> Pub. L. No. 107-198.

<sup>248</sup> 44 U.S.C. § 3506(c)(4).

<sup>249</sup> 47 CFR §§ 1.2000 *et seq.*

her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to the Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .ppt). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

89. *Filing Requirements. ---Comments and Replies.* Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

90. Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.

91. Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

92. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

93. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

94. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20743.

95. U.S. postal first service, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

96. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Government Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

97. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., CY-A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII.

98. *Additional Information.* For additional information on this proceeding, please contact Amy Van de Kerckhove, [Amy.Vandekerckhove@FCC.gov](mailto:Amy.Vandekerckhove@FCC.gov), of the Media Bureau, Audio Division.

## VII. ORDERING CLAUSES

99. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 4(i), 301, 303, 307, 316, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 301, 303, 307, 316, and 403, this *Notice of Proposed Rule Making* IS ADOPTED.

100. IT IS FURTHER ORDERED that the Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Notice of Proposed Rulemaking*, including

the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, and shall cause it to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary



**APPENDIX A**  
**Proposed Rule Changes**

**Part 73 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:**

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. Revise Section 73.854 to read as follows:

**§ 73.854 Unlicensed radio operations.**

No application for an LPFM station may be granted unless the applicant certifies, under penalty of perjury, that neither the applicant, nor any party to the application, has engaged in any manner, including individually or with persons, groups, organizations or other entities, in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301. If an application is dismissed pursuant to this section, the applicant is precluded from seeking *nunc pro tunc* reinstatement of the application and/or changing its directors to resolve the basic qualification issues.

3. Rename Section 73.865, revise paragraphs (a), (a)(1), (a)(2), (b), and (c), add new paragraph (a)(3), remove paragraph (d), and redesignate and revise paragraph (e) as (d), to read as follows:

**§ 73.865 Assignment and transfer of LPFM permits and licenses.**

(a) *Assignment/Transfer*: No party may assign or transfer an LPFM permit or license if:

(1) Consideration promised or received exceeds the legitimate and prudent expenses of the assignor or transferor. For purposes of this section, legitimate and prudent expenses are those expenses reasonably incurred by the assignor or transferor in obtaining and constructing the station (e.g., expenses in preparing an application, in obtaining and installing broadcast equipment to be assigned or transferred, etc.). Costs incurred in operating the station are not recoverable (e.g. rent, salaries, utilities, music licensing fees, etc.) Legitimate and prudent expenses will also include the depreciated fair market value of the physical equipment and facilities of the station;

(2) The assignee or transferee is incapable of satisfying all eligibility criteria that apply to a LPFM licensee; or

(3) For a period of time commencing with the grant of any construction permit awarded based on the comparative point system, § 73.872, and continuing until the station has achieved at least four years of on air operations, (i) the assignee or transferee cannot meet or exceed the points awarded to the initial applicant; or (ii) where the original LPFM construction permit was issued based on a point system tie-breaker, the assignee or transferee does not have a “locally established date,” as defined in § 73.853(b), that is the same as, or earlier than, the date of the most recently established local applicant in the tied MX group. Any successive applicants proposing to assign or transfer the construction permit or license prior to the end of the aforementioned period will be required to make the same demonstrations. This restriction does not apply to construction permits that are awarded to non-mutually exclusive applicants or through settlement.

(b) A change in the name of an LPFM permittee or licensee where no change in ownership or control is involved may be accomplished by written notification by the permittee or licensee to the Commission.

(c) *Holding period*: A construction permit cannot be assigned or transferred for 18 months from the date of issue.

(e) [Redesignate as (d)] Notwithstanding the other provisions in § 73.865, transfers of control involving a sudden or gradual change of more than 50 percent of an LPFM's governing board are not prohibited, provided that the mission of the entity remains the same and the requirements of § 73.865(a) are satisfied. Sudden majority board changes shall be submitted as a *pro forma* ownership change within 30 days of the change or final event that caused the LPFM permittee or licensee to exceed the 50 percent threshold.

4. Section 73.871 is amended by revising paragraph (c) to read as follows:

**§ 73.871 Amendment of LPFM broadcast station applications.**

\* \* \* \* \*

(c) Only minor amendments to new and major change applications will be accepted after the close of the pertinent filing window. Subject to the provisions of this section, such amendments may be filed as a matter of right by the date specified in the FCC's Public Notice announcing the acceptance of such applications. For the purposes of this section, minor amendments are limited to:

\* \* \* \* \*

(3) Changes in ownership where the original party or parties to an application either: (i) retain more than a 50 percent ownership interest in the application as originally filed; or (ii) retain an ownership interest of 50 percent or less as the result of gradual governing board changes in a nonstock or membership applicant with little or no effect on such organization's mission. All changes in a governmental applicant are considered minor, provided that the applicant entity remains unchanged.

\* \* \* \* \*

5. Section 73.872 is amended by revising paragraph (c) and adding a new paragraph (c)(5) to read as follows:

**§ 73.872 Selection procedure for mutually exclusive LPFM applications.**

\* \* \* \* \*

(c) *Voluntary time-sharing*. If mutually exclusive applications have the same point total, any two or more of the tied applicants may propose to share use of the frequency by electronically submitting, within 90 days of the release of a public notice announcing the tie, a time-share proposal. 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. Where such proposals include all of the tied applications, all of the tied applications will be treated as tentative selectees; otherwise, time-share proponents' points will be aggregated. Applicants may agree, at any time before the Media Bureau implements the involuntary time-share procedures pursuant to § 73.872(d), to aggregate their points to enter into a time-share agreement. Applicants can only aggregate their points and submit a time-share agreement if each is designated a tentative selectee in the same mutually exclusive group, and if each applicant has the basic qualifications to receive a grant of its application.

\* \* \* \* \*

(5) In the event a tentatively accepted time-share agreement is dismissed, the Commission staff will release another public notice, initiating a second 90-day period for all remaining tentative

selectees within the affected MX group to enter into either a voluntary time-share arrangement or a universal settlement in accordance with paragraphs (c) or (e) of this Section.

\* \* \* \* \*

6. Section 73.3572 is amended by revising paragraph (b) to read as follows:

**§ 73.3572 Processing TV broadcast, Class A TV broadcast, low power TV, TV translators, and TV booster applications**

\* \* \* \* \*

(b) A new file number will be assigned to an application for a new station or for major changes in the facilities of an authorized station, when it is amended so as to effect a major change, as defined in paragraphs (a)(1) or (a)(2) of this section, or result in a situation where the original party or parties to the application do not retain more than 50 percent ownership interest in the application as originally filed, and §73.3580 will apply to such amended application. However, a change in ownership is minor if the original party or parties to an application for a noncommercial educational full power television station retain an ownership interest of 50 percent or less in the application as originally filed as the result of a gradual governing board change in a nonstock or membership applicant with little or no effect on such organization's mission. An application for change in the facilities of any existing station will continue to carry the same file number even though (pursuant to FCC approval) an assignment of license or transfer of control of such licensee or permittee has taken place if, upon consummation, the application is amended to reflect the new ownership.

\* \* \* \* \*

7. Section 73.3573 is amended by revising paragraph (a)(1) to read as follows:

**§ 73.3573 Processing FM broadcast station applications.**

(a) Applications for FM broadcast stations are divided into two groups:

(1) In the first group are applications for new stations or for major changes of authorized stations. A major change in ownership is one in which the original party or parties to the application do not retain more than 50 percent ownership interest in the application as originally filed, except that a change in ownership is minor if the original party or parties to an application for a reserved channel NCE FM station retain an ownership interest of 50 percent or less in the application as originally filed as the result of a gradual governing board change in a nonstock or membership applicant with little or no effect on such organization's mission. In the case of a Class D or an NCE FM reserved band channel station, a major facility change is any change in antenna location which would not continue to provide a 1 mV/m service to some portion of its previously authorized 1 mV/m service area. In the case of a Class D station, a major facility change is any change in community of license or any change in frequency other than to a first-, second-, or third-adjacent channel. A major facility change for a commercial or a noncommercial educational full service FM station, a winning auction bidder, or a tentative selectee authorized or determined under this part is any change in frequency or community of license which is not in accord with its current assignment, except for the following:

\* \* \* \* \*

8. Section 73.3598 is amended by revising paragraphs (a) and (b), revising the last line of paragraph (b)(3), adding a new paragraph (b)(4), and revising paragraphs (c) and (d) to read as follows:

**§ 73.3598 Period of construction.**

(a) Except as provided in the last two sentences of this paragraph, each original construction permit for the construction of a new TV, AM, FM or International Broadcast; low power TV; low power FM; TV translator; TV booster; FM translator; or FM booster station, or to make changes in such existing stations, shall specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and application for license filed. An eligible entity that acquires an issued and outstanding construction permit for a station in any of the services listed in this paragraph shall have the time remaining on the construction permit or eighteen months from the consummation of the assignment or transfer of control, whichever is longer, within which to complete construction and file an application for license. For purposes of the preceding sentence, an "eligible entity" shall include any entity that qualifies as a small business under the Small Business Administration's size standards for its industry grouping, as set forth in 13 CFR 121 through 201, at the time the transaction is approved by the FCC, and holds

\* \* \* \* \*

(b) The period of construction for an original construction permit shall toll when construction is prevented by the following causes not under the control of the permittee:

\* \* \* \* \*

(3) \* \* \* served by the station's TV (analog) facility to be vacated by June 12, 2009; or

(4) Failure of a Commission-imposed condition precedent prior to commencement of operation.

(c) A permittee must notify the Commission as promptly as possible and, in any event, within 30 days, of any pertinent event covered by paragraph (b) of this section, and provide supporting documentation. All notifications must be filed in triplicate with the Secretary and must be placed in the station's local public file. For authorizations to construct stations in the Low Power FM service, on FM channels reserved for noncommercial educational use, and for noncommercial educational full power television stations, the Commission will identify and grant an initial period of tolling when the grant of a construction permit is encumbered by administrative or judicial review under the Commission's direct purview (e.g., petitions for reconsideration and applications for review of the grant of a construction permit pending before the Commission and any judicial appeal of any Commission action thereon), or failure of a condition under paragraph (b)(4) of this section. When a permit is encumbered by administrative or judicial review outside of the Commission's direct purview (e.g., local, state, or non-FCC federal requirements), the permittee is required to notify the Commission of such tolling events.

(d) A permittee must notify the Commission promptly when a relevant administrative or judicial review is resolved. Tolling resulting from an act of God will automatically cease six months from the date of the notification described in paragraph (c) of this section, unless the permittee submits additional notifications at six-month intervals detailing how the act of God continues to cause delays in construction, any construction progress, and the steps it has taken and proposes to take to resolve any remaining impediments. For authorizations to construct stations in the Low Power FM service, on FM channels reserved for noncommercial educational use, and for noncommercial educational full power television stations, the Commission will cease the tolling treatment and notify the permittee upon resolution of either: (1) any encumbrance by administrative or judicial review of the grant of the construction permit under the Commission's direct purview, or (2) the condition on the commencement of operations under paragraph (b)(4) of this section.

\* \* \* \* \*

9. Revise paragraph (c) of Section 73.7002 to read as follows:

**§ 73.7002 Fair distribution of service on reserved band FM channels.**

\* \* \* \* \*

(c) For a period of four years of on air operations, an applicant receiving a decisive preference pursuant to this section is required to construct and operate technical facilities substantially as proposed. During this period, such applicant may make minor modifications to its authorized facilities, provided that either: (1) the modification does not downgrade service to the area on which the preference was based, or (2) any potential loss of first and second NCE service is offset by at least equal first and, separately, combined first and second NCE service population gain(s), and the applicant would continue to qualify for a decisive Section 307(b) preference. \* \* \*

\* \* \* \* \*

10. Revise paragraphs (b)(1), (b)(2), and add new paragraphs (c)(3) and (c)(4) of Section 73.7003 to read as follows:

**§ 73.7003 Point system selection procedures.**

\* \* \* \* \*

(b) \* \* \*

(1) *Established local applicant.* Three points for local applicants, as defined in § 73.7000, who have been local continuously for no fewer than the two years (24 months) immediately prior to the application filing.

(2) *Local diversity of ownership.* Two points for applicants with no attributable interests, as defined in § 73.7000, in any other broadcast station or authorized construction permit (comparing radio to radio and television to television) whose principal community (city grade) contour overlaps that of the proposed station. The principal community (city grade) contour is the 5 mV/m for AM stations, the 3.16 mV/m for FM stations calculated in accordance with § 73.313(c), and the contour identified in § 73.685(a) for TV. Radio applicants will count commercial and noncommercial AM, FM, and FM translator stations other than fill-in stations. Television applicants will count UHF, VHF, and Class A stations.

\* \* \* \* \*

(c) \* \* \*

(3) *Voluntary time-sharing.* If a tie remains after the tie breaker in paragraph (c)(2) of this section, each of the remaining tied, mutually exclusive applicants will be identified as a tentative selectee and must electronically submit, within 90-days from the release of the public notice or order announcing the remaining tie, any voluntary time-share agreement. Voluntary time-share agreements must be in writing, signed by each time-share proponent, and specify the proposed hours of operation of each time-share proponent.

(4) *Mandatory time-sharing.* If a tie among mutually exclusive applications is not resolved through voluntary time-sharing in accordance with paragraph (c)(3) of this section, the tied applications will be reviewed for acceptability. Applicants with tied, grantable applications will be eligible for equal, concurrent, non-renewable license terms.

(i) If a mutually exclusive group has three or fewer tied, grantable applications, the Commission will simultaneously grant these applications, assigning an equal number of hours per week to each applicant. The Commission will require each applicant subject to mandatory time-sharing to simultaneously and confidentially submit their preferred time slots to the Commission. If there are only two tied, grantable applications, the applicants must select between the following 12-hour time slots: 3 a.m.-2:59 p.m., or 3 p.m.-2:59 a.m. If there are three tied, grantable applications, each applicant must rank their preference for the following 8-hour time slots: 2 a.m.-9:59 a.m., 10 a.m.-5:59 p.m., and 6 p.m.-1:59 a.m. The Commission will require the

applicants to certify that they did not collude with any other applicants in the selection of time slots. The Commission will give preference to the applicant that has been local, as defined in §73.7000, for the longest uninterrupted period of time. In the event an applicant neglects to designate its preferred time slots, staff will select a time slot for that applicant.

(ii) Groups of more than three tied, grantable applications will not be eligible for licensing under this section. Where such groups exist, the Commission will dismiss all but the applications of the three applicants that have been local, as defined in §73.7000, for the longest uninterrupted periods of time. The Commission will then process the remaining applications as set forth in paragraph (c)(4)(i) of this section.

\* \* \* \* \*

11. Rename Section 73.7005, revise paragraph (b), add new paragraph (c), and redesignate paragraph (c) as (d), to read as follows:

**§ 73.7005 Maintenance of Comparative Qualifications**

\* \* \* \* \*

(b) *Technical.* In accordance with the provisions of §73.7002, for a period of four years of on air operations, an NCE FM applicant receiving a decisive preference for fair distribution of service is required to construct and operate technical facilities substantially as proposed. During this period, such applicant may make minor modifications to its authorized facilities, provided that either: (1) the modification does not downgrade service to the area on which the preference was based, or (2) any potential loss of first and second NCE service is offset by at least equal first and, separately, combined first and second NCE service population gain(s).

(c) [Redesignate as (d)]

(c) *Point System Criteria.* Any applicant selected based on the point system, § 73.7003, must maintain the characteristics for which it received points for a period of time commencing with the grant of the construction permit and continuing until the station has achieved at least four years of on air operations. During this time, any applicant receiving points for diversity of ownership, § 73.7003(b)(2), and selected through the point system, is prohibited from (i) acquiring any commercial or noncommercial AM, FM, or non-fill-in FM translator station which would overlap the principal community (city grade) contour of its NCE FM station received through the award of diversity points; (ii) acquiring any UHF, VHF, or Class A television station which would overlap the principal community (city grade) contour of its NCE television station received through the award of diversity points; (iii) proposing any modification to its NCE FM station received through the award of diversity points which would create overlap of the principal community (city grade) contour of such station with any attributable authorized commercial or noncommercial AM, FM, or non-fill-in FM translator station; (iv) proposing any modification to its NCE television station received through the award of diversity points which would create overlap of the principal community (city grade) contour of such station with any attributable authorized UHF, VHF, or Class A television station; (v) proposing modifications to any attributable commercial or noncommercial AM, FM, or non-fill-in FM translator station which would create overlap with the principal community (city grade) contour of its NCE FM station received through the award of diversity points; and (vi) proposing modifications to any attributable UHF, VHF, or Class A television station which would create overlap with the principal community (city grade) contour of its NCE television station received through the award of diversity points. This restriction applies to the applicant itself, any parties to the application, and any party that acquires an attributable interest in the permittee or licensee during this time period.

## APPENDIX B

## Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies proposed in the *Notice of Proposed Rulemaking (NPRM)*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* provided in paragraph 89. The Commission will send a copy of this entire *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the *NPRM* and the IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

2. **Need For, and Objectives of, the Proposed Rules.** The Commission initiates this rulemaking proceeding to obtain comments concerning certain proposals designed to clarify and simplify the point systems used to evaluate competing applications for noncommercial educational (NCE) broadcast stations (full-service FM, full power television, and FM translator) and low power FM (LPFM) broadcast stations, and related NCE and LPFM rules. Specifically, the Commission seeks comment on the following: (1) whether to eliminate the current requirement that NCE applicants amend their governing documents to pledge that localism/diversity be maintained in order to receive points as “established local applicants” and for “diversity of ownership;”; (2) whether to award points based on contingent pledges to divest interests in existing full-service stations if the divestiture is not yet implemented by close of the application filing window; (3) whether to alter tie-breaker criteria to reduce the need for mandatory time-sharing and/or to adopt procedures that would minimize some of the drawbacks of mandatory time-sharing; (4) whether to clarify aspects of the “holding period” by which NCE permittees maintain the characteristics for which they received comparative preferences and to specify consequences for non-compliance; (5) whether to disallow any LPFM post-filing window change in directors as a means of resolving an alleged history of unauthorized operations by a party to the application; (6) whether to codify the permissibility of LPFM applicants to discuss their intent to aggregate points and time-share prior to the filing of LPFM applications; (7) whether to establish a process for LPFM point aggregation time-share agreements that have been accepted, but later deemed invalid; (8) whether, for LPFM and NCE applicants, to reclassify as “minor” all changes to governmental applicants and gradual board changes in nonstock and membership applicants; (9) whether to modify the NCE and LPFM application forms to clarify the existing requirement for applicants to obtain reasonable assurance of site availability; (10) whether to toll NCE and LPFM broadcast construction deadlines without notification from the permittee, based on certain pleadings pending before, or actions taken by, the agency; (11) whether to revise the LPFM construction period from 18 months to 3 years; (12) whether to allow assignment and transfer of LPFM construction permits after an 18-month holding period; and (13) whether to eliminate the three-year holding period for the assignment and transfer of LPFM licenses. Additionally, the Commission seeks comment on any additional proposals designed to reduce burdens upon NCE and LPFM broadcasters, or to enhance NCE and LPFM service to the public. The Commission’s objectives are to clarify comparative requirements, minimize confusion among applicants, deter speculative applications, and initiate service to the public quickly and efficiently.

3. **Legal Basis.** The authority for this proposed rulemaking is contained in Sections 1, 2, 4(i), 301, 303, 307, 316, and 403 of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 301, 303, 307, 316, and 403).

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

4. **Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.** The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.<sup>4</sup> The RFA generally defines the term "small entity" as encompassing the terms "small business," "small organization," and "small governmental entity."<sup>5</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>6</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>7</sup> The proposed rules will apply to applicants, permittees, and licensees within the LPFM service, NCE full power television service, and to radio stations licensed to operate on channels reserved as "noncommercial educational," either within the reserved band of the FM spectrum or designated solely for noncommercial educational FM use in a particular area through the Commission's allocations process. Most affected entities will be applicants for which a "point system" process is used to compare their qualifications with those of competing applicants. However, the proposals concerning minor changes to pending applications, reasonable site assurance, and tolling of broadcast construction deadlines will also affect applications granted outside of the comparative process, such as those that are "singletons" or resolved by settlement among originally conflicting parties.

5. **NCE FM Radio Stations.** The proposed policies could apply to NCE FM radio broadcast licensees, and potential licensees of NCE FM radio service. The SBA defines a radio broadcast station as a small business if such station has no more than \$38.5 million in annual receipts.<sup>8</sup> Business concerns included in this industry are those primarily engaged in broadcasting aural programs by radio to the public.<sup>9</sup> Radio stations that the Commission would consider commercial, as well as those it would consider NCE stations, are included in this industry. With respect to current licensees, a Commission staff review of the BIA Publications, Inc. Master Access Radio Analyzer Database reflects that as of June 8, 2017, all 4,404 (100 percent) of radio stations operating as noncommercial have revenues of \$38.5 million or less and thus qualify as small entities under the SBA definition. Of these, no more than 4,112 authorized stations<sup>10</sup> are potentially affected by the proposals because they are licensed as NCE stations, whereas BIA data also includes stations that are not licensed as NCE stations but choose to operate with a noncommercial format. The estimate may overstate the number of potentially affected licensees because it includes stations that would not be affected by the proposals, including those that have been authorized by methods other than a point system, already met construction deadlines, and/or are no longer subject to a holding period. The estimate may also overstate the number of small entities because in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations<sup>11</sup>

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<sup>4</sup> 5 U.S.C. § 603(b)(3).

<sup>5</sup> *Id.* § 601(6).

<sup>6</sup> *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>7</sup> 15 U.S.C. § 632.

<sup>8</sup> See 13 CFR § 121.201, NAICS Code 515112.

<sup>9</sup> *Id.*

<sup>10</sup> See *Broadcast Station Totals as of March 31, 2017*, News Release (rel. Apr. 11, 2017) ([https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344256A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344256A1.pdf)) (*Broadcast Totals*).

<sup>11</sup> "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 CFR § 121.103(a)(1).



must be included. Our estimate considers each station separately and does not include or aggregate revenues from affiliated organizations or from commonly controlled stations.

6. The proposals will primarily impact potential licensees. The Commission accepts applications for new NCE FM radio broadcast stations in filing windows. There are no pending applications remaining from previous NCE FM filing windows. We anticipate that in future filing windows we will receive a number of applications similar to past filing windows and that all such applicants will qualify as small entities. The last filing window for reserved band FM spectrum occurred in 2007 and generated approximately 3,600 applications of which approximately 2,700 were mutually exclusive. The last filing window for channels reserved for NCE use through the allotment process was held in 2010, and generated 323 applications, virtually all of which were mutually exclusive. This estimate may overstate the number of potentially affected applicants because filing windows typically include some proposals that need not be resolved by a point system, such as those resolved through settlement agreements.

7. An additional element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the estimate of small businesses to which the proposed rules may apply does not exclude any radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also, as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

8. **FM Translator Stations and Low Power FM Stations.** The proposed policies could affect licensees of FM translator stations and LPFM stations, as well as potential licensees in these radio services. The same SBA definition that applies to radio broadcast licensees would apply to these stations. The SBA defines a radio broadcast station as a small business if such station has no more than \$38.5 million in annual receipts.<sup>12</sup> Given the nature of NCE FM translators and LPFM stations, we will presume that all such licensees qualify as small entities under the SBA definition. Currently, there are approximately 1,924 licensed LPFM stations.<sup>13</sup> There are 7,453 licensed FM translator and booster stations, but the booster stations and commercial translators included in this number will not be affected by the proposals.<sup>14</sup> In addition, there are approximately four pending mutually exclusive noncommercial applications filed in the 2003 FM translator filing window and 11 pending applications filed in the 2013 LPFM filing window. The proposal would primarily affect applicants in future FM translator and LPFM windows. We anticipate that in future filing windows we will receive a number of applications similar to past filing windows and that all applicants will qualify as small entities. The last LPFM filing window in 2013 generated approximately 2,827 applications. The 2003 FM translator filing window generated approximately several hundred applications from NCE applicants, of which approximately 69 were mutually exclusive.

9. **NCE Television Stations.** This economic Census category “comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.”<sup>15</sup> These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming

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<sup>12</sup> See 13 CFR § 121.201, NAICS Code 515112.

<sup>13</sup> See *Broadcast Totals* ([https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344256A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344256A1.pdf)).

<sup>14</sup> *Id.*

<sup>15</sup> U.S. Census Bureau, 2012 NAICS Code Economic Census Definitions, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for Television Broadcasting firms: those having \$38.5 million or less in annual receipts.<sup>16</sup> The 2012 economic Census reports that 751 television broadcasting firms operated during that year. Of that number, 656 had annual receipts of less than \$25 million per year. Based on that Census data we conclude that a majority of firms that operate television stations are small. Specifically, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 390.<sup>17</sup> These stations are non-profit, and therefore considered to be small entities.<sup>18</sup> We therefore estimate that the majority of noncommercial television broadcasters are small entities.

10. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included.<sup>19</sup> Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

**11. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.** The proposed rule and procedural changes may, in some cases, impose different reporting requirements on potential NCE full service stations, NCE FM Translators, and LPFM licensees and permittees. The *NPRM* proposes a new submission of information verifying that the applicant obtained reasonable assurance of site availability. Any additional burden would be minimal, however, because the underlying requirement to obtain such assurance currently exists and would not change. Likewise, NCE applicants seeking points as “established local applicants” or for “diversity of ownership” would provide information that is different from that currently required. We believe that the new information would be simpler for applicants to produce because applicants would no longer be required to amend their governing documents. Elimination of certain tolling notification requirements could decrease burdens on applicants that experience encumbrances preventing construction. An NCE or LPFM permittee could receive additional construction time for which it qualifies without initiating a process to notify the Commission of actions taken by or pending within the Commission. If the Commission revises the LPFM construction period to three years, LPFM permittees needing more than the current 18-month construction period would no longer need to file and justify requests for an 18-month extension. Finally, if the Commission were to adopt its proposals to clarify and/or modify application requirements that applicants have found confusing, this would reduce burdens on such applicants to file and/or respond to petitions challenging point claims.

**12. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.** The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance,

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<sup>16</sup> 13 CFR § 121.201; NAICS code 515120.

<sup>17</sup> See *supra* note 10.

<sup>18</sup> See generally 5 U.S.C. § 601(4), (6).

<sup>19</sup> “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both.” 13 CFR § 121.103(a)(1).

rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>20</sup>

13. In the *NPRM*, the Commission seeks to assist NCE full service broadcast stations, NCE FM Translator, and LPFM broadcast applicants by clarifying and simplifying requirements for claiming and maintaining qualities that are used to compare competing applications. The proposals, if adopted, would enable such applicants: (1) to claim comparative points without the burdensome process of amending their governing documents; (2) to maintain existing full-service broadcast operations by making contingent pledges that do not require divestment of existing interests prior to application grant; and (3) to make certain changes to their governing boards without facing dismissal. The proposals would also: (1) alter tie-breaker criteria to reduce the need for the currently unpopular use of mandatory time-sharing; (2) eliminate the “holding period” for LPFM licenses, clarify the NCE “holding period” rule, and increase flexibility of applicants receiving comparative preferences to satisfy the “maintenance of comparative qualifications” requirements; (3) clarify that LPFM applicants cannot cure prior unauthorized “pirate” operations by removing the alleged pirates from their boards; (4) reduce challenges based on reasonable assurance of site availability; (5) toll NCE and LPFM broadcast construction deadlines without notification about certain matters known to the agency; (6) provide at the outset a longer construction period for LPFM stations; and (7) permit the assignment and transfer of LPFM permits after 18 months. The Commission seeks comment as to whether its goals of providing new NCE and LPFM service to the public, limiting speculation, and clarifying requirements could effectively be accomplished through these means. The Commission is open to consideration of alternatives to the proposals under consideration, as set forth herein, including but not limited to alternatives that will minimize the burden on NCE and LPFM broadcasters, virtually all of whom are small businesses. There may be unique circumstances these entities may face, and we will consider appropriate action for small broadcasters when preparing a *Report and Order* in this matter.

14. **Federal Rules Which Duplicate, Overlap, or Conflict With, the Commission’s Proposals.** None.

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<sup>20</sup> 5 U.S.C. § 603(b).