

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

Report and Order – 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 the initiation of new service. The measures adopted in this *Report and Order* are intended 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 Report and Order Would Do:

- Eliminate the requirement for applicants claiming “established local applicant” and “diversity of ownership” points to amend their governing documents.
- Recognize contingent divestiture pledges to provide flexibility to applicants with existing ownership interests.
- Expand the NCE tie-breaker process to reduce the need for mandatory time-sharing.
- Clarify aspects of the “holding period” rule, requiring NCE permittees to maintain the characteristics for which they received a comparative preference.
- Bar amendments to LPFM construction permit applications that attempt to rectify past unauthorized station operations.
- Authorize early time-sharing discussions among LPFM applicants.
- 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.
- Clarify the requirements to demonstrate reasonable assurance of site availability.
- Streamline tolling procedures and notification requirements for NCE and LPFM permittees.
- Extend the LPFM construction period from 18-months to a full three years.
- Allow the assignment and transfer of LPFM permits after an 18-month holding period and eliminate the three-year holding period on assigning LPFM licenses.

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

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

REPORT AND ORDER*

Adopted: []

Released: []

By the Commission:

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* This document has been circulated for tentative consideration by the Commission at its December 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.

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I. INTRODUCTION

1. In this *Report and Order*, we adopt changes to our rules and procedures for considering competing applications for new and major modifications to noncommercial educational FM radio stations, noncommercial educational FM translator stations, noncommercial educational full power television stations (collectively, NCE or NCE broadcast)¹ and low power FM (LPFM) stations. Specifically, we adopt several of the proposals set forth in the *Notice of Proposed Rulemaking*,² including: (1) eliminating the requirement that NCE applicants amend their governing documents to pledge to maintain localism and diversity in order to receive points for being an “established local applicant” and for “diversity of ownership”; (2) expanding the scope of the divestiture policies by recognizing station divestitures for comparative purposes; (3) improving and expanding the NCE tie-breaker process and reducing the need for mandatory time-sharing; (4) establishing a mandatory time-sharing process, similar to the LPFM involuntary time-share rules, for mutually exclusive (MX) NCE applicants that are unable to arrive at a voluntary time-share agreement; (5) clarifying aspects of the “holding period” rule by which NCE permittees must maintain the characteristics for which they received comparative preferences and points; (6) clarifying the LPFM rules to specifically permit LPFM applicants to discuss their intent to aggregate points and time-share prior to tentative selectee designations; (7) aiding NCE and LPFM permittees by eliminating certain tolling notification requirements; (8) supporting LPFM permittees and licensees by extending the construction period from 18 months to a full three years; and (9) allowing the assignment or transfer of LPFM permits after an 18-month holding period and eliminating the three-year holding period on assigning LPFM licenses. The changes we adopt herein are designed to improve our comparative selection procedures, reduce confusion among future applicants, expedite the initiation of new service to the public, and eliminate unnecessary applicant burdens.

II. BACKGROUND

2. As explained in the *NPRM*, due to the noncommercial nature of the NCE and LPFM service, MX applications³ for new station licenses are not subject to auction but are resolved by applying comparative procedures. This includes a point system, which is a simplified “paper hearing” method for selecting among MX applications.⁴ Given the finite nature of and high demand for spectrum, the

¹ 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.

² *See Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations*, Notice of Proposed Rulemaking, 34 FCC Rcd 851 (2019) (*NPRM*). A list of commenters is included at Appendix A.

³ 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.

⁴ 47 CFR §§ 73.872, 73.7003. *See also Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Notice of Proposed Rulemaking, 10 FCC Rcd 2877 (1995), *further rules proposed*, Further (continued....)

Commission cannot authorize an NCE or LPFM station to every qualified applicant. Accordingly, applicants receive points for criteria established in the rules, with the license awarded to the applicant with the highest points, or with mandatory time sharing in the event of a tie.⁵

3. The NCE and LPFM comparative procedures used in past filing windows facilitated the grant of several thousand new station construction permits.⁶ Certain rules, however, confused applicants, drew criticism, or delayed the initiation of new service. The commenters responding to the *NPRM* agree that there are flaws in the comparative process and licensing system and generally concur with our proposals to improve and expedite the comparative process. As explained in the *NPRM*, 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 prior NCE and LPFM filing windows, and the comments submitted in this proceeding, we adopt changes to clarify, simplify, and otherwise improve our licensing procedures for new NCE broadcast⁷ and LPFM stations. We adopt all of our proposals from the *NPRM*, with some minor modifications, as detailed below.

III. CHANGES TO THE NCE COMPARATIVE PROCESS

A. Eliminate Governing Document Requirements for Established Local Applicants

4. We adopt the *NPRM*'s proposal to eliminate the requirement that NCE applicants claiming points as an established local applicant amend their governing documents to require that "localism be maintained" (Localism Governing Document Requirement).⁸ Commenters support this change, and none oppose it.⁹

(Continued from previous page)

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 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); *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*).

⁵ The NCE and LPFM point system selection processes are detailed in full in the *NPRM* at paras. 6 – 18.

⁶ *See, e.g., 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*); *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) *Commission Identifies Tentative Selectees in 111 Groups of Mutually Exclusive Applications Filed in the LPFM Window*, Public Notice, 29 FCC Rcd 10847 (2014).

⁷ The NCE point system (47 CFR § 73.7003) was adopted to apply equally to applications for NCE FM and NCE full power television stations.

⁸ *See* 47 CFR § 73.7003(b)(2); FCC Schedule 340, Point System Factors Section, Established Local Applicant Question; *see also NPRM* at para. 25.

⁹ *See* Comments of REC Networks at 4 (REC Comments); Comments of Discount Legal at 5 (Discount Legal Comments); Comments of Prometheus Radio Project, Common Frequency, Albert Davis, and Caitlin Reading at 1 (Prometheus Comments); Comments of America's Public Television Stations, Corporation for Public Broadcasting, National Public Radio, Inc., and Public Broadcasting Service at 2 (Public Broadcasting Comments).

5. Under the NCE point system selection process, to qualify as an “established local applicant,” as defined in section 73.7000 of the rules,¹⁰ a party must certify that it has been local and established in the community to be served continuously for at least two years immediately prior to the application filing.¹¹ Further, to receive three localism points, the rules currently require an applicant to submit in its initial application:¹² (1) documentation to illustrate how it qualifies as local and established, such as corporate materials from the secretary of state, or lists of names, addresses, and length of residence of board members;¹³ and (2) documentation demonstrating that the applicant’s governing documents have been amended to require that “such localism be maintained” (Localism Governing Document Requirement).¹⁴

6. Some commenters indicated they interpreted the *NPRM* to propose to eliminate both documentation requirements.¹⁵ We clarify that is an incorrect interpretation of the *NPRM*, and we will continue to enforce the existing requirement that an applicant submit substantiating documentation to verify that it has been local and established for at least two years immediately prior to the application filing. We reiterate that the failure to submit documentation establishing local bona fides¹⁶ by the close of the filing window is fatal to an established local applicant point claim.¹⁷

7. In the *NPRM* we did, however, propose to eliminate the current section 73.7003(b)(1) requirement that an applicant’s governing documents be amended to include a localism provision,¹⁸ and the corresponding requirement to submit such documents to the Commission. While 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, the Worksheets and Instructions to FCC Schedule 340, as well as the orders adopting the current NCE point system, limit the rule’s

¹⁰ *Id.* § 73.7000.

¹¹ *See id.* § 73.7003(b)(1); *see also* FCC Schedule 340, Instructions at 15, Point System Factors Section, Established Local Applicant Question. 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. A governmental unit is considered local within its jurisdictional boundaries.

¹² The documentation, which must be submitted by the close of the filing window, must also be placed in the applicant’s public inspection file. *See, e.g.*, FCC Schedule 340, Instructions at 15, Point System Factors Section, Established Local Applicant Question.

¹³ *See* 47 CFR § 73.7003(b)(1); FCC Schedule 340, Point System Factors Section, Established Local Applicant Question. Acceptable documentation also includes copies of governing documents requiring a 75 percent local governing board, and course brochures indicating that classes have been offered at a local campus for the preceding two years.

¹⁴ *See* 47 CFR § 73.7003(b)(2); FCC Schedule 340, Point System Factors Section, Established Local Applicant Question.

¹⁵ *See, e.g.*, REC Comments at 4 (emphasizing the need to require applicants to submit documents to demonstrate local qualifications); Discount Legal Comments at 5 (urging the Commission to stress that it “will continue to require applicants to continue to submit documentation to establish its local bona fides”).

¹⁶ We did not propose any change to our definition of “local” and “established” in the *NPRM*, and we will continue to limit 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.

¹⁷ *See, e.g., Comparative Consideration of 32 Group 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, 5017, para. 11 (2010) (*32 Group NCE Point Order*) (“applicant submitting no timely documentation at all cannot be found to have made a valid certification”).

¹⁸ *See* 47 CFR § 73.7003(b)(1).

applicability to just applicants relying on governing board residences to claim localism points.¹⁹ As we detailed in the *NPRM*, this discrepancy created undue confusion among applicants, generated considerable litigation, and delayed the initiation of new NCE service during the 2007 and 2010 NCE FM filing windows.²⁰ Because we continue to believe, and commenters concur, that any benefits from the Localism Governing Document Requirement²¹ have been outweighed by the harm it has engendered in the licensing process, we eliminate this documentation requirement for *all* categories of applicants.²²

8. We emphasize that the localism criterion is still a vital factor in the point system analysis because it increases the likelihood that organizations most knowledgeable, responsive, and accountable to their local community will be awarded licenses.²³ Accordingly, in the *NPRM* we sought comment on alternative measures, in lieu of the Localism Governing Document Requirement, to keep the points meaningful and safeguard our localism goals.²⁴ Specifically, we asked commenters to address our proposal to incorporate into the current holding period rule²⁵ 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.²⁶ No commenter addressed our safeguard proposal or suggested alternatives. Because we continue to believe this rule clarification, along with a certification pledging to maintain localism at the time of filing the Schedule 340 application, will help protect the “established local applicant” criterion, we adopt these safeguard measures.

B. Eliminate Governing Document Requirements for Applicants Claiming Diversity Points

9. We adopt the proposal in the *NPRM* to simplify our diversity of ownership requirements by eliminating both: (1) the requirement that applicants amend their governing documents, or provide an alternative demonstration to guarantee that “diversity be maintained” (the Diversity Governing Document Requirement), and (2) the requirement to submit such documents to the Commission and place the

¹⁹ See 47 CFR § 73.7003(b)(1); FCC Schedule 340 at Worksheet #4, Items 1.a through 1.d; *see also* Instructions to FCC Schedule 340 at 15 (requiring governing documents to ensure that applicant maintain “local” characteristics of governing board); *NCE Reconsideration Order*, 17 FCC Rcd at 13134, para. 8, n.10; *NCE Report and Order*, 15 FCC Rcd at 7419, para.78.

²⁰ See *NPRM* at para. 26.

²¹ The requirement was designed to ensure that local boards retain their local character notwithstanding inevitable board changes over time.

²² See, e.g., Discount Legal Comments at 5 (agreeing with the proposal to eliminate documentation regarding durability of localism and stating, “these disputes were wasteful and served no public interest purpose”); Prometheus Comments at 1 (agrees “with the need to reduce administrative burden ...and agree that a change is needed.”).

²³ See, e.g., *NCE Report and Order*, 15 FCC Rcd at 7400, para. 33.

²⁴ In its comments, Prometheus asserts that localism “is often pushed aside by 307(b)” and proposes that “307(b) should be applied after the local points, or apply only when the local points criteria is met.” Prometheus Comments at 2. Center for International Media Action (CIMA) agrees with Prometheus, stating that it “would be best to come up with a new approach to implementation of 307(b), or de-prioritize it with respect to the comparative procedures.” CIMA Reply Comments at 5. We decline to consider these proposals, which are beyond the scope of this proceeding, and would be more properly considered in the context of a separate petition for rulemaking. When there are competing NCE FM radio applications proposing to serve different communities, we will continue to first consider Section 307(b), the fair distribution of service, as a threshold matter, before applying the point system. See U.S.C. § 307(b); 47 CFR § 73.7002(a).

²⁵ See 47 CFR § 73.7005.

²⁶ See *infra* Section III.F., “Clarify and Modify the ‘Holding Period’ Rule.”

documentation in the applicant's public inspection file.²⁷ The commenters addressing this proposal unanimously endorse this change.²⁸

10. Under the point system selection process, two points are awarded 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.²⁹ To qualify for diversity points, we have required applicants to document both current and future diversity. Specifically, 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.³⁰ We proposed no changes to this particular documentation requirement in the *NPRM*, and we will continue to enforce this requirement.

11. To document future diversity, an applicant is required to file a copy of its pertinent corporate governance documents, showing that it properly amended its governing documents to require the maintenance of diversity in the future.³¹ The Commission adopted the Diversity Governing Document Requirement with the goal of ensuring that an applicant will maintain the diversity characteristics for which it received credit, despite inevitable changes in board composition.³² However, as detailed in the *NPRM*, the Commission has found that the requirement instead had the unintended effect of frustrating and confusing many applicants, sparking numerous challenges regarding whether applicants sufficiently satisfied the requirement,³³ disqualifying legitimate applicants that failed to comprehend the requirement,³⁴ and delaying or curtailing the initiation of new NCE FM service. Commenters agree. Specifically, Prometheus emphasizes that "the existing rule adds confusion and has many times been misinterpreted by applicants – sometimes fatally."³⁵ Discount Legal states that the disputes created by the Diversity Governing Document Requirement were "wasteful and served no public interest purpose."³⁶

²⁷ See *NPRM* at para. 31.

²⁸ See REC Comments at 5; Discount Legal Comments at 5; Prometheus Comments at 2.

²⁹ 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.

³⁰ See FCC Schedule 340, Instructions at 15, Point System Factors Section, Diversity of Ownership Question. Such documents must also be placed in the applicant's public inspection file.

³¹ Applicants whose governing documents cannot be amended without legislative action and applicants without traditional governing documents have been permitted to base the governing document component of their diversity certification on alternative safeguards. See *NCE MO&O*, 16 FCC Rcd at 5095, para. 58; *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, 5148, para. 35 (2015).

³² See *NCE MO&O*, 16 FCC Rcd at 5095, paras. 56-58.

³³ See, e.g., *Open Arms Community of El Paso*, Memorandum Opinion and Order, 31 FCC Rcd 12185 (2016); *NCE MX Group 389*, Letter Order, 27 FCC Rcd 7670 (MB 2010); *Talking Inf. Ctr.*, Letter Order, 22 FCC Rcd 11120 (MB 2007).

³⁴ As explained in the *NPRM*, 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. See, 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 (2010) (denying diversity points to over 25 percent of the applicants certifying credit for diversity of ownership due to insufficient supporting documentation).

³⁵ Prometheus Comments at 2; see also REC Comments at 5 (agreeing that "in NCE, the bylaw requirement is not warranted").

³⁶ Discount Legal Comments at 5.

Accordingly, we will, as proposed, eliminate the Diversity Governing Document Requirement for all applicants seeking to qualify for diversity points.

12. We emphasize that the diversity of ownership criterion is still a critical factor in the point system analysis because it enables the public to hear a variety of viewpoints from different NCE broadcasters.³⁷ Accordingly, in the *NPRM* we sought comment on alternative measures to safeguard our diversity goals. Specifically, we asked commenters to address our proposal to incorporate into the current holding period rule³⁸ a new provision prohibiting any prevailing applicant that receives diversity points during the point system analysis from acquiring stations³⁹ which would overlap the principal community contour of its new NCE station during the period from the grant of the construction permit until the station has achieved four years of on-air operations.⁴⁰ No commenter addressed our safeguard proposal or suggested alternatives. Because we continue to believe our proposal will be an effective means to safeguard our diversity goals, we will incorporate this new restriction into our rules.⁴¹ The restriction will 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. Finally, to further safeguard our diversity goals, we will, as we proposed in the *NPRM*, add an additional question to FCC Schedule 340, FCC Form 314, and FCC Form 315,⁴² requiring applicants to certify that the proposed acquisition would comply with the subject authorization's diversity condition.⁴³

C. Establish Uniform Divestiture Pledge Policies

13. We adopt the proposal in the *NPRM* to expand the scope of our divestiture policies by recognizing full-service station divestiture pledges for comparative purposes and crediting *all* contingent divestiture pledges that are made and submitted in the application by the close of the filing window.⁴⁴ The commenters addressing this issue agree with this policy change.⁴⁵

³⁷ See, e.g., *NCE Report and Order*, 15 FCC Rcd at 7400, para. 33.

³⁸ See 47 CFR § 73.7005.

³⁹ In this context, for radio applicants, a barred "acquired station" would be any commercial or noncommercial AM, FM, or non-fill-in FM translator station. For television applicants, a barred "acquired station" would be any UHF, VHF, or Class A television station (for television applicants).

⁴⁰ See *infra* Section III.F., "Clarify and Modify the 'Holding Period' Rule."

⁴¹ See 47 CFR § 73.7005(c) at Appendix B.

⁴² See Application for Consent to Assignment of Broadcast Station Construction Permit or License (CDBS-based FCC Form 314); Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License (CDBS-based FCC Form 315). The Media Bureau is in the process of transitioning applications from the CDBS database system to the Licensing Management System (LMS). Any changes to FCC Forms in CDBS will also apply to any successor application version that may be established in LMS.

⁴³ Applicants proposing a modification to a station received through the award of diversity points in the point system analysis will 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 station or full power or Class A television station must certify that the modification will not create overlap with any of its attributable NCE FM radio stations or NCE television stations, respectively, received through the award of diversity points in the point system analysis.

⁴⁴ See *NPRM* at para. 35.

⁴⁵ See Prometheus Comments at 3; REC Comments at 6.

14. As explained in the *NPRM*, the Commission examines an applicant's qualifications for comparative points, including diversity of ownership, as of the close of the filing window.⁴⁶ The Commission previously 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.⁴⁷ Although the Commission has carved out exceptions to this general policy and accepts contingent divestiture pledges for some secondary services,⁴⁸ the Commission has never allowed applicants to utilize contingent divestiture pledges to exclude full-service stations from the diversity of ownership consideration.⁴⁹

15. We find no compelling reason to continue to limit acceptable divestiture pledges for NCE applicants to *only* secondary service interest holdings, and commenters have expressed no rationale for retaining the current burdensome divestiture policy. As explained in the *NPRM*, the current policy is burdensome because (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.⁵⁰ We conclude that the public interest is better served by permitting all applicants and parties to maintain continuity of service to the public during the licensing and construction process. Accordingly, we will permit an NCE applicant with any type of overlapping attributable broadcast interest to qualify for diversity of ownership points if it commits to divest the broadcast interest or resign from the attributable positional interest. We emphasize that the divestiture pledge must be submitted by the close of the filing window. The applicant, however, will not be required to complete the pledged action by the close of the filing window. Rather, we will, as proposed in the *NPRM*, mandate that the actual divestiture or resignation be completed by the time the new NCE station commences program test operations.⁵¹

D. Expand Tie-Breaker Criteria

16. We expand our tie-breaker criteria to add an additional tie-breaker round, and therefore, minimize the need to resort to the unpopular last-resort tie-breaker option, mandatory time-sharing. 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.⁵² The first tie-breaker is the number of radio or television station

⁴⁶ 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. See 47 CFR § 73.7003(b)(2).

⁴⁷ 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.").

⁴⁸ See *NCE MO&O*, 16 FCC Rcd at 5102-03, paras. 84-85 (non-fill in FM translator stations); *NCE Omnibus Order*, 22 FCC Rcd at 6120, para. 47 (Class D stations); *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, 8798, paras. 12-13 (2010) (LPM stations).

⁴⁹ 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).

⁵⁰ *NPRM* at para. 35.

⁵¹ 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 direct the Bureau staff to 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.

⁵² See 47 CFR § 73.7003(c).

authorizations attributable to each applicant.⁵³ 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.⁵⁴ The applicant with the fewest pending applications prevails. If the second factor fails to break the tie, we use mandatory time-sharing⁵⁵ as the tie-breaker of last resort for full-service NCE stations.⁵⁶

17. During the 2007 and 2010 NCE FM filing windows, hundreds of MX groups resulted in ties following the point system analysis and were resolved by applying the tie-breaker criteria.⁵⁷ Multiple MX groups ultimately resulted in mandatory time-sharing, the unpopular last resort tie-breaker option.⁵⁸ We believe some MX groups would have avoided mandatory time-sharing if our proposed rule changes had been implemented prior to those windows. Additionally, as explained in the *NPRM*, we anticipate more ties in future NCE FM filing windows, and more mandatory time-shares.⁵⁹ The Commission has previously acknowledged that mandatory time-sharing “can be difficult for applicants with different missions, philosophies, or formats”⁶⁰ as well as “confusing to audiences and potentially inefficient to listeners.”⁶¹ Accordingly, in the *NPRM* we sought comment on our current tie-breaker system and asked whether there are further tie-breaking measures we should use if a tie is not broken after the second tie-breaker, and therefore, minimize the need to resort to the final mandatory time-sharing option.⁶²

18. Prometheus proposes an alternative point system while Discount Legal suggests a supplemental tie-breaker criterion.⁶³ Specifically, Prometheus proposes that the current tie-breaker

⁵³ See *id.* § 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). 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. See *NCE MO&O*, 16 FCC Rcd at 5103, para. 85.

⁵⁴ See 47 CFR § 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.

⁵⁵ Mandatory time-sharing means the remaining tied applicants are required to share the channel and program the station on a part-time basis.

⁵⁶ See *NCE Report and Order*, 15 FCC Rcd at 7416, para. 74; 47 CFR § 73.7003(c)(3). For NCE FM translator stations, if a tie is not broken by the second factor, we select the first application received. See *NCE MO&O*, 16 FCC Rcd at 5077, para. 7. We did not propose to, nor do we, alter the FM translator tie-breaker criterion.

⁵⁷ See, e.g., *Comparative Consideration of 37 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations*, Memorandum Opinion and Order, 26 FCC Rcd 7008 (2011); *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).

⁵⁸ *Id.* Almost half of the mandatory time-sharing MX groups contained three or more applicants.

⁵⁹ See *NPRM* at para. 39.

⁶⁰ *NCE MO&O*, 16 FCC Rcd at 5100, para. 78.

⁶¹ *NCE FNPRM*, 13 FCC Rcd at 21180, para. 26.

⁶² In the *NPRM*, we also asked whether, to encourage more voluntary settlements and time-sharing among applicants, it would be helpful to amend the reimbursement restrictions of Section 73.3525 of our rules, 47 CFR § 73.3525(a)(3), to specify that the restrictions do not apply to applicants which remain tied after the second tie-breaker criterion. See *NPRM* at para. 40. No commenter addressed this specific issue. We, therefore, defer consideration of this proposal at this time.

⁶³ See Prometheus Comments at 3; Discount Legal Comments at 4. Jeff Sibert (Sibert), in contrast, suggests that “perhaps the Commission should simply throw away the tie-breaker comparisons and just force NCE stations to share time like it does in the LPFM service.” Sibert Comments at 2. Given that mandatory time-sharing is already unpopular among NCE FM applicants, and can be difficult for applicants with different missions, philosophies, and formats, we reject Sibert’s proposal, which is contrary to our goal of minimizing mandatory time-shares.

criteria “instead be explicit points” that are used earlier in the process to make the initial determination of the tentative selectee and recommends that the Commission “allocate one negative point for every existing authorization not being divested.”⁶⁴ We find that Prometheus’s proposed revamp of the point system would unnecessarily penalize applicants with any existing authorizations at too early a stage in the process, and therefore, we decline to consider it further.

19. Discount Legal suggests that an applicant be granted a dispositive tie-breaker preference if it can demonstrate that: (1) it applied in a previous filing window, and had its application accepted for filing and processed, but subsequently dismissed in favor of an applicant possessing superior points or a tie-breaker showing; and (2) it was in continuous existence as a legal entity at all times from the date of the previous NCE window filing until the present.⁶⁵ Discount Legal emphasizes that conferring an advantage on a returning applicant “recognizes that its continuous interest and existence are demonstrable equities that favor an authorization.”⁶⁶ We agree that Discount Legal’s proposal is a practical, fair, and effective way to improve and apply the current tie-breaker process, award new permits to deserving legitimate applicants, and minimize resorting to the mandatory time-share option. Accordingly, we will incorporate Discount Legal’s proposal into our rules as the third and final tie-breaker criterion. Consistent with our diversity of ownership goal, we will limit the tie-breaker to applicants that were unsuccessful in all previous NCE windows in which they participated and have no NCE permits or licenses.⁶⁷ In the event a tie is still not resolved after this new third tie-breaker criterion, we will impose mandatory time-sharing on the remaining applicants.

E. Revise Procedures for Allocating Time in NCE Mandatory Time-Sharing Situations

20. As proposed in the *NPRM*, we adopt mandatory time-share rules and procedures for mutually exclusive NCE applicants, modeled after the current LPFM rules, 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. We believe that the new rules will help expedite new NCE service to the public and expand the diversity of voices available to radio audiences.

21. As discussed above, in cases where the NCE point selection process and tie-breakers results in more than one remaining mutually exclusive application, the Commission imposes mandatory time-sharing on the remaining applicants.⁶⁸ Although the additional tie-breaker criterion that we adopt herein⁶⁹ should reduce the need to resort to the final mandatory time-share option, we anticipate that there will still be some MX groups with ties remaining after applying the three tie-breaker criteria.

22. Although the Commission did not codify a set period for reaching an agreement on time sharing, under current procedures, if a tie remains, the Commission typically directs the Bureau staff to provide the tied applicants 90 days to reach a voluntary time-sharing agreement. The Commission also advises applicants that, if they are unable to reach a voluntary time-sharing agreement within 90 days, it will designate their applications for hearing solely on the issue of allotting time in accordance with

⁶⁴ Prometheus Comments at 3. Prometheus also states that “as unpopular as mandatory time-sharing is, it is probably the only fair way to handle such ties.” *Id.*

⁶⁵ See Discount Legal Comments at 4.

⁶⁶ *Id.* Discount Legal also states that its proposed tie-breaker preference may curtail “the harrowing possibility of an applicant, denied in a first window, denied in a second window, and having to re-apply 30 years later or even more.” *Id.*

⁶⁷ See 47 CFR § 73.7003(c)(3) at Appendix B.

⁶⁸ See *NCE Report and Order*, 15 FCC Rcd at 7416, para. 74; 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”).

⁶⁹ See *supra* para. 19.

section 73.561(b)(2) of the rules.⁷⁰ As detailed in the *NPRM*, the uncodified 90-day deadline, even when paired with the prospect of a hearing to allocate time, did not result in timely time-sharing agreements, but rather resulted in delayed construction of facilities and commencement of service.⁷¹ Accordingly, we proposed rules and procedures for mutually exclusive NCE tentative selectees that are unable to reach a voluntary time-share agreement modeled after the LPFM service rules, which have allowed for the expedient resolution of mutually exclusive LPFM applications.⁷² The commenters addressing this issue generally agree with adopting a method similar to the LPFM rules.⁷³

23. Accordingly, as proposed in the *NPRM*, we adopt an explicit 90-day deadline and require tied NCE applicants to file voluntary time-share agreements within 90 days of the release of the public notice or order announcing the tie.⁷⁴ The proposals must be in writing, signed by each time-share proponent, and specify the hours of operation of each time-share proponent. We believe that a deadline codified in our rules and explicit requirements for the proposals will discourage the delay we experienced in previous processing rounds and will promote the expedient submission of voluntary time-share agreements, resolution of the ties, and ultimate commencement of new service.⁷⁵

24. If mutually exclusive tied NCE applicants are unable to reach a voluntary time-share agreement within the designated 90-day period, the applicants will now proceed to mandatory time-sharing, modeled after the LPFM involuntary time-share rules, which have worked effectively to resolve mutual exclusivities and expedite new service to the public.⁷⁶ Specifically, in lieu of the mere prospect of a hearing to arrive at an appropriate time-sharing agreement,⁷⁷ we adopt strict, concise mechanisms for allotting time to such applicants, as described below.

25. Pursuant to our new mandatory time-share rules, NCE applicants with tied, grantable applications will be eligible for equal, concurrent, non-renewable license terms.⁷⁸ In the *NPRM* we proposed to limit the number of mandatory time-share applicants to three. If there are more than three tied, grantable applicants in an MX group, we proposed to use the date of established presence in the local community as the cut-off mechanism, and therefore, dismiss all but the applications of the three applicants that have been local for the longest uninterrupted periods of time. REC supports this method while Prometheus disagrees with “a limit of three and also with preferring the oldest organizations.”⁷⁹

⁷⁰ 47 CFR § 73.561(b)(2). See, e.g., *32 Group NCE Point Order*, 25 FCC Rcd at 5038, para. 94.

⁷¹ See *NPRM* at para. 42.

⁷² See *NPRM*, para. 44, citing *LPFM Sixth Report and Order*, 27 FCC Rcd at 15475-76, para. 197.

⁷³ See Prometheus Comments at 3 (agreeing with NCEs using a method similar to the LPFM rules); REC Comments at 7 (supporting policies that “bring NCE and LPFM on a more level playing field”).

⁷⁴ Although Section 73.561(b)(1) of our rules, 47 CFR § 73.561(b)(1), details the requirements for voluntary NCE time-share proposals, there is currently no parallel rule mandating an explicit deadline for submitting voluntary NCE time-share agreements.

⁷⁵ In the *NPRM* we asked whether, in the event of a tie between three or more applicants, we should amend our rules to permit voluntary point aggregation time-share agreements, as we do in the LPFM context. See *NPRM* at para. 44; 47 CFR § 73.872(c). No commenter expressed support for point aggregation time-share agreements in the NCE context while Prometheus expressly disapproves of point aggregation policies, which it believes “promote aggression rather than cooperation.” Prometheus Comments at 3. Accordingly, the record does not support adopting this potential rule change.

⁷⁶ See 47 CFR § 73.872(d).

⁷⁷ The mere prospect of a hearing has proven unworkable. No mutually exclusive group of NCE applicants has ever actually been designated for a hearing.

⁷⁸ Applicants will be permitted to convert their licenses into renewable licenses if they file voluntary time-sharing agreements.

⁷⁹ REC Comments at 7; Prometheus Comments at 3.

Prometheus, however, does not explain why it opposes these proposals. We believe that mandatory time-shares with more than three applicants may be cumbersome, may result in the licensees obtaining too few hours for programming and prove difficult to allocate time-slots and assign the applicants an equal number of hours per week. Further, no commenter suggests an alternative cut-off mechanism that would be more effective for the NCE services than the date of established presence in the local community, which we believe is a practical, workable solution and consistent with our overall goal of promoting localism.

26. Accordingly, we will, as proposed, limit the number of mandatory time-share applicants to three. To effectuate this process, we will require each applicant to provide, as part of its initial application, its date of established presence in the local community. We also adopt time slots and selection procedures modeled after the LPFM service. Specifically, when there are three remaining tied NCE applicants in an MX group, we will 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 will assign each one of the following time slots: 3 a.m.-2:59 p.m., or 3 p.m.-2:59 a.m. We direct the Bureau staff to allow the NCE 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, we direct the Bureau staff to select a time slot for the applicant. Finally, to ensure that there is no gamesmanship, we will require the applicants to certify that they have not colluded with any other applicants in the selection of time slots. We believe that these procedures will expedite the resolution of ties and ultimate initiation of new NCE service, and we will revise our rules and FCC Schedule 340 accordingly.

F. Clarify and Modify the “Holding Period” Rule

27. We adopt both stylistic and substantive changes to section 73.7005 of our rules (the Holding Period Rule) to (1) better promote the goal of ensuring that our comparative selection process is meaningful and the public receives the benefit of the best proposal,⁸⁰ and (2) aid permittees and licensees by eliminating the current absolute bar on any section 307(b) preference-related service downgrade.⁸¹ As explained in the *NPRM*, the Commission initially adopted section 73.7005 of its rules to ensure that applicants selected through the NCE point system or a decisive section 307(b) preference⁸² maintain the characteristics that formed the basis of their selection for a period of four years of on-air operations.⁸³

28. The Holding Period Rule currently contains technical and non-technical components. The “Technical” component of the rule prohibits any NCE applicant receiving a decisive section 307(b) preference from downgrading service to the area on which the preference was based during the first four-years of on-air operations.⁸⁴ The non-technical, “Assignments/Transfers” component of the rule permits

⁸⁰ See 47 CFR § 73.7005; see also *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.”).

⁸¹ 47 CFR §§ 73.7005(b), 73.7002(c). 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. See 47 CFR § 73.7002(b). Any applicant awarded a construction permit through a 307(b) preference is required to construct and operate technical facilities substantially as proposed. The rules also currently prohibit such applicants from “downgrad[ing] service to the area on which the preference was based” for the first four years of on-air operations. See 47 CFR §§ 73.7005(b), 73.7002(c).

⁸² See *id.* § 73.7005(a)-(b).

⁸³ See *id.* § 73.7005. See *NCE Report and Order*, 15 FCC Rcd at 7407, 7424, para. 48, 92-94; *NCE MO&O*, 16 FCC Rcd at 5090, para. 44.

⁸⁴ See 47 CFR § 73.7005(b); see also *id.* § 73.7002(c).

transfers and assignments during the first four years of on-air operations *only if*: (1) the proposed buyer would qualify for at least the same number of points as the applicant selected through the point system originally received; and (2) consideration received and/or promised does not exceed the assignor's or transferor's legitimate and prudent expenses in obtaining and constructing the station.⁸⁵ The current rule does not contain any provision, similar to the technical component, requiring an applicant selected through the NCE point process to maintain particular comparative qualifications during the first four-years of on-air operations. In the *NPRM* we proposed rule changes to more accurately reflect the purpose of the rule and uphold the integrity of the comparative selection system.⁸⁶ The commenters who addressed this issue generally agree with our proposed changes, with some suggested modifications, which are discussed below.⁸⁷

29. Accordingly, as proposed, we rename section 73.7005 of the rules "Maintenance of Comparative Qualifications." Second, we adopt a new provision to section 73.7005 to establish, for the first time, specific timing requirements for maintaining comparative qualifications. In the *NPRM* we proposed 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. Prometheus contends that a four-year maintenance period is not sufficient to prevent speculation and, instead, suggests a ten-year maintenance period.⁸⁸ Based on our experience from previous processing rounds, we believe that a four-year period strikes the correct balance and is sufficient to establish meaningful service for the community and deter license speculators, while not unduly burdening the licensee. Moreover, as the Commission previously explained, a four-year period should allow a new station reasonable time to establish and implement its educational programs, receive feedback from the public it serves, and adjust its programming accordingly.⁸⁹ We, therefore, adopt a four-year maintenance period, as proposed.

30. Third, as proposed, we 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 on any preference-related service downgrade.⁹⁰ Specifically, we will allow minor modifications, provided that any potential loss of first and/or second NCE FM service is offset by first

⁸⁵ See *id.* § 73.7005(a) ("[L]egitimate 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.)."). In his comments, Sibert urges the Commission to modify the rule "to bar the for-profit sale of any permit or license until the station has been licensed and operational continuously for four years." Sibert Comments at 2. Sibert argues that "to do any less will simply encourage speculators to apply for permits that they will never construct, or will assign shortly after building, thus depriving local entities of their ability to launch new NCE service over the competing applications of speculators." *Id.* at 3. As noted above, the current rule permits transfers and assignments during the first four years of on-air operations only if consideration does not exceed the assignor's or transferor's legitimate and prudent expenses in obtaining and constructing the station. We find that the current assignment/transfer restrictions have been sufficient to ensure the comparative selection process is meaningful and not undermined by the rapid re-assignment of permits and licenses. We, therefore, make no changes to the substance of the rule regarding assignments/transfers during the four-year period.

⁸⁶ See *NPRM* at paras. 50-51.

⁸⁷ See Discount Legal Comments at 5; Prometheus Comments at 3.

⁸⁸ See Prometheus Comments at 3.

⁸⁹ See *NCE Report and Order*, 15 FCC Rcd at 7424, para. 93.

⁹⁰ 47 CFR §§ 73.7005(b), 73.7002(c). By their terms, Sections 73.7005(b) and 73.7002(c) do not currently 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. See, e.g., *Jeffrey D. Southmayd, Esq.*, Letter Order, 24 FCC Rcd 5672 (MB 2009).

and, separately, combined first and/or second NCE FM service population gain(s).⁹¹ Applicants, therefore, will be permitted to modify their facilities to downgrade as long as the population losing service is offset by a population gain elsewhere. Prometheus, the only commenter to address this issue, supports this change.⁹² We believe that this rule change will aid permittees and licensees by allowing them reasonable flexibility to implement facility modifications while also benefiting the public by limiting service losses to areas in which the NCE FM station is providing section 307(b)-preferred service.

31. Finally, in the *NPRM* we sought 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. Specifically, we asked whether stations that fail to maintain their comparative qualifications should be subject to mandatory time-share proposals as part of the license renewal process, or whether the Commission should refuse to renew the licenses of stations that fail to maintain their comparative qualifications for the required period of time. No commenter addressed these particular safeguard proposals so we will not adopt them at this time. We believe, however, that the clarifications we make to section 73.7005, along with the certification and application changes we will implement to further safeguard our localism and diversity goals,⁹³ will ensure that our selection process is meaningful and that successful applicants live up to their promises. Moreover, during the four-year period, we will also consider any complaints alleging that the permittee or licensee is not operating pursuant to the proposal for which it received points and take appropriate enforcement action.

IV. CHANGES TO THE LPFM COMPARATIVE PROCESS

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

32. As proposed in the *NPRM*, we amend our rules to preclude an LPFM applicant dismissed due to unauthorized broadcasting 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.⁹⁴ Section 632(a)(1)(B) of the 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."⁹⁵ Section 73.854 of the Commission's rules and FCC Schedule 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.⁹⁶ There is currently no explicit rule, however, 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 board members that have engaged in unauthorized broadcasting, and no rule barring an LPFM applicant from making a minor board of

⁹¹ 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.

⁹² See Prometheus Comments at 3.

⁹³ See *supra* paras. 8 and 12.

⁹⁴ 47 CFR § 73.854.

⁹⁵ 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).

⁹⁶ See *LPFM Second Report and Order*, 16 FCC Rcd at 8030, para. 11; 47 CFR § 73.854; FCC Schedule 318, Legal Certifications Section, Unlicensed Operations Question.

directors change to cure an “unauthorized broadcasting” ownership defect. In the *NPRM* we proposed to incorporate these restrictions, which are consistent with Bureau policy,⁹⁷ into our rules.

33. Commenters disagree on the breadth of our proposed rule change.⁹⁸ Specifically, Prometheus argues that the current proposal is “unduly harsh” and suggests that a “compromise might be to limit changes [to cure an unauthorized broadcasting defect] to a small percentage of the board, perhaps 20 percent.”⁹⁹ Prometheus asserts that “even with due diligence, in well run stable organizations, such issues sometimes fly by.”¹⁰⁰ REC disagrees with Prometheus’s contention, stating that “making a *nunc pro tunc* amendment should be used to correct an error on the original application, not change the past.”¹⁰¹ REC also urges the Commission to expand the scope of the proposed restrictions beyond just unauthorized operation to prohibit “any kind of change to parties to the application in order to cover other issues such as inconsistent applications, parties who lack candor, parties with non-existent or incorrect residential addresses, parties that do not exist, and parties discovered to have unauthorized undisclosed attributable interests.”¹⁰²

34. We decline to adopt REC’s suggestion to make the rule more encompassing. The rule was implemented to specifically address Congress’s direct mandate to treat unlicensed broadcasting as disqualifying, not to address a myriad of additional application defects. We also decline to relax the rule or treat ignorance, or not completing sufficient due diligence, as an excuse for the violation, as Prometheus suggests. We continue to believe that a restriction on corrective amendments to resolve basic qualification issues under section 73.854 is not too harsh, but rather, is in keeping with the intent of the Appropriations Act and reflects the seriousness with which the Commission treats unauthorized broadcasting.

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

35. As proposed in the *NPRM*, we modify section 73.872(c) of our rules¹⁰³ to specifically permit LPFM 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. We also modify our rules to limit the number of applicants that can enter into a time-sharing arrangement to three.

⁹⁷ See, e.g., *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.”).

⁹⁸ See Prometheus Comments at 3-4; REC Comments at 7; REC Reply Comments at 1-2; Sibert Comments at 3-4. We note that in his comments, Sibert asserts that “fairness would dictate that the Commission should have the same prohibition across all services. If the Commission is unwilling to extend the same rule to all other services, then proposing to further tighten the restriction on LPFM stations is ludicrous.” Sibert Comments at 3-4. We clarify that the rule merely codifies Congress’s explicit directive to treat past participation in unlicensed broadcasting by LPFM applicants as disqualifying. The statute does not encompass all broadcast applicants, but rather, is limited to the LPFM service.

⁹⁹ Prometheus Comments at 3-4.

¹⁰⁰ *Id.*

¹⁰¹ REC Reply Comments at 1-2; see also REC Comments at 7 (“if there was an unauthorized or unqualified party on the application at the time of filing, then the application should have never been accepted for filing and should have been dismissed. There should be no second chance in this case.”).

¹⁰² REC Comments at 7.

¹⁰³ 47 CFR § 73.872(c).

36. Under our current rules, if the LPFM point analysis results in a tie, the Commission first employs voluntary time-sharing as the initial tie-breaker.¹⁰⁴ Although 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 been 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.¹⁰⁵ Accordingly, in the *NPRM* we sought comment on amending our rules to explicitly allow applicants to communicate and collaborate on time sharing arrangements, and what, if any, safeguards are needed to limit the potential for gamesmanship. In particular, we asked if we should consider limiting the number of organizations that can enter into a time-share agreement, so that applicants cannot “stack the deck” in their favor.¹⁰⁶

37. The commenters generally agree on allowing communication and collaboration during the LPFM application process.¹⁰⁷ Prometheus asserts that the Commission should “allow and encourage applicants to work together”¹⁰⁸ while CIMA argues that there is “absolutely nothing wrong with allowing organizations to collaborate.”¹⁰⁹ We agree, and we continue to believe this type of cooperation can help ensure increased service to the public. By allowing organizations interested in filing an LPFM application the leeway to communicate with other eligible organizations, they can maximize their chances of acquiring LPFM construction permits and explore potential time-share construction and operating efficiencies. Accordingly, we amend our rules to explicitly allow LPFM point aggregation discussions and agreements,¹¹⁰ provided that the agreement is conditioned on each application becoming a tentative selectee.¹¹¹

¹⁰⁴ Specifically, 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. 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). A new aggregated point total is then assigned to the group, and the group with the highest number of aggregated points prevails. Only applicants tied for the highest point total in an MX group may enter into a time-sharing agreement and aggregate their points.

¹⁰⁵ 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*, 863 F.3d. 854 (D.C. Cir. 2017).

¹⁰⁶ See *NPRM* at paras. 58-59.

¹⁰⁷ See, e.g., Prometheus Comments at 4; Sibert Comments at 6; CIMA Reply Comments at 3; Reply Comments of Albert Davis at 1 (Davis Reply Comments); Reply Comments of Clayton John Leander at 3 (Leander Reply Comments).

¹⁰⁸ Prometheus Comments at 4.

¹⁰⁹ CIMA Reply Comments at 3 (“the supposed harms for collusion are small, while the benefits of a system that promotes mature settlements is huge”); see also Sibert Comments at 6 (encouraging the Commission to “allow organizations to form a consortium with the express purpose of filing multiple applications for the same frequency in order to ensure the strongest organizations are successful”).

¹¹⁰ We will only limit discussions and agreements 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, we will continue to require applicants to 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.

¹¹¹ Leander suggests that the Commission allow “for applicants to even propose timeshares at the time original applications are filed.” Leander Reply Comments at 2. 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), we decline to change the requirement that time-share proposals may only be submitted after the release of the public notice announcing the tentative selectees. 47 CFR § 73.872(c). This will ensure that time-share agreements are limited to applicants tied for the highest point total in each MX group.

38. Although the commenters generally concur on allowing collaboration among applicants, they disagree widely on what safeguards, if any, are necessary to prevent gamesmanship, and whether to limit the number of organizations that can enter into a time-sharing agreement. Several commenters urge the Commission to place no limit on the number of applicants that can enter into a time-sharing agreement.¹¹² According to Leander “allowing for multiple timeshares will reduce abuses that come with total editorial control, while also ensuring a diversity of voices will retain some access to the public airwaves, if only for the minimum 10 hours per week.”¹¹³

39. On the opposite end of the spectrum, Discount Legal states that “point aggregation probably needs to be capped at two participants.”¹¹⁴ REC recommends limiting time-share agreements to no more than three proponents and adopting safeguard provisions to create “viable time-share agreements.”¹¹⁵ Specifically, to ensure the agreements are “viable,” REC urges the Commission to mandate that each time-share applicant propose: (1) a minimum of 36 hours per week of operation; (2) at least five contiguous hours between 6:00 a.m. and 11:59 p.m. at least five days per week; and (3) different transmitter sites with a minimum separation from the other proponents.¹¹⁶ According to REC, point-stacking was an issue during the 2013 LPFM window, and the Commission must therefore “develop a backstop that prevents the behavior of filing for only 10 hours in order to ‘stack the deck.’”¹¹⁷ REC believes that its proposal would be fair for future applicants and prevent gamesmanship.

40. We recognize that there are indeed benefits, as many commenters note, of placing no explicit limit on the number of applicants that can enter into a point aggregation agreement. As the Commission previously emphasized, the point-aggregation rule “increas[es] participation by a variety of local community organizations in the operation of LPFM stations” and “increas[es] the number of new broadcast voices.”¹¹⁸ We also recognize that the Commission encourages LPFM stations to originate programming locally by awarding one point to each MX applicant that pledges to provide at least eight hours per day of local programming.¹¹⁹ In fact, during the 2013 LPFM window, every applicant that ultimately became a tentative selectee committed to originate at least eight hours of local programming per day and, therefore, received one merit point for this pledge.¹²⁰ If we continue to place no limit on point aggregation, each applicant in a group with more than three applicants will not be able to fulfill this

¹¹² See, e.g., Prometheus Comments at 4; Sibert Comments at 5; CIMA Reply Comments at 3; Davis Reply Comments at 3 (“allowing as many as possible to participate is a good idea” because it “encourages them to work together and build community, in a positive way.”); Leander Reply Comments at 3.

¹¹³ Leander Reply Comments at 3; see also Sibert Comments at 5 (“stronger applicants ... should be encouraged to bring as many stakeholders to the table as possible.”).

¹¹⁴ Discount Legal Comments at 2.

¹¹⁵ See REC Comments at 11-13.

¹¹⁶ *Id.* at 11. According to REC, the primary cause of gamesmanship is the current rules that allow “co-located groups to ‘add’ other non-profit organizations to their proposal and give them a miniscule time slot of only 10 hours per week for the sole purpose of giving the illusion of a ‘stronger proposal.’” *Id.* at 18.

¹¹⁷ *Id.* at 11. REC believes that “the 10-hour minimum rule is a catalyst of the point-stacking gamesmanship that took place in the 2013 window.” *Id.* at 16.

¹¹⁸ *LPFM Report and Order*, 15 FCC Rcd at 2263, paras. 147-148; see also Davis Reply Comments at 3 (“there is nothing wrong with one taking hours that could be considered by others to be undesirable.”).

¹¹⁹ See 47 CFR § 73.872(b)(2).

¹²⁰ 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); see also 47 CFR § 73.872(b)(2) (local program origination point).

local origination commitment.¹²¹ Accordingly, we will cap the number of applicants that can aggregate points at three.¹²² This limit will better align with the eight hours of local programming pledge and ensure that the pledge is enforceable.

41. We decline, however, to adopt REC's other "safeguard" proposals, including the proposal to require time share applicants to specify different transmitter sites with a minimum separation from the other proponents. REC argues that different transmitter sites will assure that aggregated time share groups "include two or three truly independent groups and not two groups operating like one, as we have seen following the 2013 window."¹²³ While we are cognizant of REC's concern, we find this suggested safeguard would unnecessarily penalize future LPFM applicants. Such a requirement would hamper the cost efficiencies of timesharing,¹²⁴ and therefore, we will not require time share applicants to specify different transmitter sites, as REC suggests.

42. Finally, in light of a rule explicitly allowing applicants to communicate and collaborate on LPFM time-sharing arrangements, we asked in the *NPRM* if we should reconsider the current process for reapportioning time following the surrender or expiration of a construction permit or license of a time-share party. 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. In the *NPRM* we solicited suggestions on procedures or policies the Commission should adopt to deter abuses¹²⁵ and promote the fair and efficient use of air time following the cancellation of a time-share authorization. Specifically, we asked if we should open a "mini-window" for the filing of applications for the abandoned air-time.¹²⁶

43. Only two commenters, REC and Prometheus, expressed support for requiring abandoned air-time to be made available in a mini-window.¹²⁷ According to REC, the "prospect of the mini-window will protect the LPFM service and promote localism by assuring that spectrum is being reasonably used by as many voices as possible in a manner that is viable for the licensee and not confusing to the listener."¹²⁸ CIMA, in contrast, does not support mini-windows, or anything that makes the process "any more complicated than it already is."¹²⁹

44. We agree with CIMA that mini-windows are a complicated solution that would likely pose a great administrative burden while providing only minimal benefits. Moreover, we believe that our elimination of the absolute prohibition on the assignment and transfer of LPFM construction permits and the three-year holding period for LPFM licenses¹³⁰ is a necessary change that will help to ensure viable

¹²¹ During the 2013 window, the Commission granted seven point aggregation agreements, which were each comprised of more than three applicants.

¹²² This limitation on the number of applicants included in voluntary time-sharing agreements also will apply to any time-sharing agreement incorporated in an overall settlement under 47 CFR § 73.872(e).

¹²³ REC Comments at 12.

¹²⁴ See Davis Reply Comments at 3 (noting that many LPFM applicants have limited budgets "so buying all of the equipment is a lot of money," and "allowing them to share facilities is a good idea.").

¹²⁵ 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.

¹²⁶ See *NPRM* at para. 61.

¹²⁷ See REC Comments at 10-11; Prometheus Comments at 4.

¹²⁸ REC Comments at 14.

¹²⁹ CIMA Reply Comments at 3.

¹³⁰ See *infra* Section V.E.

community groups build LPFM stations. It will allow additional flexibility for permittees and licensees to ensure that unused time from any surrendered or expiring construction permit or license is assigned, to another party that is ready, willing, and able to construct and operate the station. Accordingly, we will not adopt a mini-window approach. Rather, if one of the participants in a voluntary time-sharing arrangement does not construct, or chooses to surrender its station license after commencing operations, the particular permittee or licensee may either (1) seek Commission consent to assign or transfer its existing permit or license to another qualified party;¹³¹ or (2) surrender the existing permit or license to the Commission, and the remaining time-share participants can apportion the vacant air-time as they see fit pursuant to section 73.872(c)(3) of the rules.¹³²

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

45. As proposed in the *NPRM*, we amend our rules to codify a procedure that when a tentatively accepted time-share agreement is dismissed, the Bureau will resume the processing of any remaining tentative selectees.¹³³ Under current rules, if the LPFM point system analysis¹³⁴ 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 agreements.¹³⁵ If an accepted agreement is subsequently 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, our rules do not currently dictate procedures to follow for the further processing of the remaining tentative selectees in the affected MX group. In the *NPRM* we proposed to announce a second 90-day period, affording all remaining applicants tied for the highest point total within the affected MX group a further opportunity to enter into either a universal settlement or a voluntary time-share arrangement.

46. Prometheus and REC, the only commenters to address this issue, support the general concept of a do-over process, as proposed in the *NPRM*, and agree that the Commission should establish procedures in the event it is unable to grant all the applications in a prevailing point-aggregation time-share agreement.¹³⁶ Prometheus and REC also each suggest modifications to our proposal. Specifically, Prometheus suggests that the “initial window to file agreements be short, perhaps 30 days” and that “any filing that changes the outcome triggers a 30-day extension for others to react, becoming final when 30 days passes with no filings.”¹³⁷ We decline to shorten the time-period for filing voluntary time-sharing arrangements. Although the Commission initially adopted a 30-day time-period, it subsequently extended the period to 90-days, finding that the shorter period impeded the successful negotiation of agreements.¹³⁸ We continue to believe a 90-day period is necessary to allow applicants sufficient time to negotiate and reach viable agreements.

¹³¹ The assignment or transfer, and the assignee or transferee, must meet all of the requirements of 47 CFR § 73.865(a).

¹³² 47 CFR § 73.872(c). If the parties to the agreement reapportion the time, they must notify the Commission: “Where a station is authorized pursuant to a time-sharing proposal, a change of the regular schedule set forth therein will be permitted only where a written agreement signed by each time-sharing permittee or licensee and complying with requirements in paragraphs (c)(1)(i) through (iii) of this section is filed with the Commission, Attention: Audio Division, Media Bureau, prior to the date of the change.” 47 CFR § 73.872(c)(2).

¹³³ See *NPRM* at para. 63.

¹³⁴ 47 CFR § 73.872. See also *LPFM Report and Order*, 15 FCC Rcd at 2258-2264, paras. 136-149.

¹³⁵ See 47 CFR § 73.872(c); *LPFM Report and Order*, 15 FCC Rcd at 2263, para. 147.

¹³⁶ See Prometheus Comments at 4; REC Comments at 18-19.

¹³⁷ Prometheus Comments at 4.

¹³⁸ See *Creation of Low Power Radio Service*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912, 21925, para. 25 (2007).

47. REC asserts that the Commission still needs to establish a defined process to address the procedures to follow in the event an acceptable settlement or time-share agreement is not reached after the second 90-day period.¹³⁹ REC suggests amending the proposed rules to allow the Commission to initiate a third 90-day period for filing settlements and/or time-share agreements. REC also expresses its hope that, in the event an agreement is never reached “the standard tie-breaker process would apply, and the top three applicants would be placed in an involuntary time-sharing group.”¹⁴⁰ We believe that amending our rules to allow for a third 90-day period would have minimal benefit, but rather, would create an administrative burden and delay the initiation of new LPFM service. We will, however, as REC suggests, amend our rules to clarify that the involuntary time-share rules will apply in the event an acceptable agreement is not reached after the second 90-day period.¹⁴¹

48. Upon consideration of the entire record, we codify the following procedural changes. Following the dismissal of a tentatively-accepted time-share agreement, we direct the Bureau to release a public notice to initiate a second 90-day period, affording *all* remaining tentative selectees within the affected MX group¹⁴² 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).¹⁴³ We direct the Bureau to dismiss all pending point aggregation amendments/agreements when it releases the public notice commencing the new settlement period. If applicants are unable to reach voluntary agreements during this subsequent 90-day period, the Commission will assign involuntary time-sharing arrangements to no more than three of the tied applicants in each MX Group.¹⁴⁴ We believe that these procedural changes will be fair and efficient for all applicants and promote the LPFM service with little administrative burden.

V. CHANGES TO OTHER LICENSING PROCEDURES

A. NCE and LPFM Board Changes

49. To decrease regulatory burdens and provide certainty, we amend our rules to classify as “minor” most board changes for nonstock and membership NCE and LPFM applicants.¹⁴⁵ We will also treat all board changes in a governmental applicant as minor.

50. The NCE and LPFM new station application processes are governed by sections 73.3572, 73.3573, and 73.871, respectively,¹⁴⁶ each of which define as a “major change” any amendment to an 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.¹⁴⁷ Accordingly, although an NCE or LPFM applicant can make “minor” changes to its application at any time, a “major” change in the composition of the applicant’s governing board can lead to dismissal of the pending application, and is potentially

¹³⁹ See REC Comments at 18-19.

¹⁴⁰ *Id.*

¹⁴¹ See 47 CFR § 73.872(c)(5) at Appendix B.

¹⁴² This group, which will 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, will have a fresh start to negotiate a settlement or agreement. We will *not* consider point-aggregation requests from non-high point total applicants.

¹⁴³ 47 CFR § 73.872(c) and (e).

¹⁴⁴ See *id.* § 73.872(d).

¹⁴⁵ See *NPRM* at para. 67. This rule revision only applies to board changes involving applicants for NCE and LPFM authorizations. We are not modifying our treatment of board changes involving NCE or LPFM permittees or licensees nor are we revising our treatment of non-board related changes for NCE or LPFM entities.

¹⁴⁶ See 47 CFR §§ 73.3572, 73.3573, 73.871.

¹⁴⁷ 47 CFR §§ 73.871(c)(3), 73.3573(a)(1). See 47 CFR §§ 73.3572(b).

fatal.¹⁴⁸ To address this problem for applicants, the Commission's current practice is to consider waivers for gradual (although not sudden)¹⁴⁹ majority board changes occurring while a new station application is pending.¹⁵⁰

51. Our current waiver approach has led to uncertainty for NCE and LPFM applicants undergoing board changes as a regular or natural part of their organizational function. Accordingly, in the *NPRM*, we proposed to amend our rules to classify as "minor" any gradual board changes in nonstock and membership NCE and LPFM applicants, even when they result in a change in the majority of such organization's governing board. We also proposed to treat all changes in a governmental applicant as minor, provided that the change has little or no effect on such applicant's mission. However, because we remain concerned that sudden board changes are more indicative of gamesmanship or takeover issues and inconsistent with our processing system, we proposed to continue to treat sudden majority board changes for NCE and LPFM applicants as major changes.¹⁵¹ In the *NPRM* we requested comments on these proposals, including the definitions of "gradual" and "sudden" in this context.¹⁵²

52. REC endorses our proposed rule changes.¹⁵³ Public Broadcasting and the Joint NCE Licensees believe that the proposed rule changes "move in the right direction."¹⁵⁴ However, those entities oppose the restrictions in our proposed rules.¹⁵⁵ Specifically, each argues that the *NPRM* approach is too

¹⁴⁸ See *id.* §§ 73.871(a),(c); 73.3572(b); 73.3573(b)(1), (3). In contrast, the Commission has frequently treated a change in the majority of the governing board of an NCE permittee or licensee as "insubstantial," and therefore requiring the filing of a "short form" transfer of control application associated with minor changes rather than a "long form" application associated with major changes.

¹⁴⁹ Gradual board changes are changes in nonstock and membership NCE and LPFM applicants that occur gradually over time and have little or no effect on the entity's mission, even when they may result in changes in the majority of the governing board.

¹⁵⁰ See, e.g., *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). The Commission has not considered waivers for majority board changes that occur more suddenly or impact the organization's mission.

¹⁵¹ We note that in 1989, the Commission proposed similar guidelines for identifying when transfers of control occur for certain licensed non-stock entities, and procedures to follow when such transfers are proposed. See *Transfers of Control of Certain Non-Stock Entities*, Notice of Inquiry, 4 FCC Rcd 3403 (1989) (*Transfers of Control NOI*). See *id.* at 3405, para. 15 (considering, *inter alia*, 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'"). The proposals from the *Transfers of Control NOI* were never adopted. The guidelines, therefore, are only tentative conclusions, which do not bind the Commission or the Bureau. See *KBOO Found.*, Memorandum Opinion and Order, 31 FCC Rcd 1358, 1360, para. 5, n. 19 (2016) ("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.").

¹⁵² See *NPRM* at paras. 68-70. We also asked commenters to address, *inter alia*, the circumstances, if any, in which even a gradual board change (or series of changes) may constitute a break in continuity of control and therefore still be treated as a major change for application purposes, and what amendment information, if any, we should require from applicants to demonstrate that a board change should be treated as minor. *Id.*

¹⁵³ See REC Comments at 8 (supporting "the concept of allowing gradual changes of board members to be considered as minor changes even if the overall change results in more than a 50 percent change").

¹⁵⁴ See Public Broadcasting Comments at 3.

¹⁵⁵ See Public Broadcasting Comments at 2-8; Reply Comments of Alaska Public Telecommunications, Inc. *et al.* at 2-5 (Joint NCE Licensees Reply Comments); see also Davis Reply Comments at 1 (agreeing with Public Broadcasting and Joint NCE Licensees).

limited and insists that any change in an NCE or LPFM applicant governing board, regardless of the timing and regardless of whether it changes the majority of the governing board, should be considered minor. Public Broadcasting asserts that “changes in the membership of the non-profit entity’s governing board, regardless of the extent of the changes, or the timing, are irrelevant.”¹⁵⁶

53. We decline to adopt Public Broadcasting and Joint NCE Licensees’ approach of considering *all* changes under all circumstances to NCE and LPFM governing boards as minor. We find that it is not feasible or appropriate in light of the wide, diverse range of our NCE and LPFM applicants and our experience with previous application filing windows when we identified problematic board changes.¹⁵⁷ While we recognize that a change in the composition of the board generally does not alter the nature of the NCE or LPFM applicant itself, there are nevertheless instances where a majority board change is indicative of gamesmanship or takeover issues. Although we are not seeking to micromanage the day to day governance of nonprofit organizations, the commenters’ suggested approach would not allow the Commission to detect such issues and respond to such circumstances, which is inconsistent with our processing regime.¹⁵⁸ Accordingly, we reject this aspect of the Public Broadcasting and the Joint NCE Licensees’ proposal.¹⁵⁹

54. We concur, however, with the Public Broadcasting and the Joint NCE Licensees that all changes to governing boards of governmental applicants should be treated as minor¹⁶⁰ and adopt this proposal from the *NPRM*. We believe even sudden changes to governing boards of governmental applicants, due to their nature as government-controlled entities, are unlikely to indicate gamesmanship or takeover issues. Moreover, we agree with the Public Broadcasting and Joint NCE Licensees that it is unnecessary to make a finding that changes in governmental applicants have no effect on the applicant’s mission and will omit this requirement from our rules.¹⁶¹

55. For non-governmental applicants, we will continue to treat gradual board changes as minor.¹⁶² We recognize that nonprofit organizations often have routine or mandated changes in board members that do not impact the organization or its operations.¹⁶³ Accordingly, we will treat all routine board turnover changes due to term expirations, resignations, etc. as minor. For sudden board changes that take place over the course of less than six months, we also will treat those changes as minor unless

¹⁵⁶ Public Broadcasting Comments at 4.

¹⁵⁷ See, e.g., *La Casa Dominica de Hazelton, Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 4236 (2016) (*Casa Dominica*).

¹⁵⁸ *Id.* Statement of Commissioner Ajit Pai (“when there are substantial changes to the board as a result of a battle for control of the organization, I believe that dismissing an applicant’s permit is not only mandated by the Commission’s rules, it is also the correct policy outcome.”).

¹⁵⁹ We also note that the Public Broadcasting and the Joint NCE Licensees proposal relies on their assertion that board members of noncommercial entities should not be treated as “owners” for purposes of our rules. That issue was not discussed in the *NPRM* and is, therefore, beyond the scope of this proceeding.

¹⁶⁰ Public Broadcasting Comments at 4 (“Public Broadcasting concurs that changes in membership of governing boards of governmental entities (such as school boards, university regents, state public broadcasting commissions, etc.) should always be treated as minor”).

¹⁶¹ *Id.* (“Public Broadcasting seriously doubts that the Commission is or should be prepared to make determinations about changes in the mission of a school district, a public university, or a state public broadcasting commission, and about how any such changes in mission might affect a pending NCE application.”).

¹⁶² As noted in the *NPRM*, gradual board changes could result in a decrease in the number of points for which the applicant originally qualified if the replacement board member qualifies for fewer points than the original board member. *NPRM* at 27, n.183.

¹⁶³ See *Center for Community Arts, Inc.*, 20 FCC Rcd 11164 (2005) (“the changes in the CCA board have occurred gradually, not as an outgrowth of any party’s desire to gain control over a pending radio station application.”).

there is evidence that the change in the board is the result of a conflict within the organization, an attempted takeover or some other change that would change the essence or mission of the organization. As noted in the *NPRM*, however, to the extent that an ownership change is not solely board-related, we are not modifying the existing standard for what constitutes a major change.¹⁶⁴ These rule changes will allow us to avoid micromanaging the composition of nonprofit boards and discontinue the current potentially subjective and time-consuming waiver process, while deterring abuses. Finally, we emphasize that any applicant undergoing a change of its governing board, even if considered minor under the new rules, is required to notify the Bureau of the changes via an amendment to its application, in accordance with section 1.65 of the rules.¹⁶⁵

56. *LPFM-specific transferability issues for permittees and licensees.* We will, as proposed, clarify how board changes impact LPFM licensees and permittees under rule 73.865. No commenter addressed this noncontroversial rule clarification. As explained in the *NPRM*, section 73.865(e)¹⁶⁶ 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."¹⁶⁷ The current language of section 73.865(d), however, prohibits the "assignment or transfer 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). Therefore, we clarify that section 73.865(e) applies to LPFM permittees and licensees at all times, including during any relevant permit holding period.¹⁶⁸ We will, as proposed, 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. This modification is simply intended to provide clarity to LPFM permittees and licensees that a sudden change of control of more than 50 percent of an LPFM board is permitted at any time, provided that the affected permittee or licensee files a *pro forma* FCC Schedule 316 for a sudden majority board change. We also clarify that the 316 application must be filed 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).¹⁶⁹

B. Clarify Reasonable Site Assurance Requirements

57. As proposed in the *NPRM*, to promote compliance with the reasonable site assurance requirement and the efficient processing of NCE and LPFM applications, we will implement FCC

¹⁶⁴ See *NPRM* at 28, n.185 ("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.").

¹⁶⁵ 47 CFR § 1.65.

¹⁶⁶ The paragraph references herein refer to the current rule. See *infra* Appendix B, Final Rule Changes. As noted therein, we modify Section 73.865 of the rules to, *inter alia*, remove paragraph (d) and re-designate current paragraph (e) as (d).

¹⁶⁷ 47 CFR § 73.865(e). See also *NPRM* at paras. 71-72.

¹⁶⁸ See *infra* Section V.E. We 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 adopt an 18-month holding period on the assignment or transfer of LPFM construction permits, 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.

¹⁶⁹ 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).

Schedule 318 and Schedule 340 instruction and application form changes,¹⁷⁰ including adding a reasonable assurance of site certification to these applications. When an applicant files an application, it must have reasonable assurance that its specified site will be available for the construction and operation of its proposed facilities.¹⁷¹ Despite this obligation, NCE and LPFM station applicants have never been required to certify the availability of proposed transmitter sites in the NCE and LPFM construction permit applications. Moreover, the Instructions to the NCE and LPFM construction permit applications do not explain the Commission's site availability requirements or underscore that reasonable site assurance is a prerequisite to application filing. As detailed in the *NPRM*, this lack of clarity led to speculative applications, numerous site availability challenges, and processing delays.¹⁷² We therefore proposed changes to the FCC Schedule 318 and Schedule 340 applications, including adding a certification of site availability, to deter these problems.

58. The commenters agree that application form changes are necessary to address these issues,¹⁷³ which, according to REC, "plagued the 2013 LPFM window."¹⁷⁴ They disagree, however, on whether the Commission should require applicants to submit documentation to establish the basis on which reasonable assurance has been obtained as part of the Schedule 318 or Schedule 340 filing. REC and Alpert each support a documentation requirement.¹⁷⁵ CIMA, in contrast, argues that site assurance documentation should only be required to be submitted upon request and that "asking for much more is really an undue burden."¹⁷⁶ We find that any purported burden of a combined site certification and the minimal documentation requirement described below is offset by the resulting benefits of reducing frivolous and speculative applications, deterring site availability challenges, and promoting the expeditious processing of applications and initiation of service to the public.

59. Accordingly, we direct the Bureau to take the following steps. First, it will update the FCC Schedule 318 and Schedule 340 Instructions to explain the requirement of obtaining reasonable site availability prior to the application filing. Second, it will amend the FCC Schedule 318 and Schedule 340 to add a question requiring an applicant to certify that it has obtained reasonable assurance from the tower owner, its agent, or authorized representative that its specified site will be available. The certification will require the applicant to list the name and telephone number of the person contacted, and specify whether the contact is a tower owner, agent, or authorized representative. Because obtaining reasonable site assurance is already a prerequisite to the application filing, the requirement to simply report substantiating information on the initial Schedule 318 and Schedule 340 construction permit applications should pose little or no burden on applicants.

¹⁷⁰ See *NPRM* at para 75.

¹⁷¹ 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). 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.

¹⁷² See *NPRM* at para. 74.

¹⁷³ See REC Comments at 19-23; Comments of Dan J. Alpert, Esq. at 1 (Alpert Comments); CIMA Reply Comments at 6; REC Reply Comments at 7.

¹⁷⁴ REC Comments at 19-21. According to REC, 21 applications were dismissed for lack of site assurance during the 2013 LPFM window.

¹⁷⁵ REC Comments at 23; Alpert Comments at 1 (documentation will "allow the FCC and other applicants to check the nature and extent of the reasonable assurance that ostensibly has been acquired").

¹⁷⁶ CIMA Reply Comments at 6.

C. Streamline Tolling Procedures and Notification Requirements

60. We adopt the *NPRM*'s proposal to simplify the tolling procedures for NCE and LPFM permittees, including the current tolling notification requirements for these services.¹⁷⁷ As explained in the *NPRM*, broadcast construction permits terminate and, thus, are forfeited, if the permittee does not complete construction and file a covering license application prior to expiration.¹⁷⁸ Although the Commission will “toll”¹⁷⁹ the broadcast construction period when an original construction permit is encumbered by certain circumstances beyond the permittee’s control,¹⁸⁰ tolling treatment is not automatic but rather requires notification from the permittee.¹⁸¹ Staff practice is to grant tolling treatment in six-month increments, with permittees required to submit update notifications at the end of each six-month period to retain their construction permits in a tolling posture.¹⁸² The notification and six-month update requirements currently apply 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.

61. In the *NPRM*, we emphasized that the Commission has characterized tolling notification requirements as an unnecessary bureaucratic hurdle for LPFM permittees with limited resources, and we recognized that inexperienced NCE and LPFM permittees often fail to notify the Commission of a tolling event, thus potentially losing substantial construction time, or even the authorization itself. Accordingly, we proposed to shift the onus of identifying a tolling event from the permittee to the Commission staff when either (1) the permit includes a condition on the commencement of operations and the Commission has a direct licensing role in the satisfaction of the condition or (2) the permit grant is subject to administrative or judicial review. REC, the only commenter to address this issue, agrees with our proposal, but requests that we extend this new policy to “LPFM and NCE facilities that are along an international border that were granted prior to receiving international coordination.”¹⁸³ REC believes that having the Commission assume the role of the “gate keeper” of such a condition “would be something the Commission can manage and would be one less burden for the grantee.”¹⁸⁴ We agree. We, therefore, will codify a new tolling allowance for NCE and LPFM construction permits subject to international coordination.

62. Accordingly, we streamline our tolling procedures for NCE and LPFM permittees as follows. The Commission will identify and place into a tolling posture any 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; (2) that is subject to administrative or judicial review of

¹⁷⁷ See *NPRM* at paras. 78-79.

¹⁷⁸ 47 CFR § 73.3598(e). See 47 U.S.C. § 319(b).

¹⁷⁹ Toll means to temporarily stop the construction clock. Tolling applies to the “period of construction for an original construction permit.” See 47 CFR § 73.3598(b).

¹⁸⁰ The circumstances are: (1) natural disaster; (2) administrative or judicial review of the permit grant; (3) litigation relating to any necessary governmental requirement for construction operation; (4) failure of a Commission-imposed precedent to commencement of operations; and/or (5) a request for international coordination in connection with the DTV transition. 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. We will, however, herein codify it in the rules.

¹⁸¹ See 47 CFR § 73.3598(c); *Birach Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 3141, 3144, para. 9 (2008).

¹⁸² See e.g., *Cram Commun., LLC*, Letter Order, 20 FCC Rcd 17153, 17156 (MB 2005).

¹⁸³ REC Comments at 22.

¹⁸⁴ *Id.* at 23.

the permit grant;¹⁸⁵ or (3) that is subject to international coordination. In such situations, we direct the Bureau staff to add appropriate tolling codes to the broadcast database.¹⁸⁶ Permits tolled by staff under these revised procedures will not be subject to the six-month update requirement. Rather, the Commission will be responsible for ending tolling treatment and notifying the permittee of such termination upon the resolution of the pertinent encumbrance. We emphasize that these changes are limited to NCE and LPFM stations, services which have more commonly encountered challenges with the current tolling procedures.¹⁸⁷

D. Lengthen LPFM Construction Period

63. We adopt the *NPRM*'s proposal to lengthen the construction period for LPFM permittees from 18-months to a full three-years.¹⁸⁸ No commenter opposes the extension while Alpert and REC, which initiated the proposal,¹⁸⁹ openly support this change.¹⁹⁰ The Commission initially established an 18-month LPFM construction period,¹⁹¹ but subsequently allowed LPFM permittees to request one 18-month extension to complete construction of their facilities upon a showing of good cause.¹⁹² In the *NPRM* we acknowledged that LPFM stations have encountered more problems than originally anticipated and frequently request 18-month extensions to deal with a myriad of construction challenges.¹⁹³

64. Commenters agree that lengthening the construction period will have the dual benefit of aiding LPFM permittees struggling to complete construction and eliminating the administrative burdens associated with filing and processing waiver requests.¹⁹⁴ Moreover, as REC highlights, the extension will bring LPFM on a more level playing field with other broadcast services. Accordingly, we amend section 73.3598(a) of the rules¹⁹⁵ to extend the LPFM construction period to three years. As we proposed in the *NPRM*, the extended construction period will apply to both existing LPFM permits, which have not yet expired as of the effective date of the new rule and will now expire three years from the original grant of the permit,¹⁹⁶ and prospectively to new permits granted after the new rule takes effect.

¹⁸⁵ Tolling treatment involving a necessary local, state, or non-FCC federal requirement, which is outside the Commission's direct purview, will continue to require notification to the Commission.

¹⁸⁶ A publicly viewable "tolling code" in a station's record in the broadcast database allows the public to ascertain whether and why a construction permit is tolled.

¹⁸⁷ See, e.g., *Community Radio of Decorah, Postville, and Northeast Iowa*, 31 FCC Rcd 12180, 12181, n.13. NCE and LPFM organizations may have experienced more challenges 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.

¹⁸⁸ See *NPRM* at para. 81.

¹⁸⁹ REC filed comments in the *Modernization of Media Regulation Initiative*, proposing changes to LPFM service and technical rules. See *Commission Launches Modernization of Media Regulation Initiative*, Public Notice, MB Docket No. 17-105 (2017) (*Modernization of Media Regulation Initiative*); REC Comments (June 26, 2017).

¹⁹⁰ Alpert Comments at 1; REC Comments at 23.

¹⁹¹ *LPFM Report and Order*, 15 FCC Rcd at 2278, paras. 188-89.

¹⁹² *LPFM Third Report and Order*, 22 FCC Rcd at 21928, para. 40.

¹⁹³ See *NPRM* at para. 81.

¹⁹⁴ See Alpert Comments at 1; REC Comments at 23.

¹⁹⁵ 47 CFR § 73.3598(a).

¹⁹⁶ We direct the Bureau staff to manually re-issue any unexpired LPFM permits with the new expiration dates upon the effective date of the new rules.

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

65. We adopt the *NPRM*'s proposal, which was initiated by REC,¹⁹⁷ to eliminate both the absolute prohibition on the assignment and transfer of LPFM construction permits and the three-year holding period for LPFM licenses.¹⁹⁸ In the *NPRM* we noted that our current rules, which bar *any* assignment or transfer of LPFM construction permits and only allow the assignment and transfer of LPFM licenses after three years,¹⁹⁹ may be too restrictive and detrimental to the LPFM service. Commenters agree that eliminating these restrictions will benefit the LPFM service by increasing the likelihood that LPFM permits will be constructed and provide new service to communities and also help make the stations more viable.²⁰⁰ REC explains that the changes should "help preserve community radio by offering a 'second chance' in the event that the original grantee is unable to build the station, or once built, is unable to sustain the operation."²⁰¹

66. To balance the relaxation of these rules, we also proposed some safeguard provisions to help ensure that the LPFM service retains its noncommercial, hyperlocal character and deter speculation in LPFM authorizations.²⁰² No commenter objects to adopting an 18-month holding period on the assignment and transfer of original LPFM construction permits or requiring the assignee or transferee of the authorization to satisfy certain ownership and eligibility criteria including compliance with the Holding Period rule.²⁰³ Some commenters, however, disagree on whether and how to limit consideration for the sale of the authorization. Specifically, LPFM Advocacy Group asserts that the Commission should not attempt to regulate the sales price of an LPFM permit or license and argues that the proposed rules "violate free market concepts."²⁰⁴ LPFM Advocacy Group urges the Commission to remove the requirement that all sales be capped at fair market value,²⁰⁵ and instead, as a safeguard, add "the requirement to hold LPFM licenses for a minimum of one year after each assignment."²⁰⁶ REC, in contrast, supports the Commission's proposal to restrict consideration to the amount of the assignor or transferor's legitimate and prudent expenses.²⁰⁷

67. We decline to adopt LPFM Advocacy Group's proposals. As the Commission has previously emphasized, the for-profit sale of LPFM authorizations is inconsistent with the goal of promoting local, community-based use and ownership of LPFM stations.²⁰⁸ We continue to believe that allowing the for-profit sale could have the adverse effect of enabling gamesmanship and the trafficking in

¹⁹⁷ See REC Comments in MB Docket 17-105; see also June 13, 2018, REC Petition for Rulemaking at 34-37, paras. 56-63.

¹⁹⁸ See *NPRM* at para. 84.

¹⁹⁹ See 47 CFR § 73.865(c) (three-year holding period for LPFM licenses); 73.865(d) (prohibiting assignment or transfer of an LPFM construction permit).

²⁰⁰ See, e.g., REC Comments at 23-24; Sibert Comments at 3; Leander Reply Comments at 3.

²⁰¹ REC Comments at 23-24.

²⁰² See *NPRM* at para. 84.

²⁰³ For example, in cases where the permittee obtained the permit through the comparative points process, we proposed to require the assignee or transferee to meet or exceed the assignor/transferee's point total.

²⁰⁴ Comments of Low Power FM Advocacy Group at 5 (LPFM Advocacy Group Comments) ("regulating the sales price of an LPFM cannot be done without the FCC attempting to regulate the private transactions of desks, broadcast equipment, vehicles, real estate, and other items").

²⁰⁵ See 47 CFR § 73.865(a)(1).

²⁰⁶ LPFM Advocacy Group Comments at 4.

²⁰⁷ REC Comments at 23.

²⁰⁸ See *LPFM Third Report and Order*, 22 FCC Rcd at 21918, para. 15.

licenses by those with no genuine interest in providing LPFM service. We therefore will, as proposed, retain the prohibition on the for-profit sale of LPFM authorizations, and use the same consideration standard that we apply to full-service NCE FM stations.²⁰⁹ Specifically, we will 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.), but do not include costs incurred in operating the station (e.g. rent, salaries, utilities, music licensing fees, etc.).

68. Accordingly, we modify our rules to permit parties to assign or transfer LPFM permits and station licenses,²¹⁰ 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 of the assignor or transferor;²¹¹ (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 comparative point system provisions of section 73.872 of the rules,²¹² 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,²¹³ 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.

VI. PROCEDURAL MATTERS

69. *Regulatory Flexibility Act.* As required by the Regulatory Flexibility Act of 1980 (RFA), as amended,²¹⁴ an Initial Regulatory Flexibility Certification was incorporated into the *NPRM*.²¹⁵ Pursuant to the RFA,²¹⁶ the Commission's Final Regulatory Flexibility Certification relating to this Report and Order is attached as Appendix C.

70. *Paperwork Reduction Act.* This Report and Order contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. The requirements will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note

²⁰⁹ See 47 CFR § 73.7005(a).

²¹⁰ We note that Leander agrees with the proposed changes, but in his reply comments, suggests one modification: "where a winning selectee was granted a permit and fails to build and the permit faces cancellation, priority consideration should be given to the next qualified applicant in the MX group that was not awarded an LPFM permit." Leander Reply Comments at 3. We decline to mandate this approach. While we encourage permittees unable to build to first consider assigning the permit to the next qualified applicant in the MX group, we will allow permittees to assign to any qualified applicant after the 18-month holding period.

²¹¹ Unlike full-service NCE FM stations, the consideration restriction will not cease at the end of the four-year holding period.

²¹² See 47 CFR § 73.872.

²¹³ 47 CFR § 73.872(d).

²¹⁴ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. 601, *et seq* has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Publ. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

²¹⁵ *NPRM* at para. 86, Appendix B.

²¹⁶ See 5 U.S.C. § 604.

that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

71. In this *Report and Order*, we adopt new rules and licensing procedures for new NCE broadcast and LPFM stations. We have assessed the effects of the new rules on small business concerns. We find that the streamlined rules and procedures adopted here will minimize the information collection burden on affected applicants, permittees, and licensees, including small businesses.

72. *Congressional Review Act.* The Commission will submit this draft *Report and Order* to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, for concurrence as to whether these rules are “major” or “non-major” under the Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send a copy of this *Report and Order* to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

VII. ORDERING CLAUSES

73. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in sections 1, 4(i), 4(j), 301, 303, 307, 308, 309, 316, and 319 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 301, 303, 307, 308, 309, 316, and 319, this *Report and Order* **IS ADOPTED** and **WILL BECOME EFFECTIVE** 60 days after publication in the Federal Register.

74. **IT IS FURTHER ORDERED** that Part 73 of the Commission's Rules **IS AMENDED** as set forth in Appendix B and the rule changes to sections 73.854, 73.871(c), 73.3572(b), 73.3573(a), and 73.3598 adopted herein will become effective 60 days after the date of publication in the Federal Register.

75. **IT IS FURTHER ORDERED** that the rule changes to sections 73.865, 73.872, 73.7002(c), 73.7003, and 73.7005, which contain new or modified information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act, **WILL BECOME EFFECTIVE** after the Commission publishes a notice in the Federal Register announcing such approval and the relevant effective date.

76. **IT IS FURTHER ORDERED** that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 19-3 **SHALL BE TERMINATED**, and its docket **CLOSED**.

77. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Report and Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

78. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A
List of Commenters

Comments:

Dan J. Alpert, Esq.

America's Public Television Stations, Corporation for Public Broadcasting, National Public Radio, Inc., and Public Broadcasting Service

Discount Legal

Low Power FM Advocacy Group

Prometheus Radio Project, Common Frequency, Albert Davis, and Caitlin Reading

REC Networks

Jeff Sibert

Reply Comments:

Center for International Media Action

Albert Davis

Clayton John Leander

Alaska Public Telecommunications, Inc. *et al.* (54 noncommercial educational television and radio station licensees – Joint NCE Licensees)

REC Networks

APPENDIX B

Final Rules

Part 73 of Chapter 1 of Title 47 of the Code of Federal Regulations is 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. In § 73.854, revise 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. In § 73.865, rename the section; 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.);

(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. In § 73.871, revise 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 governing board changes in a nonstock or membership applicant except in the case where sudden changes indicate a takeover concern or a significant effect on such organization's mission. All changes in a governmental applicant are considered minor.

5. In § 73.872, revise paragraph (c) and add 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, no more than three 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. If the tie is not resolved in accordance with paragraphs (c) or (e) of this Section, the tied applications will be reviewed for acceptability, and applicants with tied, grantable applications will be eligible for involuntary time-sharing in accordance with paragraph (d) of this Section.

* * * * *

6. In § 73.3572, revise 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 governing board change in a nonstock or membership applicant if there is no evidence of a takeover concern or a significant 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. In § 73.3573, revise 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 governing board change in a nonstock or membership applicant with no evidence of a takeover concern or a significant 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. In § 73.3598, revise paragraphs (a) and (b) and the last line of paragraph (b)(3); adding a new paragraph (b)(4) and (b)(5), and revise 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;

(4) A request for international coordination, with respect to a construction permit for stations in the Low Power FM service, on FM channels reserved for noncommercial educational use, and for noncommercial educational full power television stations, has been sent to Canada or Mexico on behalf of the station and no response from the country affected has been received; or

(5) 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), a request for international coordination under paragraph (b)(4) of this section, or failure of a condition under paragraph (b)(5) 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, (2) the request for international coordination under paragraph (b)(4) of this section, or (3) the condition on the commencement of operations under paragraph (b)(5) of this section.

* * * * *

9. In § 73.7002, revise paragraph (c) 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. In § 73.7003, revise paragraphs (b)(1), (b)(2); and add new paragraphs (c)(3), (c)(4), and (c)(5) 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) If a tie remains after the tie breaker in paragraph (c)(2) of this section, the tentative selectee will be the remaining applicant that can demonstrate that (i) it applied in a previous filing window, and had its application accepted for filing and processed, but subsequently dismissed in favor of an applicant with superior points or a tie-breaker showing; (ii) it has been in continuous existence at all times from the date of that previous filing until the present and (iii) it does not hold any NCE construction permit or license.

(4) *Voluntary time-sharing.* If a tie remains after the tie breaker in paragraph (c)(3) 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.

(5) *Mandatory time-sharing.* If a tie among mutually exclusive applications is not resolved through voluntary time-sharing in accordance with paragraph (c)(4) 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. In § 73.7005, rename the section; 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 C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA)¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making (NPRM)* to this proceeding. The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The Commission received no comments on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.²

A. Need For, and Objectives of, the Report and Order

2. This *Report and Order* adopts several rule changes that are intended to clarify and simplify the point systems used to evaluate competing applications for both noncommercial educational (NCE) full-service FM, full power television, and FM translator broadcast stations and low power FM (LPFM) broadcast stations, and related NCE and LPFM application processing rules. Specifically, in the *Report and Order* the Commission adopts new rules and procedures to: (1) eliminate the current requirement that NCE applicants amend their governing documents, pledging that localism/diversity be “maintained in the future,” in order to receive comparative points as an “established local applicant” and for “diversity of ownership”; (2) expand the scope of the current divestiture policy by awarding points based on a contingent pledge to divest an interest in an existing full-service station, therefore allowing applicants to maintain continuity of service during the licensing and construction process; (3) expand the current two tie-breaker criteria to add an additional tie-breaker round and thus reduce the need for mandatory time-sharing; (4) clarify aspects of the “holding period” to better promote the goal of ensuring that the comparative selection process is meaningful and the public receives the benefit of the best proposal; (5) 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) adopt new rules authorizing early time-sharing discussions among LPFM applicants and limit the number of applicants that can enter into a time-sharing arrangement to three; (7) establish a process pursuant to which the Media Bureau will resume the processing of any remaining tentative selectees following the dismissal of a tentatively accepted time-share agreement; (8) modify the NCE and LPFM application forms to clarify the existing requirement for applicants to obtain reasonable assurance of site availability and add a reasonable assurance of site certification to these forms; (9) toll, meaning temporarily stop the construction clock, NCE and LPFM broadcast construction deadlines without notification from the permittee, based on certain pleadings pending before, or actions taken by, the agency; (10) lengthen the LPFM construction period from 18 months to three years; (11) allow the assignment and transfer of LPFM construction permits after an 18-month holding period; and (12) eliminate the three-year holding period for the assignment and transfer of LPFM licenses. The new rules and procedures are designed to clarify the comparative requirements, minimize confusion among applicants, deter speculative applications, reduce burdens upon NCE and LPFM broadcasters, and initiate service to the public quickly and efficiently.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. There were no comments to the IRFA filed.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

4. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (CWAAA).

² See 5 U.S.C. § 604.

Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.³ The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules Apply

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁴ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁵ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁶ 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 SBA.⁷

6. The new 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 rule changes concerning 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. Below, we provide a description of these small entities, as well as an estimate of the number of such small entities, where feasible.

7. **NCE FM Radio Stations.** The new rules and policies will apply to NCE FM radio broadcast licensees, and potential licensees of NCE FM radio service. This Economic Census category “comprises establishments primarily engaged in broadcasting aural programs by radio to the public.”⁸ The SBA has created the following small business size standard for this category: those having \$41.5 million or less in annual receipts.⁹ Census data for 2012 show that 2,849 firms in this category operated in that year.¹⁰ Of this number, 2,806 firms had annual receipts of less than \$25 million, and 43 firms had

³ 5 U.S.C. § 604(a)(3).

⁴ 5 U.S.C. § 603(b)(3).

⁵ *Id.* § 601(6).

⁶ *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 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.” *Id.* § 601(3).

⁷ *Id.* § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

⁸ U.S. Census Bureau, 2012 NAICS Definitions, “515112 Radio Stations,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. This category description continues: “Programming may originate in their own studio, from an affiliated network, or from external sources.”

⁹ 13 CFR § 121.201; NAICS code 515112.

¹⁰ U.S. Census Bureau, Table No. EC0751SSSZ4, *Information: Subject Series – Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515112), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table.

annual receipts of \$25 million or more.¹¹ Because the Census has no additional classifications that could serve as a basis for determining the number of stations whose receipts exceeded \$41.5 million in that year, we conclude that the majority of radio broadcast stations were small entities under the applicable SBA size standard. In addition, the Commission has estimated the number of noncommercial educational FM radio stations to be 4,122.¹² NCE stations are non-profit, and therefore considered to be small entities.¹³

8. The changes adopted herein 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.

9. **FM Translator Stations and Low Power FM Stations.** The changes adopted herein will 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 stations applies to low power FM stations. As noted, the SBA has created the following small business size standard for this category: those having \$41.5 million or less in annual receipts.¹⁴ While the U.S. Census provides no specific data for these stations, the Commission has estimated the number of licensed low power FM stations to be 2,186.¹⁵ In addition, as of September 30, 2019, there were a total of 8,177 FM translator and FM booster stations.¹⁶ Given the fact that low power FM stations may only be licensed to not-for-profit organizations or institutions that must be based in their community and are typically small, volunteer-run groups, we will presume that these licensees qualify as small entities under the SBA definition.

10. The new rules will 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.

11. **NCE Television Stations.** This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”¹⁷ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the

¹¹ *Id.*

¹² *Broadcast Station Totals as of September 30, 2019*, FCC News Release (rel. Oct. 2, 2019) (*Broadcast Station Totals*), <https://docs.fcc.gov/public/attachments/DOC-359976A1.pdf>.

¹³ 5 U.S.C. § 601(4), (6).

¹⁴ 13 CFR § 121.201, NAICS Code 515112.

¹⁵ *Broadcast Station Totals*, *supra* note 215.

¹⁶ *Id.*

¹⁷ U.S. Census Bureau, 2012 North American Industry Classification System (NAICS) Definitions, “515120 Television Broadcasting,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

public.¹⁸ 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 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 such businesses: those having \$41.5 million or less in annual receipts.¹⁹ The 2012 Economic Census reports that 751 firms in this category operated in that year. Of this number, 656 had annual receipts of \$25 million or less, 25 had annual receipts between \$25 million and \$49,999,999, and 70 had annual receipts of \$50 million or more.²⁰ Based on this data we therefore estimate that the majority of noncommercial television broadcasters are small entities under the applicable SBA size standard. Specifically, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 380.²¹ The Commission, however, does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

E. Description of Projected Reporting, Record Keeping and Other Compliance Requirements

12. The rules changes adopted in the *Report and Order* will, in a few cases, impose different reporting requirements on potential NCE full-service stations, NCE FM Translators, and LPFM licensees and permittees. Specifically, the *Report and Order* creates a new submission of information verifying that the applicant obtained reasonable assurance of site availability. The applicant will be required to list the name and telephone number of the person contacted to obtain site assurance, and specify whether the contact is a tower owner, agent, or authorized representative. Any additional burden, however, will be minimal because the underlying requirement to obtain such assurance is currently a prerequisite to the application filing. Likewise, NCE applicants seeking points as “established local applicants” or for “diversity of ownership” will be required to provide information that is different from that currently required. We believe that the new information will be simpler for applicants to produce because applicants will no longer be required to amend their governing documents. The elimination of certain tolling notification requirements, and shifting the onus of identifying a tolling event from the permittee to Commission staff in certain situations, will decrease burdens on applicants that experience encumbrances preventing construction. An NCE or LPFM permittee will 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. By lengthening the LPFM construction period to three years, LPFM permittees needing more than the current 18-month construction period will no longer need to file and justify requests for an 18-month extension. Finally, by adopting the proposals to clarify and/or modify application requirements that applicants have found confusing, the burdens on applicants to file and/or respond to petitions challenging point claims will be reduced.

F. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.

13. 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

¹⁸ *Id.*

¹⁹ 13 CFR § 121.201; 2012 NAICS Code 515120.

²⁰ U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

²¹ *Broadcast Station Totals*, *supra* note 215.

compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²²

14. The rules adopted herein are intended to assist NCE full-service broadcast stations, NCE FM Translator, and LPFM broadcast applicants by clarifying and simplifying requirements for claiming and maintaining qualifications that are used to compare competing applications. The new rules and procedures will enable such applicants: (1) to claim comparative points without the burdensome process of amending their governing documents; and (2) to maintain existing full-service broadcast operations by allowing contingent pledges that do not require divestment of existing interests prior to application grant. The new rules will also: (1) expand the current two tie-breaker criteria to add an additional tie-breaker round, and therefore, reduce the need for the currently unpopular use of mandatory time-sharing; (2) eliminate the assignment and transfer “holding period” for LPFM licenses, clarify elements of the NCE “holding period” rule, and aid permittees and licensees by eliminating the current absolute bar on any section 307(b) preference-related service downgrade; (3) clarify that LPFM applicants dismissed due to unauthorized broadcasting operations cannot seek to reinstate the application by removing the board member(s) that have engaged in unauthorized broadcasting; (4) reduce challenges based on reasonable assurance of site availability; (5) toll NCE and LPFM broadcast construction deadlines without notification, for certain matters known to the agency, including when a permit is subject to international coordination or under administrative or judicial review; (6) provide at the outset a longer construction period for LPFM stations; and (7) permit the assignment and transfer of LPFM construction permits after 18 months. The Commission sought 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, and the commenters supported the changes. The rules adopted herein are intended to minimize burdens on NCE and LPFM broadcasters, virtually all of whom are small businesses.

15. **Report to Congress:** The Commission will send a copy of this *Report and Order*, including this FRFA, in a report to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.²³ In addition, the Commission will send a copy of the *Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the *Federal Register*.²⁴

²² 5 U.S.C. § 603(c)(1)-(c)(4).

²³ *See id.* § 801(a)(1)(A).

²⁴ *See id.* § 604(b).