



PUBLIC NOTICE

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FCC SEEKS COMMENT ON PROPOSED APPLICATION LIMIT FOR NCE FM NEW STATION APPLICATIONS IN UPCOMING 2021 FILING WINDOW

MB Docket No. 20-343

Comment Date: (15 days after date of publication in the Federal Register)

Reply Comment Date: (25 days after date of publication in the Federal Register)

I. INTRODUCTION

1. The Commission recently adopted changes to its rules and procedures for considering competing applications for new noncommercial educational (NCE) FM radio stations.¹ With these changes in place, by this Public Notice, we announce that we are directing the Media Bureau (Bureau) to open a filing window for FM reserved band (channels 201 – 220) applications for NCE FM new station applications.² The Bureau will issue a forthcoming Public Notice to announce the specific dates of the 2021 window.³

II. BACKGROUND

2. In the initial rulemaking proceeding on comparative standards for NCE applicants, the Commission reserved the right to establish by public notice a limit on the number of NCE applications filed by a party in a filing window.⁴ In 2007, before the window opened, the Commission sought comment on an application cap and subsequently established a limit of ten NCE FM new station applications filed by any party during the October 2007 filing window.⁵ This application limit helped restrict the number of mutually exclusive applications (including “daisy chains” of mutually exclusive

¹ *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, 34 FCC Rcd 12519 (2019); *aff'd* Order on Reconsideration, FCC 20-121 (Sept. 2, 2020).

² Only applications for new NCE FM stations may be filed in the upcoming filing window. The Bureau will not accept applications proposing major modifications to existing NCE FM stations. An applicant seeking a major modification to an existing NCE FM station authorization may apply for a new station and, subsequent to commencement of operations with its newly authorized facilities, surrender its old station license.

³ The Bureau will also provide detailed information about filing procedures and requirements by a separate public notice during the next several months.

⁴ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, MM Docket No. 95-31, Report and Order, 15 FCC Rcd 7386, 7422, para. 86 (2000) (*NCE R&O*), *aff'd*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105, para. 92 (2001).

⁵ See *FCC Seeks Comment on Proposed Application Limit for NCE FM New Station Applications in October 12-October 19, 2007, Window*, Public Notice, 22 FCC Rcd 15910 (2007) (*2007 Cap Comment Notice*); *FCC Adopts Limit for NCE FM New Station Applications in October 12-October 19, 2007 Window*, Public Notice, 22 FCC Rcd 18699 (2007).

applications),⁶ and thereby minimized the delay caused by processing complicated application chains. The ten application cap allowed the Commission to expeditiously process and grant thousands of applications to a wide range of local and diverse applicants,⁷ therefore promoting the rapid expansion of new NCE FM service throughout the country.⁸

III. DISCUSSION

3. Given the success of the October 2007 window, we tentatively conclude that we should establish a ten-application limit in the upcoming NCE FM filing window.⁹ We believe this limit would deter speculative filings, permit the expeditious processing of the applications filed in the window, and provide interested parties with a meaningful opportunity to file for and obtain new NCE FM station licenses. In contrast, we tentatively conclude that the failure to establish a limit on the number of new NCE FM applications that a party may file in the window could lead to a large number of speculative filings, creating the potential for extraordinary procedural delays.

4. We acknowledge that the Commission previously stated in 2000 that the point system criteria and window filing procedures should be sufficient to “ameliorate the filing of large numbers of mutually exclusive applications by speculative, barely qualified, applicants” and that it would consider an application limit “[i]f the number of mutually exclusive applications received under the new [point] system exceeds our expectations.”¹⁰ However, after the 2003 FM translator window, in which the

⁶ Conflicting NCE applications, which cannot all be granted consistent with the Commission's technical rules, are considered mutually exclusive. A mutually exclusive (MX) group consists of all applications which are MX to at least one other application in the group. A “daisy chain” occurs when two or more proposals contain service areas that do not directly overlap but are linked together into a chain by the overlapping proposals of others. Applications for full-service stations present a prospect of “daisy chains” of conflicting applications due to the size of the proposed service areas and the interference protection provided to full-service stations. A limit on applications will reduce the number and complexity of such situations.

⁷ The Bureau received over 3,600 applications during the October 2007 window, almost half of which were mutually exclusive with at least one other application.

⁸ See, e.g., *Threshold Fair Distribution Analysis of 32 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 1681 (2010); *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 1681 (2010).

⁹ We note that in the 2010 NCE FM filing window, the Commission did not impose an application cap. See *Media Bureau Announces Filing Window for Vacant FM Allotments Reserved for Noncommercial Educational Use*, Public Notice, 24 FCC Rcd 12621 (MB 2009). Unlike the 2007 window, and the upcoming 2021 window, the 2010 NCE window was for a limited number of vacant allotments on the non-reserved band (channels 221-300) that had been reserved for NCE FM use. In addition, the 2010 applications for reserved allotment channels were subject to additional pre-application criteria, which curbed the number of applications filed and further made an application cap unnecessary. See, e.g., *Comparative Consideration of 37 Groups of Mutually Exclusive Applications*, 26 FCC Rcd 7008, 7009, para. 3 (2011) (explaining that a reserved allotment applicant must demonstrate that it is technically precluded from using a reserved band channel, and that it would provide first and/or second NCE radio service to at least ten percent of the population within the 60 dBu contour of its proposed station, and that such population is at least 2,000 people). In the 2010 window, the Commission received approximately 300 applications, significantly less than the 3,600 plus applications received in the 2007 window. We expect the upcoming 2021 window to be substantially similar to the 2007 NCE FM filing window, which necessitated an application cap.

¹⁰ *NCE R&O*, 15 FCC Rcd at 7422, para. 86.

Commission received over 13,000 applications, many filed by speculative filers,¹¹ the Commission and NCE FM applicants were concerned that failure to establish an application cap *before* the 2007 window could lead to similar mass speculative filings and procedural delays.¹²

5. Consistent with the Commission's predictions in connection with establishing an application cap before opening the October 2007 window, we expect there will be a large volume of NCE FM applications filed in the forthcoming window that will require establishing an application cap before the window opens. There are several factors that could contribute to a large volume of NCE FM applications in the forthcoming window: (a) there is no application filing fee; (b) there are no ownership limits in the reserved band; (c) there has not been a filing window for new NCE FM applications for over ten years; and (d) the Commission recently simplified and clarified its rules and procedures for filing applications for new NCE applications and considering competing applications.¹³ Accordingly, we tentatively conclude that establishing an application limit before the window opens will provide certainty to potential applicants and allow for expeditious processing of applications. We seek comment on this approach.

6. Accordingly, we tentatively conclude that a ten-application cap is a reasonable limit to prevent mass filings by speculators and to permit the efficient and expeditious processing of window-filed applications while at the same time supporting the goals of localism and diversity reflected in the NCE FM point system.¹⁴ As such, we propose the following limit:

An applicant may file no more than a total of ten applications in the 2021 NCE FM filing window. Furthermore, a party to an application filed in the 2021 NCE FM filing window may hold attributable interests in no more than a total of ten applications filed in the window.¹⁵ If it is determined that any party to an application has an attributable interest in more than ten applications, the Bureau will retain the ten applications that were filed first – based on the date of application receipt – and dismiss all other applications.

7. We seek comment on this proposed limit. We specifically seek comment on whether ten applications is the appropriate limit to enable the efficient processing of applications and initiation of new NCE FM service, whether a different number would be more appropriate, or whether we should establish no limit at all. In particular, we note that our goal is to give interested parties the opportunity to apply for local and regional NCE FM outlets, subject to the apparent need for an application cap for the reasons described above.

IV. PROCEDURAL MATTERS

8. *Statement of Legal Authority.* The Commission's legal authority for limiting the number of applications a party may file during a broadcast filing window is found in 47 U.S.C. §§ 151, 152(a), 154(i) and (j), 301, 303(g) and (r), 308(b), and 309(j).

9. *Filing Requirements—Comments and Replies.* Comments are due 15 days after date of

¹¹ In 2003, the Commission received more than 13,000 applications in a filing window for FM translator stations in the non-reserved band, an "extraordinary volume" considering that there were approximately 3,800 FM translator and booster stations licensed at the time. *Creation of a Low Power Radio Service*, MM Docket No. 99-25, Second Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 6763, 6777, para. 31 (2005). Many of those applications were filed by "a relatively small number of non-local filers without any apparent connection to the communities specified in the application." *Id.*

¹² See *2007 Cap Comment Notice*, supra note 5.

¹³ See note 1, supra. The changes adopted were designed to reduce confusion among future applicants, expedite the initiation of new service to the public, and eliminate unnecessary applicant burdens.

¹⁴ See 47 CFR § 73.7000 *et seq.*

¹⁵ See *NCE R&O*, 15 FCC Rcd at 7418-20, paras. 74-77 (extending commercial attribution principles to NCE applications).

publication in the Federal Register, and reply comments are due 25 days after date of publication in the Federal Register. **All filings must be submitted in MB Docket No. 20-343.**

10. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).* Pleadings sent via e-mail to the Commission will be considered informal and will not be part of the official record. Comments, reply comments, and ex parte submissions will be publicly available online via ECFS.

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
 - Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
 - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.U.S.
 - Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington DC 20554
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.¹⁶
- During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

11. *Ex Parte Restrictions.* The proceeding in this Public Notice shall be treated as a "permit but disclose" proceeding in accordance with the Commission's *ex parte* rules.¹⁷ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b), 47 CFR § 1.1206(b). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

¹⁶ See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (2020).

¹⁷ See generally 47 CFR §§ 1.1200-1.1216.

12. *Initial Regulatory Flexibility Act.* As required by the Regulatory Flexibility Act,¹⁸ we have prepared an Initial Regulatory Flexibility Analysis (IRFA), which is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing procedures and deadlines for comments on the proposed application limit, and should have a separate and distinct heading designating them as responses to the IRFA.

13. The Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Public Notice*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, and shall cause it to be published in the Federal Register

14. *Paperwork Reduction Act.* This document contains proposed information collections subject to the Paperwork Reduction Act of 1995 (PRA).¹⁹ The Commission has OMB approval to collect these applications under OMB Control Number 3060-0029.

15. *People with Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 1-888-835-5322 (tty).

16. For further information, contact Amy Van de Kerckhove, Amy.Vandekerckhove@fcc.gov; James Bradshaw, James.Bradshaw@fcc.gov; or Lisa Scanlan, Lisa.Scanlan@fcc.gov, of the Media Bureau, Audio Division, (202) 418-2700. Direct press inquiries to Janice Wise, Janice.Wise@fcc.gov, (202) 418-8165.

Action by the Commission, October 16, 2020.

-FCC-

¹⁸ See 5 U.S.C. § 603.

¹⁹ See 44 U.S.C. § 3501 *et seq.*

APPENDIX A
Proposed Rule Changes

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

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

2. Section 73.503 is amended by adding a new paragraph (g) to read as follows:

§ 73.503 Licensing requirements and service.

* * * * *

(g) *Application Limit.* An applicant may file no more than a total of ten applications in the 2021 NCE FM filing window. A party to an application filed in the 2021 NCE FM filing window may hold attributable interests, as defined in §73.7000, in no more than a total of ten applications filed in the window. If it is determined that any party to an application has an attributable interest in more than ten applications, the Media Bureau will retain the ten applications that were filed first – based on the date of application receipt – and dismiss all other applications.

APPENDIX B**Initial Regulatory Flexibility Analysis**

1. As required by the Regulatory Flexibility Act, as amended (RFA)¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the potential application limit considered in *FCC Seeks Comment on Proposed Application Limit for NCE FM New Station Applications in Upcoming 2021 Window*, FCC 20-145 (Public Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Public Notice. The Commission will send a copy of the Public Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the Public Notice and the IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Limit

2. The Commission has determined that, absent a limit on the number of applications that a party may file in the filing window described in the Public Notice, some parties may file a large number of speculative applications, including applications proposing stations in communities to which the applicant has no apparent connection and applications that are mutually exclusive with each other. Accordingly, the Commission has tentatively determined that a limit of ten applications for new NCE FM construction permits in the filing window is an appropriate procedural safeguard to deter speculation and permit the expeditious processing of the NCE FM applications filed in the window. The Commission believes that the proposed limit will benefit small entities, as defined below.

B. Legal Basis

3. The Public Notice is released pursuant to Sections 1, 2(a), 4(i) and (j), 301, 303(g) and (r), 308(b), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i) and (j), 301, 303(g) and (r), 308(b), and 309(j).

C. Description and Estimate of the Number of Small Entities To Which the Proposed Procedures Will Apply

4. 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 procedures, if adopted.⁴ The RFA defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental entity” under Section 3 of the Small Business Act.⁵ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small

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

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ 5 U.S.C. § 603(b)(3).

⁵ *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, 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.”

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

5. *NCE FM Radio Stations.* The proposed application limit will apply to potential licensees of the 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 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 NCE FM radio stations to be 4,197.¹² Because NCE licensees must be non-profit, we will presume that all are small entities.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

6. We anticipate that none of the changes adopted as a result of the Public Notice would result in an increase to the reporting and recordkeeping requirements of broadcast stations or applicants for NCE FM authorizations. As noted above, we invite small business entities to comment in response to the Public Notice.

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

7. 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): (a) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (c) the use of performance, rather than design, standards; and (d) an exemption from coverage of the rule, or any part thereof, for small entities.¹³

8. We are directed under law to describe any alternatives we consider, including alternatives not explicitly listed above.¹⁴ The Public Notice describes and seeks comment on a proposed limit on the

⁶ *Id.*

⁷ 15 U.S.C. § 632.

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.

¹¹ *Id.*

¹² See *Broadcast Station Totals as of June 30, 2020*, available online at <https://www.fcc.gov/document/broadcast-station-totals-june-30-2020>.

¹³ 5 U.S.C. § 603(c).

¹⁴ 5 U.S.C. § 603(b).

number of new NCE FM applications that may be filed during the filing window described in the Public Notice. The proposed limit is intended to benefit all small NCE entities seeking to establish a new NCE FM service on a local or regional basis by preventing mass filings of speculative applications. The proposed limit should benefit applicants by expediting the review and processing of applications filed during the window. The proposed limit does not impose any significant compliance or reporting requirements because it would merely set a limit on the number of applications for new NCE FM authorizations that a party could file during the window. Accordingly, we are not aware of any alternatives that would benefit small entities. We encourage small entities to comment on the proposed limit described in the Public Notice.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Limit.

9. None.