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2021 NONCOMMERCIAL FM FILING WINDOW

The Federal Communications Commission (FCC) has announced a filing window for applications for noncommercial FM stations from November 2 to November 9, 2021. This is an opportunity for applications for new stations and major modifications to existing stations. Applications of this type can only be submitted to the FCC during a filing window. These are very rare events. The last general filing window for new noncommercial FM applications was in October 2007. Anyone interested in pursuing such an opportunity should not expect that there will be another filing window anytime soon for full power noncommercial FM stations.

Noncommercial stations are licensed only to nonprofit entities, such as schools, churches, and nonprofit corporations. For purposes of FCC qualifications, it is not necessary to be tax-exempt under Section 501(c)(3) of the Internal Revenue Code (although that status will be necessary for tax purposes if contributors are to be entitled to tax deductions for their contributions). However, the applicant entity does need to be recognized as nonprofit under the laws of the state or territory where it is organized. Noncommercial stations are prohibited from broadcasting commercial advertisements. Aside from that restriction, noncommercial station owners have wide discretion to select the content they wish to broadcast.

Noncommercial FM stations resulting from this filing window will operate on the FM frequencies from 88.1 to 91.9 MHz. These frequencies are reserved exclusively for noncommercial use. These stations may operate with as little as 100 watts of effective radiated power or as much as 100,000 watts, depending on the geographic location (higher power is generally more likely to be available west of the Mississippi River) and the distance to other stations on the same or an adjacent frequency that need to be protected from interference.

The very first task that a prospective applicant must undertake is to determine whether one or more frequencies is vacant and available at the desired location where the applicant wants to establish it. The FCC will not permit a new station to cause interference to or to receive interference from a previously authorized station.

Technical research needs to be performed to find the openings for new stations. This research is more complex than merely listening to a radio receiver at a given location to see if there is nothing but apparent silence on a given frequency. The signal strength contours of existing stations must be compared to the contours proposed for the new station. This work relies

on databases of the authorized facilities of all existing stations, and on databases of the geographical features of the area where the new station is to be located. Professional broadcast consulting engineers do this kind of work. It is highly recommended to hire such a person or firm to conduct the channel search. The professionals who perform such services do not need to visit your site. All of their work is done online with FCC databases.

If the channel search identifies an available open frequency, the project can proceed to preparing and filing an application. For this task, it is highly recommended that the applicant engage the services of both a broadcast attorney and a broadcast consulting engineer. The application is submitted to the FCC electronically on the agency's website. All data is uploaded to the FCC's online form. The applicant certifies and signs the form under the penalty of perjury with an electronic signature.

In the engineering portion of the application form, the applicant must identify the precise location where it proposes to place its transmitter and antenna. The height of the antenna above ground and above the surrounding average terrain is an important aspect of an FM facility. An FM antenna is almost always mounted on a tower. An applicant may undertake to construct its own tower. However, that may be an expensive undertaking and may require significant time and expense in obtaining approval from local zoning authorities. An alternative would be to seek to rent space on an existing tower, or atop a very tall building.

If the applicant does not own or control the proposed antenna site, it must certify in the application that it has permission from the owner of the site to designate this location in the application. The FCC requires the applicant to have reasonable assurance that the proposed site is available to it for construction of the radio station. While a formal rental agreement is not necessary at this stage, the applicant is strongly advised to obtain written consent from the site owner.

The results of the channel search will dictate the frequency and power level that the applicant proposes. The consulting engineer can assist in developing a strategy for the proposal. The FCC does not select any of the variables for the applicant. All of these factors are proposed by the applicant and the FCC merely reacts to the proposal as a whole with a grant or a denial of the application.

The legal portion of the application form requires the applicant to identify itself and all of its officers and board members. At least 80% of the voting control of the applicant must be held by United States citizens. The applicant must claim that it is legally qualified to be a noncommercial licensee. The official title for this category of stations is "noncommercial educational." Accordingly, an applicant for this type of station must provide a statement about its educational objectives and how it would use the proposed station to achieve those objectives.

The applicant also certifies that it is financially qualified to have its application granted. Documentation of the financial qualifications is not required to be submitted with the

application, but such documentation must be provided to the FCC upon request. The applicant is required to have reasonable assurance of access to enough funding to construct the proposed station and to operate it for at least three months without revenue. This means that the applicant must determine a reasonable budget for constructing the station and operating it for the first three months. Then it must identify sources of funding for those costs. To have reasonable assurance of funding, the applicant can rely on its own actual liquid assets, on a loan commitment from a financial institution, or commitments for loans or contributions from other sources that have been reasonably vetted. To reasonably vet a financial source (other than a financial institution) means that the applicant has actual knowledge of the source's ability to fulfill its commitment. Relying on unverified pledges from supporters will not suffice to meet this standard.

The applicant must designate a specific community as the "community of license" for the proposed station. This can be any legally cognizable community within the protected coverage area of the proposed station. The station will be legally tied to this community and have particular responsibilities to it. Applicants most often like to select their home town as the community of license. However, there may be strategic advantages to selecting another community with a view toward prevailing in a comparative analysis with competing applicants (explained below).

Within a few weeks after the close of the filing window, the FCC will begin processing the applications. In a case where an application does not propose a signal that overlaps the signal of another application, the FCC can review the application rather quickly and proceed to place it on notice for public comment. During the public comment period, the application may be subject to petitions to deny filed by existing stations with claims of potential signal interference, and/or by residents of the coverage area with allegations that the applicant is not qualified. If such petitions are filed, the applicant can file opposition pleadings, and the FCC then decides the case. If no petitions are filed, the FCC can proceed immediately to grant the application.

All applications filed during the filing window will be treated with the same priority as if they were filed at the same time. There is no benefit to being the first to file. If two or more applications are filed that are in conflict with each other, such that the resulting stations would cause interference to each other, the applications are said to be mutually exclusive and the FCC must decide which applicant to name as the selectee while the others will be dismissed. The FCC has established both engineering and legal criteria for evaluating which applicant should become the tentative selectee. Given the limited supply of open frequencies and the demand for new stations, it is likely that most applications will be in conflict with competing applications. It is therefore wise to develop an application strategically with as many of the preferred qualities as possible so as to prevail in the comparative evaluation. The applicant with the most preference points will become the tentative selectee. The tentative selectee's application will then be placed on public notice for public comment as explained above.

If mutually exclusive FM applications designate different communities of license, the highest level comparative issue concerns which application, if any, would substantially further

the FCC's responsibility to distribute radio services fairly among the communities and states of the nation. Unless a mutually exclusive group of applications includes a Tribal Applicant (for which there is a priority preference under certain conditions), an analysis will be made to determine which, if any, of the applications would provide the first or second noncommercial radio service to at least 10 percent of the population within the proposed station's protected contour, and a minimum of at least 2,000 people. An applicant proposing to provide such service will be considered superior to applicants not providing such service. If there is only one such application in the group, that application will be chosen as the tentative selectee. If more than one application proposes such service, the application providing such new service to the highest number of people will be selected, provided that the difference in the number of people served is at least 5,000. If multiple applications are considered essentially equal in this analysis, they will be compared under the point system described below.

If the analysis described above does not produce a tentative selectee, or if all of the applicants in the group propose the same community of license, the mutually exclusive applications are compared with a point system. Points are awarded on the basis of desired characteristics, and the applicant earning the highest point score becomes the tentative selectee.

An established local applicant earns three points. A local applicant is one that has its headquarters, a campus, or the residences of at least 75 percent of the members of its governing board within 25 miles of the reference geographic coordinates of the proposed community of license. A governmental applicant is local if the proposed community of license is within its area of jurisdiction. To be eligible for the points, the applicant must demonstrate that it met this criterion for being local continuously for at least 24 months immediately preceding the close of the filing window.

An applicant can earn two points in the comparative analysis if it can demonstrate diversity of ownership. This means the applicant must show that neither the applicant nor anyone holding an attributable interest in the applicant (i.e., any officer or board member) holds an attributable interest in any other radio station license or construction permit the principal community contour of which overlaps the principal community contour of the applicant's proposed new station. The principal community contour for FM stations is the 3.16 mV/m contour, for AM stations, it is the 5 mV/m contour.

Applicants (and their principals) with attributable interests in other stations can claim the points for diversity of ownership if they commit in the application to divest themselves of the other stations before the new station goes on the air.

Other criteria for earning points include: (1) operating a statewide network if the applicant does not qualify for points for diversity of ownership (two points), and (2) proposing to serve the largest geographic area and population in the mutually exclusive group (one point).

A tentative selectee that survives the public comment period without objection (almost all do) or that overcomes a petition to deny, will have its application granted and will receive a construction permit that is valid for three years. During that three-year period, the applicant must construct the station, begin broadcasting, and file an application for a license.

An applicant that is selected over competitors on the basis of any of the preferences or comparative points described above must maintain the qualities for which the points were awarded for four years from the time that the new station goes on the air.

This filing window may present the licensee of a low power FM station with an opportunity to obtain and develop a higher powered station. However, this would not be the process of “growing” the LPFM station into a full-power station. The two types of stations are legally different categories of stations. One cannot become the other. The LPFM licensee can apply for a full-power station, but in the application it must commit to divesting itself of the LPFM station if the full-power application is granted. A LPFM station licensee cannot have an attributable interest in any other station. There can be no officers or directors in common with the other station after the divestiture is completed.

An applicant in this 2021 filing window will be limited to holding an attributable interest in a maximum of 10 applications.