

Legal Alerts

FCC's Noncommercial FM Filing Window Opens in Early 2021 - Key Considerations for Applicants

02.04.21 01.07.26

We expect the Federal Communications Commission (FCC) will soon open an application window for permits to construct new noncommercial educational (NCE) FM stations and to make major changes in existing stations (including certain changes in frequency and community of license). If you are considering submitting an application for a new NCE station, below is a general overview of the process to help you plan for your filing now.

The Structure of the Application

Schedule 340 is divided into several sections that solicit information that will enable the Commission to choose a winner from among two or more applications proposing technically conflicting facilities (i.e., "mutually exclusive" applications).

One section seeks information relevant to determining whether the applicant will provide a first or second full-service NCE service to at least 10 percent of the total population in its predicted (60dBu) contour *and* at least 2,000 people. This question is important because it may result in a decisive "fair distribution of service" preference, awarded under Section 307(b) of the Communications Act (commonly referred to as a "307(b) preference"). This preference comes into play only if two or more mutually exclusive applications specify different communities of license.

Another section asks the applicant to certify whether it qualifies for certain points awarded under the point system, which is used to award a construction permit when two or more qualified mutually exclusive applicants apply and when no applicant is entitled to a 307(b) preference. The possible points are:

Established Local Applicant 3 points Diversity of Ownership or Statewide Network 2 points
Technical Parameters 1-2 points

Tie Breakers

The application solicits information about attributable interests in licenses and construction permits for other stations, including full-service commercial and noncommercial stations and translators. This information is used to break point-system ties. The first tie breaker awards a preference to the applicant

with the fewest authorizations. If two or more applicants are still tied, the second tie breaker awards a preference to the applicant with the fewest pending applications. A third tie breaker will prefer applicants that were unsuccessful in prior NCE filing windows and that have no NCE stations. If applicants remain tied after that third tie breaker, the FCC will select a maximum of three applicants that have remained local for the longest uninterrupted period of time. Those remaining applicants will be forced to share the air time based on either a voluntary agreement among the applicants or on a Commission-imposed schedule in the absence of an agreement.

- **Limit on Number of Applications.** Although the FCC has proposed to limit the number of applications any one applicant can file to a maximum of 10, as this legal alert's publication date, that limit has not yet been finalized.
- **Back to Basics.** An applicant must establish that it holds the "basic qualifications" to be eligible to hold a noncommercial license. Its "basic qualifications" include showing that it serves an educational purpose, which will be advanced by a radio station. The applicant must also demonstrate that it possesses requisite "character qualifications," complies with limits on alien ownership and is financially qualified.
- **Site Certification.** The FCC added a certification to the application that requires the applicant to provide the name and contact info for the transmitter site owner. An applicant must have a reasonable assurance from the site owner that it will be able to use the site. That assurance must be obtained prior to filing the application.
- **Financial Qualifications.** An applicant must certify that it has the resources to build the proposed station and operate it for three months with no revenues. Prior to filing your application, develop a budget of expenses and a plan for meeting those expenses.
- **Expect No Mercy.** Although the point system is technically a hearing designed to select the "best" applicant, it is applied in an unforgiving, even mechanical way. Late-filed applications or applications that do not provide required information are likely to be dismissed. The FCC will generally assume the accuracy of any information contained in applications, but will not do an applicant's work for it by supplying missing information.
- **Documentation Counts.** Claims for localism and diversity of ownership credits must be documented. The documentation must demonstrate that the claims are valid at the time the application is filed. The FCC will not award credit for undocumented claims. Fortunately, the FCC removed a previous requirement that bylaws be amended to show future adherence to localism and diversity point claims.
- **Coverage Rules.** The FCC's point system awards signal coverage in two different ways. First, it awards a potentially dispositive 307(b) preference to applicants that provide a first or second noncommercial service to at least 10 percent of the population *and* 2,000 people within the predicted contour. This means that an applicant entitled to no points will prevail over an applicant entitled to the maximum number of points if the zero-point applicant receives a 307(b) preference. Second, if a 307(b) preference is not applicable, an applicant that provides coverage to a greater area *and* population may receive one or two points for "technical superiority."
- **The Establishment Clause.** In order to receive the localism credit, an entity must be both "established" and "local." A non-profit entity is "established" if the entity itself has been in existence for at least two

years. An entity is "local" if the applicant's headquarters, campus or 75 percent of its board members reside within 25 miles of the reference coordinates for the community of license. A governmental entity will be "local" within its area of jurisdiction. A non-local parent may not claim localism through a subsidiary nor base its claim on the location of a "branch office," rather than of its own headquarters.

- **Diversity Counts.** A claim to advance diversity of ownership is awarded if the applicant does not have an attributable interest in another overlapping station. This claim is based upon a "snapshot" of the interests held by the applicant and its board members at the time the application is filed. Nevertheless, the FCC will recognize a contingent diversity claim based upon a promise that an officer or director, who held an attributable interest in an existing overlapping station at the time the application was filed, will resign later if the application is granted, and when the new station is built and commences program tests.
- **The Best Coverage Points.** Up to two points are awarded for the applicant with the "best" technical proposal. To be technically superior to another applicant, the preferred applicant must serve 10 percent (one point) or 25 percent (two points) more area *and* population than the "next best" applicant. To receive credit, the applicant must serve both the most area *and* population compared with the area and population served by any other mutually exclusive applicant.
- **Maintenance of Qualifications.** Any applicant that wins on a 307(b) preference or wins on comparative points must maintain those qualifications for four years of on-air operations.
- **More Law, More Often.** The FCC will issue public notices that will provide more information about filing procedures, application requirements and the deadline to submit applications.

If you have any questions about the FCC's application process for new NCE FM stations, please feel free to contact [Melodie Virtue](#), [Brad Deutsch](#), [Benjamin Lambiotte](#) or [Amy Lin](#).

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