

COMMENTS OF REC NETWORKS

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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC

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

COMMENTS OF REC NETWORKS

I. INTRODUCTION

1. REC Networks (“REC”) is a leading advocate for a citizen’s access to spectrum with a heavy focus on the Low Power FM (LPFM) broadcast stations as well as the full-service noncommercial educational (NCE) broadcast stations. REC acknowledges the Media Bureau’s (Bureau) efforts that have gone into the preparation of this *Notice of Proposed Rulemaking* (NPRM) which addresses many of the issues that Bureau staff encountered during the 2007 NCE reserved-band filing window, the 2010 NCE commercial band filing window and the 2013 LPFM filing window. The Bureau has also included a few items raised by REC in both the *Media Modernization Initiative*¹ and reiterated in REC’s *Petition for Rulemaking*.²

2. With the exception of one item which we will discuss in more detail, the proposals in this NPRM are non-controversial in nature and address some of the issues encountered by applicants, grantees, licensees and Bureau staff in the aftermath of the 2007 reserved-band NCE window, 2010 commercial-band NCE window and 2013 LPFM windows. We will discuss each proposal in detail.

¹ - MB Docket 17-105.

² - RM-11810. REC acknowledges that many of the issues raised in RM-11810 are not addressed in this specific NPRM and that the Bureau may address those in a future proceeding.

II. PROPOSED CHANGES TO THE NCE COMPARATIVE PROCESS

A. Eliminate Governing Document Requirements for Established Local Applicants

3. The Commission is seeking comments to on eliminating the documentation requirements to demonstrate a local applicant for localism points. This can include corporate materials from the secretary of state, list of names, addresses and length of residence of board members, copies of governing documents requiring a 75 percent local governing board, and course brochures indicating that classes have been offered at a local campus in the preceding two years.³ The Commission seeks comments on whether this is a reasonable solution or if it would create additional problems.⁴

4. In lieu of the Localism Governing Document requirement, the Commission proposes to safeguard localism goals by incorporating into the current holding period rule, a new provision explicitly requiring any prevailing applicant that receives localism points during the point system analysis to maintain localism for the period from when the construction permit was granted until the station has achieved four years of on-air operations.⁵ The Commission questions whether a pledge to maintain localism on Form 340 would be sufficient. Alternatively, the Commission asks if it should retain the Localism Governing Document solely for the category of applicants relying on board member residence addresses.⁶

5. In the 2013 LPFM window and afterwards, we saw a considerable number of false claims of localism where applicants included residential addresses of people who are not really board members including some who didn't know their name was on an application. This also includes applicants claiming localism by virtue of 75% percent of their board members residing within 10 or 20 miles of the transmitter using business or other addresses.⁷ Likewise, unauthorized locations were used for claims of localism by virtue of headquarters or campus location.⁸ While the specific question at hand deals with (full-service)

³ - NPRM at 21.

⁴ - NPRM at 27.

⁵ - NPRM at 27.

⁶ - See Id.

⁷ - See *Lufkin Iglesia Cristo Viene*, BNPL-20131113ABL, Letter (March 1, 2016). (*Applicant used church as a residential address for two board members.*)

⁸ - See *Lake Charles Iglesia Cristo Viene*, BNPL-20131114BLF, Letter (March 1, 2016). (*Applicant used a Catholic Church as headquarters. Staff contacted the church who stated that applicant was never headquartered at that address.*)

NCE, a part of REC's priorities with the LPFM service is to bring the service's rules on a more level playing field with other services. In the 2013 LPFM window, we saw applications granted despite the lack of articles of incorporation⁹, post office box numbers¹⁰ and even in some cases, the application was granted without any residence addresses at all, despite specific instructions on the form to include addresses.¹¹

6. REC's position for LPFM is that the Commission needs to better enforce the localism rules and likewise, similar standards can be applied to both NCE and LPFM. In the NCE case where localism is being used for points and the claim is on virtue of the residence addresses, then it is important that a copy of the articles of incorporation or similar legal document is provided. In the case of LPFM, such a document should be required on all applications where a claim of localism under §73.853(b)(2) is made.¹² For a claim of a campus or headquarters within the designated local area¹³, then evidence of the headquarters or campus should be able to be satisfied through brochures demonstrating the campus has existed, copies of lease/rental agreements or in the case of LPFM stations with headquarters in private residences, a copy of the articles of incorporation showing the headquarters address for one of the board members. In no case, shall the Commission accept a post office box as well as a mailing service that uses street addresses (such as a UPS Store) to satisfy either the residential address or headquarters/campus address requirement. REC also feels that it would be best if both Forms 318 and 340 are amended to include space for a designated

⁹ - See Note 22 *infra*.

¹⁰ - See *Center Pole, Inc.*, BNPL-20131113BIQ (granted January 15, 2014) (*4 of 6 board members designating a P.O. box as their residential address and headquarters is P.O. box*); see also *Monroe County Broadcasters*, BNPL-20131115ASU (granted January 15, 2014) (*single board member with PO Box, headquarters address also PO Box, no articles of incorporation included*);

¹¹ - See *Dover-New Philadelphia Educational Broadcasting*, BNPL-20131018ACO. (None of the parties to the application listed their residential addresses despite Form 318's directive that name and address is provided for each party.) See also *Hope & Healing Ministries*, BNPL-20131021ABG. (*None of the parties to the application listed their residential address and the mailing address is a post office box. The listing of a main studio address was the only indication of any physical presence.*) See also *George A. Thompson Post 878*, BNPL-20131113BSE (*No residential addresses, mailing address a PO Box, main studio address a non-existent street address coupled with the mailing address PO Box*).

¹² - See 47 C.F.R. §73.853(b)(2) (*states that an organization that has 75% of its board members residing within 16.1 km (10 miles) of the proposed site for the transmitting antenna for applicants in the top 50 urban markets, and 32.1 km (20 miles) for applicants outside of the top 50 urban markets, it would meet the localism requirement for the LPFM service.*)

¹³ - Within 25 miles of the reference coordinates for the community to be served for NCE stations and for LPFM stations, within 16.1 km (10 miles) of the proposed site for the transmitting antenna for applicants in the top 50 urban markets, and 32.1 km (20 miles) for applicants outside of the top 50 urban markets. See also 47 C.F.R. §73.853(b)(1) and §73.7000.

headquarters address.¹⁴ As an alternate, it could be specified as a line in the “Parties to the Application”.¹⁵ This consistent policy will assure that there is as close to a level playing field between both NCE and LPFM and will result in more efficient handling for staff.

B. Eliminate Governing Document Requirements for Applicants Claiming Diversity Points

7. Currently, the Commission requires applicants claiming points for diversity to include a contour map or statement demonstrating that they do not hold any attributable interest in a nearby station. It also requires applicants to include in their bylaws that broadcast diversity be maintained and finally, it requires documentation of their diversity qualifications be placed in the public inspection file.¹⁶ In the NPRM, the Commission proposes to eliminate the requirements that “diversity must be maintained” in the organization’s bylaws and also removes the public file documentation requirement.¹⁷

8. The LPFM service currently has a strict broadcast diversity rule which limits the licensee, in most cases one station and no more than two commonly-owned translators.¹⁸ LPFM stations may use diversity to demonstrate their first entry into broadcasting.¹⁹ REC agrees that in NCE, the bylaw requirement is not warranted and can be demonstrated and enforced through other means as demonstrating a lack of a nearby commonly-owned station. With that said, REC supports the Commission’s proposal to eliminate the bylaw and public file document requirement as they apply to NCE.

C. Establish Uniform Divestiture Pledge Policies

9. Current Commission policy awards diversity of ownership points if an applicant can certify that the principal community contour of its proposed station does not overlap with those of any other party

¹⁴ - If this method is used, the CDBS raw data feed should be modified to include this information for open data users.

¹⁵ - See Form 318, Section II, Question 3a. Also, see Form 340, Section II, Question 6(a).

¹⁶ - NPRM at 28.

¹⁷ - NPRM at 31.

¹⁸ - Tribal applicants may hold up to 2 LPFM stations and up to 4 translators (§73.860(c)), accredited educational institutions may hold full-service stations and an LPFM license if the LPFM station will be managed and operated on a day-by-day basis by students (§73.860(d)) and not-for-profit organizations and governmental entities with a public safety purpose may be granted multiple LPFM licenses (§73.853(c)).

¹⁹ - See 47 C.F.R. §73.872(b)(5).

to the application which holds an attributable interest based on their qualifications at the close of the filing window.²⁰ The Commission has carved out exceptions so divestiture pledges can be in the cases of organizations that currently have a non-fill-in translator, Class D station or an LPFM station in the same area as the proposed NCE station contingent on the divestiture of the other facility prior to program test of the full-service NCE station.²¹ In the NPRM, the Commission proposes that all contingent divestiture pledges that are made and submitted in the application by the close of the filing window will be credited.²²

10. REC projects that when the Commission opens a filing window for new full-service NCE-FM reserved band stations, there will be participation from existing LPFM stations wishing to “upgrade” to a full-service facility. Currently, the process involves the LPFM licensee disclosing on Form 340 of the attributable interest. Prior to the program testing of the full-power station, the grantee must divest of their LPFM station through assignment or cancellation.²³ This is regardless of the service area of the full-service station in respect to the LPFM station.²⁴ We need to make sure that the divestiture process for LPFM licensees seeking NCE-FM stations (and vice versa) remain in effect, thus contingent on program testing or consummation of the new facility.

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

11. The Commission is considering changing the NCE time sharing rules to set a 90-day deadline for voluntary time share agreements similar to that in the LPFM rules.²⁵ The Commission is also

²⁰ - NPRM at 33 citing 47 C.F.R. §73.7003(b)(2).

²¹ - NPRM at 34 citing 16 FCC Rcd. 5102-5103 at paras. 84-85 (translators), 22 FCC Rcd. 6120, para. 47 (Class D stations) and 25 FCC Rcd. 8798, paras. 12-13 (LPFM stations).

²² - NPRM at 35.

²³ - 47 C.F.R. §73.860(a) prohibits cross-ownership of an LPFM station and another broadcast station. Id. At (b) allows for a limited cross-ownership of FM translators and Id. At (e) permits cross-ownership where the LPFM station is operated by the students of an educational institution.

²⁴ - While the NPRM does not specifically address this, but such a divestiture statement is also necessary if an LPFM station wishes to obtain a full-service station through assignment or transfer. This is to assure compliance with 47 C.F.R. §73.860. REC does note that the Form 314 instructions does not include any information on the LPFM cross-ownership rules. We do feel that this instruction should be added to require such a statement in order to remind LPFM licensees that they must divest of their LPFM station prior to consummation of the assignment or transfer.

²⁵ - NPRM at 44.

looking at other time-sharing rules similar to LPFM such as a revised involuntary time-sharing policy which includes the possible aggregation of points²⁶.

12. REC does support policies that bring NCE and LPFM on a more level playing field. In the discussion on LPFM time-sharing in these comments *infra*, REC will make some recommendations for enhancements to the LPFM time-share process of which, many of the proposed enhancements could also apply to NCE stations.

III. PROPOSED CHANGES TO THE LPFM COMPARATIVE PROCESS

A. Prohibit Amendments to Cure Section 301 Violations by Application Parties and Reclassifying Gradual Board Changes as Minor

13. Citing a couple of cases that happened in the aftermath of the 2013 LPFM Window, the Commission acknowledges that there is no codified rule to prohibit the removal of a party to an application through *nunc pro tunc* amendment if that party was found to have engaged in unlicensed operation in violation of §301 of the Communications Act despite past precedence.²⁷ The Commission is also proposing to allow for gradual changes in board members over the pendency of an application to be considered a minor change.²⁸

14. REC agrees with the Commission's proposal to prohibit the removal of party members *nunc pro tunc* as this will avoid applicants to use amendments to "change the past". We feel though that this rule should be expanded beyond just unauthorized operation but should include any kind of change to parties of the application in order to cover other issues such as inconsistent applications, parties who lack candor to be Commission licensees, parties with non-existent or incorrect residential addresses, parties that do not exist, parties eventually discovered to have an unauthorized undisclosed attributable interest and parties who have been determined to not be actual parties to the application. 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.

²⁶ - NPRM at 45-46.

²⁷ - NPRM at 53-55 citing *Taklima 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 by removing principals that participated in the unlicensed operation of a radio station.*")

²⁸ - NPRM at 67.

15. REC supports 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 from the original application. However, as with our position on *nunc pro tunc*, any changes in the board members can't be used to "change the past". Overall, the Audio Division needs to be more diligent in reviewing applications to assure that articles of incorporation or other evidence of nonprofit status is included with the application.²⁹ During the pendency of the 2013 LPFM window, we saw cases where board members were changed on applications but were not changed on state documents.³⁰ To prevent the speculation and other issues that took place in the 2013 LPFM window, it is REC's position that during the application process (as well as during the assignment process), any changes in board members must include updated state documentation to reflect the new board structure or a legal explanation why providing a revised state filing cannot be accomplished during the filing process.³¹ We feel that a requirement that the board membership showing on an application at the time of grant matching the state corporation filing at the time of application grant will address many of the concerns related to illicit attempts to "gain control", either internally or externally as well as address the issues raised in *Costa Mesa* where a questionable change of control took place during the pendency of the construction permit application. With the speculation that took place on about 10 percent of all applications filed in the 2013 LPFM window, it demonstrates that in order to maintain integrity in the service, we can't rely on "self-certification", especially when willful acts of false certification result in nothing more than an admonishment and a dismissed application. We must insist on supporting documentation from applicants. Therefore, it is necessary, in the public interest to substantiate supporting documentation with any board member change during the application process in order to assure

²⁹ - See *Bohica*, BNPL-20131112BDP ("Bohica") (*application granted with only a statement that the organization is a "no profit [sic] so [sic] that has been involved in the Hyden and Leslie Co [sic] community since 4/15/2011" and no supporting documentation from a state agency or an appropriate claim of an unincorporated association was included*); also see *Kingsford Community Radio*, BNPL-20131023ADI (*Statement that the organization has corporate status but no corporate documents were attached to the application*); See also *Ministerios El Jordan*, BNPL-20131025ACN (*No corporate documents, only a statement.*); See also Form 318, Instructions, Question 2, Subsection 2(a) ("*Applicants must submit complete copies of the documents establishing their nonprofit status, such as corporate charters or articles of incorporation. Applications that fail to provide these materials are subject to dismissal.*")

³⁰ - See *Costa Mesa Hispanic Community Radio*, BNPL-20131112AEK (dismissed by letter, June 6, 2017) ("*Costa Mesa*") REC Networks Supplement to Informal Objection at 1-2 (*failure to update Texas state records to show a six-member board of directors alleging the possibility the application was speculatively filed for with the intention of "selling the facility to another party."*)

³¹ - We acknowledge that some states have laws or regulations that do not require that the state be notified through filing whenever there is a change in the board of directors and such update is only required at the filing of the annual report. It would be acceptable to cite that regulation in lieu of providing evidence with the state that the board membership was changed.

that at the time the grant, the board shown on the Form 318 application is the same one that is known to the state.

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

1. “Point Stacking” Was an Issue in the 2013 LPFM Window

16. The Commission is proposing to change LPFM time share agreement rules to permit point aggregation discussions and agreements at any point before the Bureau implements the involuntary time-share procedures, including prior to tentative selectee designations, if any such agreement is conditioned on each of the parties subsequently achieving tentative selectee status.³² This includes whether there should be a limit on the number of time share proponents in order to prevent point stacking.³³ The Commission also is considering changes to the air-time reapportionment policy which is suggesting the potential for a “mini-window” for filings for the abandoned airtime by new entrants.³⁴

17. During the 2013 LPFM filing window, the issue of “point stacking” was huge in MX groups in Philadelphia as well as the largest MX group, #27 in Los Angeles. In the latter case, it was alleged that a group of applicants joined together to file multiple applications as evidenced by boilerplate exhibits filed by each proponent. Under a special arrangement, those applicants were moved to other channels.³⁵

18. In other cases, points were stacked by filing more than one application under different organization names and then during the settlement period, file a time share agreement to aggregate points and place one proponent with viable hours and another with non-viable hours. This happened in Boston in MX Group #185, a group that originally had 7 proponents. One applicant was dismissed prior to the announcement of MX applicants and two other applicants were able to find an alternate channel and were

³² - NPRM at 57.

³³ - NPRM at 59.

³⁴ - NPRM at 61.

³⁵ - Since the first of these stations has been licensed, it has been the subject of controversy. See *Machine Project*, Petition for Reconsideration, BMPL-20170612ACF et. al., Letter at p. 11 (“Nevertheless, the facts of this case highlight that [Machine Project] has not been meticulous in defining particularly the role of [Alejandro] Cohen [of Future Roots] vis-à-vis KZUT-LP operations...”. Future Roots was the applicant that had the most time allotted in the group in one of the Los Angeles MX #27 groups where there were 4 other applicants specifying 12 hours per week thus aggregating a total of 25 points); See also *Machine Project*, Notice of Violation, File No. EB-FIELDWR-17-00024883 (EAS violations including not addressing failed RMT reception and monitoring sources not specified in the State EAS Plan.)

able to break out of the MX group. Of the remaining tentative selectees, Zumix, Inc.³⁶ and Winthrop Art Association (“Winthrop”)³⁷ reached a time share agreement which specified that Winthrop would operate between 12 midnight and 5AM and Zumix would have the remaining hours. As a result, Zumix and Winthrop were able to aggregate points resulting in two applicants being dismissed as non-tentative selectees. Zumix and Winthrop would co-locate and license their constructed facility on the same day and use similar call signs.³⁸ Currently, there are stations in Los Angeles³⁹ and Miami⁴⁰ that due to time share agreements are only authorized to operate during a period between midnight and 6 AM. §73.872(c)(1)(iii) requires that each proponent in a time-share agreement must proposed to operate for at least 10 hours per week.⁴¹ In the Philadelphia case, two of the proponents of the winning group only proposed 10 hours of weekly operation with three proponents operating from a common location.⁴²

19. REC feels that the Commission should approach this issue with great caution, especially given the issues that came up in the 2013 LPFM window that we have already discussed here. While REC opposes point-stacking, we do feel that the Commission may have presented an acceptable backstop, which, if implemented correctly, could make point-stacking a less attractive option as well as open opportunities for new entrants between major filing windows. REC supports the Commission’s concept of requiring “abandoned” time from a time share group to be made available in a “mini-window” instead of being

³⁶ - Facility No. 194385.

³⁷ - Facility No. 196674.

³⁸ - For Zumix, see BLL-20160929AGC, call sign WZMR-LP. For Winthrop, see BLL-20160929ALJ, call sign WZMW.

³⁹ - See *Echo Park Film Center*, Facility ID # 196192, BNPL-20131114BEK (granted April 25, 2016) (authorized to operate Mondays between 1AM and 5AM and Tuesday through Saturday between 1AM and 3AM). Also see *Future Roots, Inc.*, Facility ID #196172, BMPL-20170329AAA (granted April 10, 2017, original permit granted April 25, 2016) (authorized to operate Tuesday through Saturday between 3AM and 5AM and on Sundays from 1AM to 5AM). See also *Prism Church of Los Angeles*, BNPL-20131114AYY (granted May 2, 2016) (authorized to operate Monday through Friday between 2AM and 5AM and on Sundays between 6AM and 10AM).

⁴⁰ - See *Actions for a Better Future*, Facility ID #196997, BLL-20180807ADM (authorized to operate Monday through Friday between 2AM and 4AM).

⁴¹ 47 C.F.R. §73.872(c)(1)(iii).

⁴² - See *Germantown United Community Development Corporation*, Facility ID #195118 (authorized to operate Thursday between 10AM and 1PM, Friday between 12 midnight and 1AM, Friday between 10AM and 1PM and Sunday between 12 noon and 3PM.) See also *Germantown Life Enrichment Center*, Facility No. 195802 (authorized to operate on Thursday between 12 midnight and 1AM, Thursdays and Fridays between 1PM and 4PM and on Saturdays between 12 noon and 3PM) (Collectively, “Germantown Stations”).

distributed among the surviving licensee(s). If anything, the proposed changes to time share agreements being introduced by REC in this pleading may alleviate the need for the Commission's proposed change to permit point aggregation prior to the release of the MX groups as the proposed changes by REC would discourage any kind of "consortia" or organized time-share strategies that existed in the 2013 window.⁴³

2. Time Share Proposals Must Be Viable for All Applicants

20. In the event of a future mini-window, we must have opportunities that are viable. No one is going to file for 10 hours between 2AM and 4AM, five days a week in a window and really build the facility. We must also develop a backstop that prevents the behavior of filing for only 10 hours in order to "stack the deck". REC proposes that the Commission change the time share proposal rules to require each time share proponent to propose a minimum of 36 hours per week.⁴⁴ On each day of the week a time share proponent operates, a minimum of 5 contiguous hours must be specified between 6 AM and 12 midnight on at least 5 days per week. In addition, all time between 6AM and 12 midnight, Monday through Sunday must be negotiated and assigned to a proponent.⁴⁵ There cannot be any vacant time between 6AM and 12 midnight.⁴⁶ Any subsequent time share agreement would also be required to follow this same "36/5/5 Rule". This will assure that each time share proponent will have at least 5 hours a day of operation between 6 AM and 12 midnight on at least 5 days per week and if the application or license is cancelled, the mini-window will be for a minimum of 36 hours including at least 5 hours a day during viable portions of the day, thus making the proposed facility more attractive to new entrants. This minimum time share standard is more consistent with the minimum operating schedule requirements of §73.850(b).⁴⁷ With these time-share

⁴³ - The concept of "consortia" was proposed in the *Fourth NPRM*, 27 FCC Rcd. 3315 at para. 62.

⁴⁴ - The Viable Time Share concept was discussed with staff subsequent to the release of the draft NPRM being released and prior to the NPRM being adopted. See REC Networks *ex parte* presentation, dated February 1, 2019.

⁴⁵ - Because some LPFM stations are operated by educational institutions, it may not be in the public interest to fill in all time periods seven days per week. Perhaps it may be more in the public interest to only apply this requirement on weekdays thus requiring that all time between 6AM and 12 midnight, Monday through Friday (or Monday through Saturday) must be assigned to a time share proponent.

⁴⁶ - A time share agreement that has unallocated time between 12 midnight and 6AM would still be acceptable and a future time share agreement would be required if any proponent wishes to occupy any of that time. Operation between 12 midnight and 6AM would count towards the 36 hour per week minimum but would not count towards the 5 hours per day requirement nor the requirement to operate 5 days per week.

⁴⁷ - 47 C.F.R. §73.850(b) ("All LPFM stations are required to operate at least 36 hours per week, consisting of at least 5 hours of operation per day on at least 6 days of the week.") For the purposes of time share agreements, REC is not expecting time-share LPFM stations to operate a minimum of 6 days per week as long as the minimum hours per week is 36 or greater of which, 5 hours on a calendar day that the LPFM station operates must be between the hours of 6AM and 12 midnight.

minimum standards, by design, the number of time-share proponents will never exceed 3. This is because there is only 18 hours during the viable period of the day (6AM to 12 midnight) and each time share proponent must propose at least 5 hours within the viable period of the day on broadcast days the station is scheduled to broadcast.⁴⁸ There are no restrictions or requirements on the time in the non-viable portion of the day (12 midnight to 3AM and 3AM to 6 AM) as long as the minimum hours in the viable period are met. Finally, to prevent point-stacking, all time share agreements must propose all proponents operating from a different transmitter site with a minimum separation (for example, a minimum of 500 meters) from the other proponents.⁴⁹ This will assure that aggregated time share groups would be more likely to include two or three truly independent groups and not two groups operating like one, as we have seen following the 2013 LPFM window.⁵⁰

3. Sample Operating Schedules

21. The following chart is a weekly time schedule of a 3-proponent time share group where all time has been equally distributed among all three stations and in a manner which meets the REC proposed “36/5/5” Rule:

	VIALE OPERATING PERIOD (5 HOURS PER OPERATING DAY REQUIRED)																								
	3A	4A	5A	6A	7A	8A	9A	10A	11A	12N	1P	2P	3P	4P	5P	6P	7P	8P	9P	10P	11P	12M	1A	2A	3A
Monday	STATION A										STATION C								STATION B						
Tuesday	STATION A										STATION C								STATION B						
Wednesday	STATION A										STATION C								STATION B						
Thursday	STATION A										STATION C								STATION B						
Friday	STATION A										STATION C								STATION B						
Saturday	STATION A																	STATION B							
Sunday	STATION B										STATION C														

⁴⁸ - For the purpose of this proposed rule, a “broadcast day” runs from 3AM to 3AM local time. For example, a time share proponent that proposes to operate after 12 midnight after meeting its 5-hour minimum can operate until 3AM and not be obligated to operate 5 hours in the viable period on Tuesday (as long as the 36 hour weekly minimum is met).

⁴⁹ - This proposed change will render a portion of §73.870(a) and all of §73.871(c)(6) to be obsolete and REC will propose changes to these rules in order to implement Viable Mini-Windows. These rules permit a minor move of over 5.6 kilometers in order to allow an LPFM station that is in a time share agreement to co-locate with another LPFM station in the same time share agreement. Since we are proposing a prohibition on co-located time share facilities, these rules are obsolete.

⁵⁰ - As an alternative to a complete restriction on co-located time share proponents, it could be possible to permit co-located time share proponents, however in the event of co-location (or site within 500 meters), points for the co-located proponent(s) would not be aggregated and the community presence date of the oldest organization would be used in the event of a tie.

In the following example, Station A is a public or private high school with a student radio lab. The station is on the air during school hours but is extended on Fridays for sports or other school events. Station C has no desire to operate overnight. Station B is permitted to operate overnight on Friday as they have no time scheduled in the viable period (they have Saturday and Sunday instead). In this case, all stations meet 5 hours per day and 5 days per week in the viable period and a minimum of at least 36 hours overall:

	VIALE OPERATING PERIOD (5 HOURS PER OPERATING DAY REQUIRED)																								
	3A	4A	5A	6A	7A	8A	9A	10A	11A	12N	1P	2P	3P	4P	5P	6P	7P	8P	9P	10P	11P	12M	1A	2A	3A
Monday				STATION A									STATION C						STATION B						
Tuesday				STATION A									STATION C						STATION B						
Wednesday				STATION A									STATION C						STATION B						
Thursday				STATION A									STATION C						STATION B						
Friday				STATION A																		STATION B			
Saturday													STATION C						STATION B						
Sunday													STATION C						STATION B						

4. Guidelines for the “Mini-Window”

22. First, to maximize the future opportunities for new-entrants, REC proposes that the air-time reapportionment period not be limited to a certain time period. By keeping this time share group permanent, we are maintaining as many opportunities as possible for new voices, especially in areas where there is limited spectrum for LPFM stations. The four-year holding period would not assure this opportunity for future generations. With the limited spectrum available, the most effective use of the spectrum would be to bring fresh new entrants in the event of an abandonment.

23. REC foresees a “mini-window” process that following the finality of a dismissal, cancellation or revocation, the vacant time that was abandoned by the previous permittee/licensee would be provided as a single assignment in a “winner take all” format. In this process, mutual exclusivity would first be resolved using the existing point system. If a tie remains, then the *documented* local presence date is used to declare a winner. In metro markets other than those where LPFM stations outnumber FM translators within a 30x30 (or 20x20) minute grid, mutual exclusivity could also be resolved through breaking out of the MX group by an adjacent or non-adjacent channel change.⁵¹ Also, no new time share agreement with the remaining licensee(s) may be negotiated until after the construction permit is granted.

⁵¹ - Based on a “channel point” report similar to one conducted by the Commission in 2012, markets that may have more LPFM stations than translators (including granted and proposed Auction 99/100) in their respective grid includes: Miami, FL (#11), Portland, OR (#22), Sacramento, CA (#27), McAllen, TX (#56), Tucson, AZ (#62) and Killeen, TX (#141). Such an evaluation may be necessary to meet the requirements of Section 5 of the Local Community Radio Act of 2010, Pub. L. No. 111-371, 124 Stat. 4072 (2011).

24. In the event of two of the three “slots” being abandoned in a single time-share group, then a more traditional time-share agreement can be negotiated including point aggregation. In this case, both time-share proponents must propose a schedule in accordance with the “36/5/5” Rule and applicants with the same number of points may aggregate their points. Time share agreements must propose only the vacant hours. The remaining licensee in the group may not propose a new time share agreement involving one or more of the tentative selectees. Once the construction permits are awarded, the existing and new time share proponents may negotiate an agreement that meets the “36/5/5” Rule requirement.

25. In a “mini-window” the original construction permit application must specify a facility that is mutually exclusive to one or more LPFM stations that are in the same time share group, are not mutually exclusive with any LPFM station not within the time share group and otherwise meets all minimum distance separation requirements under §73.807 of the Commission’s Rules.

26. Overall, 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.

5. Involuntary Time Share Schedules

27. Currently, §73.872(d)(2) specifies the involuntary time share periods. In the event of two proponents, the time slots are from 3:00AM to 2:59PM and from 3:00PM to 2:59AM. In the event of three proponents, the time slots are from 2:00AM to 9:59AM, 10:00AM to 5:59PM and from 6:00PM to 1:59AM. In order to best accommodate the proposed “36/5/5” Rule, REC proposes a one-hour shift on the three proponent time-share periods. This would make the time slots from 3:00AM to 10:59AM, 11:00AM to 6:59PM and 7:00PM to 2:59AM. This assures that all involuntary time slots have the minimum of 5 hours during the viable operating period and continues to give an incentive to the tentative selectee with the oldest community presence date if they wish to take the “11-7” time slot.

6. “Non-Renewable” Status of Involuntary Time Shares

28. REC is aware of one involuntary time share remaining from the 2013 LPFM Window.⁵² The “threat” of an involuntary permit has led to time share proponents reaching agreements either before or after the original construction permit grant. Current Commission culture is that if after the grant of a non-renewable time share group, the Bureau will remove the time share condition as well as the non-

⁵² - See MX Group #96, Barry University (Facility ID #192433) and Iglesia Misionera Pregoneros de Justicia de Florida, Inc. (Facility ID #194335).

renewable condition and reapportion the time to the remaining licensee. If the “mini-window” concept is enacted, a decision will need to be made on surviving stations from a non-renewable time share if one station is cancelled or revoked for reasons other than a non-renewable time share. Since time will not be reapportioned to the existing licensee but instead will be made available through window and if the surviving licensee is considered non-renewable, then the time share group will have one renewable and one non-renewable licensee as the new license will be granted based on a “winner take all” method where no timeshare agreement is involved. We question whether the threat of a non-renewable license is an effective deterrent. REC feels that the Commission should consider removing the non-renewable requirement for involuntary time share groups.

7. Status of Time-Shared Spectrum Made Vacant Through Cancellation

29. The concept of the “mini-window” also brings up an issue regarding the relationship between LPFM stations and subsequently authorized FM translators as well as subsequently authorized full-service FM broadcast stations. Today, when a license or permit is cancelled or dismissed, and that action is eventually finalized, that spectrum becomes available for secondary use for FM translators that can use contour overlap methods to obtain the available spectrum they need. Also, translators can be placed in a manner where they fully protect LPFM stations through contours however in the other direction, the LPFM would be short-spaced to the subsequently authorized translator facility. This type of activity taking place before or after the cancellation of the LPFM will completely hinder the viability to reapportion the spectrum for a “mini-window”.

30. In the event of a reapportionment to prepare for a “mini-window”, REC suggests that the previously cancelled facility parameters be protected as a “current” facility in CDBS. During a “mini-window”, if the previous station is currently §73.807 short-spaced to FM translators or full-service FM stations, then the proposed facility may continue to be short spaced as long as the spacing towards the short-spaced facilities is not reduced. This should not be an issue for FM translators as in can be argued that Section 3(b) of the LCRA does not apply to LPFM protecting FM translator stations as FM translator and FM booster stations are not considered “full-service FM stations”, as mentioned in the LCRA. There may be a statutory issue if a subsequently authorized full-service station is short-spaced with the recently cancelled LPFM facility subject to reapportionment. It is REC’s position that if the spectrum remains “reserved” and the facility remains “current” status in CDBS, then a facility should be permitted to replace it (no different than a station going silent and then resuming operations in 364 days).

31. Looking in the other direction is assurances necessary that the spectrum for the future “mini-window” is protected in the secondary service sector. REC does feel that LPFM “allotments” subject

to the “mini-window” should receive protection from the previously cancelled geographic coordinates and at “maximum permitted facilities” as described in §74.1204 note to paragraph (a)(4). This will assure that the new LPFM station could at the minimum be able to place a 100 watt (or maximum ERP based on HAAT) at the previous coordinates. There should be no limit to the location where a “mini-window” station can apply for other than that it must specify a facility that is mutually exclusive to the incumbent licensee. Despite that, it is our concept that only the area that is protected after cancellation and up to the conclusion of the application freeze following the “mini-window” is the maximum permitted facility at the coordinates of the cancelled LPFM facility.

8. More than One Potential Grantee

32. While rare, a situation may come up where the Commission may receive two or more applications during the “mini-window” which are mutually exclusive to the incumbent LPFM station(s) but not mutually exclusive to each other. In such a situation, the applicant stations are 24 km apart from each other on co-channel or 14 km apart from each other on first-adjacent channels but are still mutually exclusive with the incumbent and they meet all §73.807 minimum separation requirements in respect to other primary and secondary FM facilities. In this case, it would be possible to allot the vacant time to each of the stations while the incumbent station would keep their hours. In this case, each applicant would be considered in its own “group”. If there are any equally qualified applicants that are mutually exclusive to another applicant, then the previously proposed “winner take all” process would be used to determine the tentative selectee. While this is a complex arrangement, REC does support it as it will bring opportunities for more voices on the air. Overall, REC does encourage the Commission to reexamine rules and policies regarding mutual exclusivity and reconsider the current band on “secondary MX groups” and other arrangements that, while complex, can bring more local voices to the air. REC is willing to work with Staff to help improve the MX policy.

9. Summary on Future Time Share Agreements

33. Of all of the issues that took place following the 2013 LPFM filing window, this was the only issue that went judicial, therefore, REC can understand the Commission’s desire to address this. However, the issue went judicial in Philadelphia and the issue in Los Angeles with MX Group #27 was escalated so far because of alleged negotiations that took place prior to the close of the filing window. REC does feel that the current 10-hour minimum rule is a catalyst for the point-stacking gamesmanship that took place in the 2013 window. The Commission’s recommendation of establishing a “mini-window” instead of allowing surviving proponents to reapportion any abandoned time would be the best method to prevent gamesmanship in the future. REC supports the “mini-window” concept, however we support it only if the

abandoned time slots are actually viable to support a window and be attractive to a future new entrant. With that, we have supported a new standard for future time share agreements that have the following requirements:

- All time share proponents must specify a minimum of 36 hours per week.
- All time share proponents must specify operation between 6AM and 12 Midnight on at least 5 days per week.
- On days that a time share proponent is operating between 6AM and 12 Midnight, they must operate a minimum of 5 contiguous hours on that day.
- All time share agreements must include no unallocated time for any proponent between 6AM and 12 Midnight, Monday through Sunday. (*Alternative: Monday through Friday or Monday through Saturday*)
- Operation between 12 Midnight and 6AM counts towards the 36-hour minimum but not towards the daily 5-hour requirements.
- No time-share agreements with more than 3 proponents (by natural design based on the guidelines proposed).
- All future time-share proponents must maintain a minimum separation (for example, at least 500 meters) from the other stations in the same time-share group. No co-located transmitter facilities permitted. (*Alternative: permit co-located time share proponents however, point aggregation would not be possible and the “older” organization will be considered for the local presence date in the event of a tie.*)

10. Viable Time-Sharing Schedules could have prevented the issues in the wake of MX Group #304 (Philadelphia, PA 92.9)

34. With these restrictions in place, REC feels that there would be less of a need to conduct any pre-window filing time share negotiation involving point aggregation. In the *Philadelphia* case, the aggregated points for the winning group were inflated as a result of two proponents, the Germantown Stations both specifying 10 hours per week each and co-locating with the intended strong applicant in an effort to better their position.⁵³

35. It is REC’s position that the Commission is completely taking the wrong approach in this case. The Commission’s proposal will actually *encourage* gamesmanship and tarnish the integrity of the

⁵³ - See *Applications for New Low Power FM Stations in Philadelphia, PA*, Memorandum Opinion and Order, 30 FCC Rcd. 13983, *aff’d Nueva Esperanza, Inc. v. FCC*, No. 15-1500 (D.C. Cir. July 2, 2017). (“Philadelphia”).

LPFM service. It remains REC's position that the primary root cause of what lead to the initial outcome in *Philadelphia* was caused by the "loophole" in the current rules that allowed 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. It is REC's position that the way to prevent the next *Philadelphia* is to require each time share proponent to propose a viable schedule over its own dedicated facility.⁵⁴

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

36. In the NPRM, the Commission proposes to codify a procedure under which the Bureau would resume the process of remaining tentative selectees following the dismissal of a tentative accepted time-share agreement through a *second* 90-day period affording all remaining all remaining tentative selectees within the affected MX group a further opportunity to enter a universal settlement or a voluntary point-aggregating time-share arrangement.⁵⁵

37. REC does support the general concept of this "do-over" process that was proposed by the Commission. The proposal in the NPRM, nor the proposed codified rules address the process that would

⁵⁴ - If REC's proposed Viable Time-Share rules were in place for the 2013 LPFM window, an MX group consisting of any one of the Germantown organizations and South Philadelphia Rainbow Committee Center Inc. (SPRC) operating from separate facilities would have still been the successful proposal. In this example, GLEC and SPRC would have an aggregated 10 points while Nueva Esperanza, Inc. (NE) and NAACP Social Justice Law Project (NSJLP) would have also had an aggregated 10 points. Since both proposals had the same amount of points, the group would have proceeded to a tie-breaker. In the tie-breaker, the local presence date of SPRC (1978, 35 years) alone would have exceeded local presence dates of NE (1988, 25 years) and NSJLP (2011, 2 years), thus meaning that any Viable Time Share agreement that involved SPRC would have prevailed over a Viable Time Share Agreement of NE and NSJLP of only 27 years aggregated community presence. The operating schedule that was approved would have not met the Viable Time-Share schedule requirement and would have had to be reasonably modified to meet the REC proposed time share requirement. (The combined Germantown stations operate from Wednesday at 12 noon until Sunday at 11:59PM and SPRC would operate from Monday at 12:00 AM until Wednesday at 11:59 AM.). Further, the originally proposed NE/NSJLP time share agreement only proposed 36 hours per week of service thus leaving a lot of time vacant (and eventually subject to competing time share proposals). If Viable Time Share was in effect for the 2013 window, SPRC, one of the Germantown organizations and either NE or NSJLP could have reached a three-way time share that would have been able to give SPRC and either NE or NSJLP all of the hours they wanted and still gave Germantown a significant number of hours. This would have assured diversity on 92.9 in Philadelphia on a more full-time basis. We do note that the programming today on 92.9 is very diverse, but with Viable Time Share, there would have been a greater opportunity to be more inclusive. It could be speculated that if the Germantown groups did not file 4 commonly-located applications, then NE and NSJLP would have not had to file *Petitions to Deny* thus not tarnishing relations between groups. Even without Viable Time Share, all of the interests in Philadelphia could have been represented on 92.9 if the Germantown groups hadn't stacked the deck.

⁵⁵ - NPRM at 63.

be followed in the event that if, after the “do-over”, what will happen if no time-share agreements are reached in the 90-day public notice period. Our hope is that in the event of this happening, the standard tie-breaker process would apply, and the top-3 applicants would be placed in an involuntary time-sharing group. Also, the NPRM and proposed codified language uses the word “second” and opposed to “subsequent”. REC’s position is that this oversight can be addressed by changing the word “second” to “subsequent” thus suggesting that a loop could be possible. Again, we see the chances of going to a third window very highly unlikely, however we still need a defined process in place to address that happens if no acceptable settlement or time-share agreement is reached after the second or subsequent opportunity is completed, even if the Commission wishes to place a hard-stop after the second public notice and reverting to the next qualified settlement proposal or going to involuntary time-sharing if no additional agreements exist.

IV. PROPOSED CHANGES TO OTHER LICENSING PROCEDURES

A. Clarify Reasonable Site Assurance Requirements

1. Introduction

38. In the NPRM, the Commission is proposing to update Forms 318 and 340 in order to include a certification that the applicant has obtained reasonable assurance of the site’s availability and to retain the site assurance information and make it available to Bureau staff upon request.⁵⁶ Further, the Commission inquires on whether detailed information about site assurance should be included with the original application.⁵⁷

2. Speculation and gamesmanship plagued the 2013 LPFM window.

39. In the aftermath of the 2013 LPFM Window, REC tracked each original construction permit dismissal and assigned a “reason code” for each one.⁵⁸ In the 2013 window, 21 applications were dismissed for a lack of site assurance. In addition, 11 applications filed by Antonio Cesar Guel (“Guel”) were dismissed because the applicant had reasonable assurance to use the specified site when it filed the application.⁵⁹ Of the 21 applications that we have designated as dismissed for site assurance, all of them

⁵⁶ - NPRM at 73-75.

⁵⁷ - *Id.* at 75.

⁵⁸ - This data can be viewed at <https://recnet.com/dismissals>

⁵⁹ - See *e.g.*, *Antonio Cesar Guel*, Letter, 29 FCC Rcd. 5264 (2014). (“Guel LOI”)

were filed by Guel. On December 3, 2013, REC Networks filed an *Informal Objection* against 245 original construction permit applications (“REC Guel Objection”) in an effort to demonstrate a pattern of filing which would suggest the possibility of speculation. Through a public outreach effort, REC did identify approximately 25 applications filed by Guel that were not speculative in nature for which we promptly withdrew our objection resulting in those applications to be granted. In *Costa Mesa Hispanic Community Radio*, amendments were filed to add board members without any supporting documentation to show these board members’ affiliation with the applicant organization.⁶⁰ On February 25, 2016, REC filed a *Supplement* to the REC Guel Objection specifically questioning aspects of the activity taking place in the amendments to the application.⁶¹ The gamesmanship would eventually come to light in *South Miami Hispanic Community Radio*.⁶²

40. The REC 245-applicant Guel Objection received trade media coverage.⁶³ As a result, REC had received many “tips” from members of various communities where these applications were placed. REC has treated these mainly as anonymous tips. One of the most consistent messages received in those tips is that there was a possibility that the applicant did not have reasonable assurance to use the site that was proposed.⁶⁴ REC’s attempt to obtain information, including from major tower companies was not successful due to the tower company’s desire to maintain a level of confidentiality, which is highly

⁶⁰ - See *Costa Mesa Hispanic Community Radio*, BNPL-20131112AEK (dismissed June 6, 2017).

⁶¹ - See *Id.* REC Networks, Informal Objection (February 25, 2016).

⁶² - See *South Miami Hispanic Community Radio*, Letter, BNPL-20131112BEE (July 13, 2017) at 6 (“*The record clearly shows that Lopez provided contradictory information to the Commission. For example, in the First Opposition, Lopez clearly states in his affidavit that there are multiple members of the SMCHR board. However, in the LOI Affidavit, he states that he does not know any of the other directors identified in the SMHCR Application, and no other directors have ever been identified by SMHCR in either filings with the Commission or the [Texas Secretary of State].*”)

⁶³ - See Waits, Jennifer; *REC Networks Questions 245 LPFM Applications Filed By Hispanic Christian Community Network President*, Radio Survivor, December 3, 2013. Retrieved January 21, 2019 from <http://www.radiosurvivor.com/2013/12/03/rec-networks-questions-245-lpfm-applications-filed-by-hispanic-christian-community-network-president/>; also see “*Extreme Similarities*” of LPFM Apps Concerns Advocates, Radio World, February 14, 2014, retrieved January 21, 2019 from <https://www.radioworld.com/news-and-business/extreme-similarities-of-lpfm-apps-concerns-advocates>

⁶⁴ - Many of the applications captioned in the Guel Objection had the characteristics of having the transmitter site at a commercial leased tower site such as American Tower and a headquarters of a church that had no connection with the “applicant”. The latter was substantiated in *Lufkin Iglesia Cristo Viene*, BNPL-20131113ABL, Letter (March 1, 2016) (“*The Bureau staff contacted Southside Baptist Church of Lufkin and was informed that Iglesia has never been headquartered at their church.*”); also see *Lake Charles Iglesia Cristo Viene*, BNPL-20131114BLF, Letter (March 1, 2016) (“*Bureau staff contacted Our Lady, and was informed that Iglesia has never been headquartered at this address.*”)

understandable. Even though we had suspicions of a lack of site assurance in a significant number of the applications, the level of information we had at the time was no more than hearsay and therefore would have not been appropriate to raise on an objection. The Commission's action in the Guel LOI as well as individual actions on various applications demonstrated that a significant number of these alleged speculative applications did not have a reasonable site assurance.⁶⁵

3. Site assurance with documentation is essential for the next window.

41. REC supports not only a certification requirement on original construction permit applications, but also a documentation requirement where the applicant must include certification of site assurance. For property not under the direct control of the applicant, this certification would be a statement prepared by the owner or the management company of the tower or property to be utilized for the transmitter site. The statement must include all of the following:

- The name of the applicant (must match the name on the FCC application);
- The tower/antenna location using either geographic coordinates or an Antenna Structure Registration Number;
- The height (or range of heights) available to the applicant at the time of the statement;
- The name of the owner or management company, a contact person and daytime telephone number for the owner or management company.
- The date which reasonable assurance was obtained.⁶⁶

⁶⁵ - See *Venice Hispanic Community Radio*, BNPL-20131113AAT; *Cadena Radial Elohim*, BNPL-20131113ABD; *Seattle Community Radio*, BNPL20131112ALX; *Appleton Hispanic Community Church*, BNPL-20131112ABZ; *Pecos Iglesia Emmanuel*, BNPL-20131114BSY; *Meza Community Radio*, BNPL-20131112AGM; *Phoenix Community Radio*, BNPL-20131112AHV; *Tacoma Community Radio*, BNPL-20131112BEJ; *Minneapolis Community Radio*, BNPL-20131112AGP; *Union Radial Cristiana Cielos Abiertos Del Rio Texas*, BNPL-20131115ATZ; *Milwaukee Community Radio*, BNPL-20131112AGO; *South Oklahoma City Community Radio*, BNPL-20131112BHU; *North Denver Community Radio*, BNPL-20131112AGX; *Des Moines Hispanic Education Family Foundation*, BNPL-20131114APX; *Centro Mundial de Alabanza, Inc.*, BNPL-20131112ATF; *North Del Rio Hispanic Education Family Foundation*, BNPL-20131115AEV; *Walnut Park Assembly of God of Dallas*, BNPL-20131114BFP; *North Milwaukee North Community Radio*, BNPL-20131112AHD; *North Minneapolis Community Radio*, BNPL-20131112AHE; *North Texarkana Hispanic Education Family Foundation*, BNPL-20131115AON and *Libertad en Cristo*, BNPL-20131112AVA.

⁶⁶ - During the 2013 LPFM window, REC was aware of some consultants who claimed to have letters from major tower vendors such as American Tower claiming that they automatically have "assurance" at any tower site under the control of that vendor. These proposed requirements are intended to address assurance at the individual tower level and such "blanket" letters should never be acceptable in the event that the Commission does adopt a documentation requirement for site assurance.

In cases where antennas and/or towers are being placed on private property in direct control of the applicant, then a statement by the applicant to attest to the ownership of the site is all that is necessary.

4. The Commission must eliminate the site assurance loophole

42. Finally, we do feel that with the gamesmanship that took place in the 2013 Window, the Commission needs to consider extending site assurance requirements beyond the original application but also include any amended applications and modification applications filed prior to the original license grant. This would prevent a scenario where a speculator will certify to the FCC that they have control over the proposed location and then the applicant amends their application to a different site that they may not have access to, especially if the validity of the original site was questionable.

43. Therefore, REC supports the Commission's proposal to require a certification of reasonable site assurance on original construction permit applications and that certification is supported by documentation enclosed with the application thus making the information available for public scrutiny. REC does support an additional initiative to require site assurance documentation on all proposed facility locations prior to the grant of the original license.

B. Streamline Tolling Procedures and Notification Requirements

44. The Commission is proposing to modify tolling procedures for NCE and LPFM permittees by placing into tolling without any previous notification or request by the permittee in cases of conditions on the commencement of operations and the Commission having a direct licensing role in the satisfaction of the condition and for grants subject to administrative and judicial review.⁶⁷ REC agrees with the Commission that this process would not have any impact on LPFM and NCE permittees that may nevertheless decide to construct despite a non-final construction permit grant or unsatisfied condition precedent to commencement of operations.⁶⁸ REC would also support this policy also being extended to LPFM and NCE facilities that are along an international border that were granted prior to receiving the international coordination. This is mainly an issue with Mexico where delays in concurrence from IFT creates a permit condition and uncertainty. By allowing these applications, especially original permits to be granted allow applicants to start "soft" construction such as the choosing of a call sign and some preliminary construction activities that may otherwise be considered "premature" if the construction permit had not yet been granted. Since the IFT communicates with the Commission as opposed as to

⁶⁷ - NPRM at 79.

⁶⁸ - Id.

communicating directly with the grantee, the Commission would be the “gate keeper” of the permit condition. We feel this would be something that the Commission can manage in this process and would be one less burden for the grantee.⁶⁹

C. REC Petitions: Lengthen LPFM Construction Period & Modify Restrictions on the Transfer and Assignment of LPFM Authorizations

45. In comments for MB Docket 17-105 *Media Modernization* and in the *Petition for Rulemaking* that was docketed as RM-11810 (collectively, “REC Comments”), I had provided many arguments in support of lengthening LPFM construction permit periods and making the changes to the LPFM rules related to assignments of licenses and transfers of control. This is a continuing show of support for these initiatives and we refer to our arguments made in the REC Comments to reflect our current positions on these issues.

46. The REC proposed rules for assignments and transfers that are advanced in the NPRM will 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. REC remains concerned about gamesmanship, especially in the shadows of the trafficking that took place following the 2003 Auction 83 FM translator filing window, actions that were fresh in our minds when the Commission originally adopted the rules permitting assignments and transfers of LPFM stations in 2007.⁷⁰ REC supports the Commission’s proposals to assure that consideration for the assignment and transfers of construction permits may not exceed the amount of legitimate and prudent expenses of the assignor or transferor.⁷¹ It is our expectation that the Bureau staff will review all assignment and transfer applications to assure that when appropriate, they include the appropriate purchase agreements and schedules that outline *all* line items that justify the amount of the transaction.

47. The extension of the construction period takes a burden off of staff for processing the extension requests and further demonstrates that LPFM is a mature service and should be treated similar to other broadcasting services. REC supports rule changes that bring LPFM on a more level playing field

⁶⁹ - When modifying the CDBS database system in order to accommodate some of the changes in forms and data that are proposed. REC is requesting that tolling code information is added to the CDBS raw data feed and that a code table for the tolling codes is included to the documentation for the raw data.

⁷⁰ - See *Creation of a Low Power Radio Service*, Third Report and Order, 22 FCC Rcd. 21912 at para. 15-17.

⁷¹ - See NPRM at note 242.

with other broadcast services, even in those situations where the omission of the rule may be pure oversight.⁷²

V. CONCLUSION

48. Anytime, the Commission creates rules for any service, there will always be loopholes and those who will be spending years analyzing those rules and looking for ways to take advantage of the system. In several different ways, we saw that during the 2013 LPFM window. Without a serious burden on both the part of staff and of the applicant/licensee, there is no way to fully enforce the rules without depending on some form of self-certification. Unfortunately, self-certification is one of our biggest vulnerabilities. LPFM has the strictest rules regarding ownership, yet there are no teeth in enforcing those rules, all in the name of simplicity.⁷³ This is why we must look at documentation requirements in some of our most vulnerable rules and policies, such a site assurance. If LPFM had a site assurance documentation requirement for the 2013 window, it would have made it difficult for the Antonio Cesar Guel applications as well as the applications filed for one of the aggregated point-stacked time share agreements for MX Group #27 in Los Angeles. We could have prevented these frivolous and questionable filings if such a rule was in place.

49. This NPRM also has the opportunity to introduce new entrants to LPFM, even between filing windows through the proposed mini-window process. REC's counterproposed Viable Time Share concept will permit more diverse groups to come together on a single channel, whether its voluntary or involuntary and in the event a group can't make it on the air or has to cease operations, provisions in the Mini-Window process will add restore diversity by opening an opportunity without having to wait for up to 10 years for another filing window. Our spectrum is getting scarcer, and while we have a long-term ability to expand FM into a wider band, we need to assure that diverse voices are sharing what little spectrum we currently have without it becoming a "private club" like what happened in Los Angeles and Philadelphia.

⁷² - While not in the scope of this proceeding but since we are proposing to amend §73.850, our proposed rule text adds a new paragraph (d) that formalizes the rule that LPFM stations that go silent for a minimum of 10 days must notify the Commission of their silent status and for stations that are silent for over 30 days, the station must file for Special Temporary Authority (STA). Based on our reading of the initial *Report and Order* (15 FCC Rcd 2205) and subsequent orders, we can't determine why the silent station language was omitted from the operating schedule rule nor appear anywhere else in Subpart G.

⁷³ - Despite limiting ownership to a single station (for non-public safety and non-tribal entities) and a requirement of localism, LPFM stations are not required to be accountable to their community through the filing of ownership reports nor the maintenance of a public inspection file.

50. The remainder of this NPRM is common-sense or as Commissioner Carr put it, good government. This NPRM includes many “lessons learned” from the 2007 and 2013 windows and we applaud the Bureau for bringing these items forward for consideration. With the modification proposed in by REC in the February 1, 2019 *ex parte* presentation, REC supports this NPRM as written and supports the additional items regarding mini-windows and documentation requirements for site assurance.

Respectfully submitted,

/S/

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May 18, 2019

APPENDIX A**REC Counter-proposed Rule Changes**

***NOTE:** Within this proposed rule text, rule modifications proposed by REC that are different than either currently codified rules or those proposed by the Commission in Appendix A of the NPRM are shown with underlined text. Each rule that has REC counter-proposed modifications will also include notes that summarizes the counter-proposal for each rule. These notes will be inside of bordered text.*

1. Section 73.850 is amended by revising paragraphs (b) and (c)(1) and add paragraph (d) to read as follows:

§73.850 Operating schedule.

* * * * *

(b) All LPFM stations, except those in time share agreements executed prior to [date] pursuant to paragraph (c) of this section and Sec. 73.872, are required to operate at least 36 hours per week, consisting of at least 5 contiguous hours of operation per day between the hours of 6:00 AM and 11:59 PM local time on at least 5 days per week; however stations licensed to accredited educational institutions are not required to operate on Saturday or Sunday or to observe the minimum operating requirements during those days designated on the official school calendar as vacation or recess periods.

* * * * *

(c) * * *

(1) The license and the prospective licensee(s) shall endeavor to reach an agreement for a definite schedule of periods of time to be used by each. Such agreement must be in writing and must set forth which licensee will operate on which of the hours of the day throughout the year. Such agreement must not include simultaneous operation of the stations and must meet the minimum operating schedule pursuant to paragraph (b) of this section. Each licensee must file the same with each application to the Commission for initial construction permit or renewal of license. Time share agreements shall be signed by hand and not electronically. Such written authorizations become part of the terms of each station's license.

(d) In the event that causes beyond the control of a permittee or licensee make it impossible to adhere to the operating schedule in paragraph (a) or (b) of this section or to continue operating, the station may limit or discontinue operation for a period not exceeding 30 days without further authority from the Commission provided that notification is sent to the Commission in Washington, DC, Attention: Audio Division, Media Bureau, no later than the 10th day of limited or discontinued operation. During such period, the permittee shall continue to adhere to the requirements of the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the permittee or licensee will notify the FCC, Attention: Audio Division of the date that normal operations resumed. If causes beyond the control of the permittee or licensee make it impossible to comply within the

allowed period, Special Temporary Authority (see § 73.1635) must be requested to remain silent for such additional time as deemed necessary. The license of a broadcasting station that fails to transmit broadcast signals for any consecutive 12 month period expires as a matter of law at the end of that period, notwithstanding any provision, term, or condition of license to the contrary.

§73.850 NOTES: The change we are proposing in paragraph (b) is consistent with our implementation of viable time-share agreements. The requirement that LPFM stations operate a minimum of 5 days per week during viable hours (6AM-Midnight) is simply common sense and correlates with our minimum time-share standards. Part of the additional language in paragraph (c)(1) was as a result of fraudulent subsequent time share agreements that were filed where a non-consenting proponent's signature was forged through the FCC's electronic signature rule. We are proposing to add paragraph (d) in order to normalize rules between all of the broadcast services as they relate to silent stations. It is REC's position that the omission of the silent station procedure from the original LPFM *Report and Order* was an oversight.

2. Section 73.853 is amended by adding paragraphs (d) and (e) as follows:

§73.853 Licensing requirements and service.

* * * * *

(d) 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.

(e) *Demonstration of localism qualification.*

(1) Applicants demonstrating localism pursuant to paragraph (b)(1) of this section must provide evidence of a headquarters or campus within the designated area. This can include organization brochures, course catalogs showing that classes are conducted at the campus, copies of lease agreements, rental agreements or articles of incorporation demonstrating the headquarters address.

(2) Applicants demonstrating localism pursuant to paragraph (b)(2) of this section must provide articles of incorporation or other supporting documentation demonstrating the residential address of each board member.

(3) Applicants demonstrating qualification pursuant to paragraph (b)(3) of this section not originating from a government agency must include a statement by the governmental entity having legal jurisdiction over the area to be served, supporting the request.

§73.853 NOTES: We are proposing to extend the FCC proposal in §73.854 that prohibits *nunc pro tunc* amendments to “change the past” on ex-pirates to also include a prohibition on changing board members *nunc pro tunc* for any qualification issue such as localism, character issues, citizenship claims, etc. We are also adding documentation requirements for claims of localism and for claims of qualification under the “public safety” loophole.

3. Revise section 73.854 to read as follows:

§73.854 Unlicensed radio operations.

No application for a new LPFM station or the assignment or transfer of an LPFM license or permit pursuant to §73.865 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.

§73.854 NOTES: The pirate radio rule should also apply to cases of assignments and transfers.

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

§73.865 Assignment and transfer of LPFM permits and licenses.

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

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

(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.

(e) Transfers of control filed pursuant to this section must include appropriate documentation to support the change in board members as well as certification that the requirements of Section 73.853 continue to be met.

§73.865 NOTES: We are adding in language to clarify that applicants seeking an assignment must include a detailed schedule of each item (including services) in the transaction to assure that the transaction price meets depreciated fair market value. In new paragraph (f), we are requesting a requirement that any transfer of control must include revised corporate documents (either a new articles of incorporation, meeting minutes, etc.) to verify the board member changes.

5. Section 73.870 is amended by revising paragraph (a) and adding paragraphs (g) and (h) to read as follows:

§73.870 Processing of LPFM broadcast station applications.

(a) A minor change for an LPFM station authorized under this subpart is limited to transmitter site relocations of 5.6 kilometers or less. These distance limitations do not apply to an amendment or application proposing transmitter site relocation to a common location or a location very close to another station operating on a third-adjacent channel

in order to remediate interference to the other station; provided, however, that the proposed relocation is consistent with all localism certifications made by the applicant in its original application for the LPFM station. Minor changes of LPFM stations may include:

(1) Changes in frequency to first, second or third-adjacent channels or I.F. frequencies, or upon a technical showing of reduced interference, to any frequency and (2) Amendments to time-sharing agreements pursuant to Sections 73.850(b) and 73.872, including universal agreements that supersede involuntary agreements.

* * * * *

(g) Applications subject to paragraph (b) of this section must include a statement certifying that there is reasonable assurance to use a transmitter site at the time of the original filing of the application.

(1) Reasonable assurance is achieved when there is at a minimum, a meeting of the minds resulting in some firm understanding as to the site's availability.

(2) The statement to accompany all applications subject to paragraph (b) of this section must be prepared by the owner or the management company of the tower or property to be utilized for the transmitter site. The statement must include all of the following:

(i) The name of the applicant;

(ii) The location of the tower either in latitude and longitude or antenna structure registration number;

(iii) If the tower is already constructed, the level ranges above the base of the tower for which reasonable site assurance is being certified. If no tower has not been constructed, the maximum height of tower structure that will be authorized;

(iv) The name of the owner or management company, a contact person and daytime telephone number for the owner or management company; and

(v) The date which reasonable assurance was obtained.

(3) Applications subject to paragraph (b) of this section that fail to provide the statement of reasonable assurance on the initial application will be dismissed without any opportunity to amend such applications.

(4) Amendments to the application for an original construction or major change application as specified in paragraph (b) of this section will require a statement of reasonable assurance that reflects the proposed facilities specified in the amendment.

(h) Mini-window: In the event a license or permit that was a party to a time-sharing agreement authorized after [date] is cancelled, expired or revoked and the action has been finalized, the

Commission may open a limited filing window (“mini-window”) by public notice pursuant to this paragraph for the time that was made vacant by the previous action.

(1) The former facility shall remain protected from the time the action has been finalized to the close of the mini-window. Contingent LPFM and FM translator proposals that are mutually exclusive with the former facility shall not be entertained.

(2) Time-sharing proposals between existing licensees or permittees in the same time-share group as the former facility may not propose to reapportion time previously authorized to the former facility.

(3) Proposals for new stations made during the mini-window must be mutually exclusive to one of the remaining time-share proponents. Proposals that do not meet the minimum distance separation requirements of Section 73.807 may be authorized if it does not lessen the spacing to stations authorized subsequent to the former facility.

(4) If a single application is received that meet the requirements of paragraph (h)(3) and is not mutually exclusive with any other applications filed during the mini-window, it shall be considered singleton. If multiple applications are received that meet the requirements of paragraph (h)(3) and are not mutually exclusive with other applications filed during the mini-window, each application will be considered a singleton.

(5) If two or more applications that meet the requirements of paragraph (h)(3) and are mutually exclusive with other applications meeting the requirements of paragraph (h)(3) filed during the mini-window, the applicants shall be awarded points in accordance with Section 73.872(b) and the applicant with the highest number of points shall be the tentative selectee. In the event of a tie, the tentative selectee shall be the applicant that has been local as defined in Section 73.853(b) of this part, for the longest uninterrupted period of time.

(6) The tentative selectee or selectees shall be initially awarded the time that was vacated by the former facility.

§73.870 NOTES: Section 73.870(a) was revised by removing language pertaining to amendments proposing site relocations by parties to a voluntary time-sharing agreement to a common location. The language in (a)(1) is updated to better clarify what is an “adjacent” channel. We also added language to refer to the main time-sharing rules as well as the handling process for mutually exclusive applications filed in a “mini-window”. Paragraph (g) adds in language requiring a document of site assurance and Paragraph (h) details the proposed “mini-window” process.

6. Section 73.871 is amended by revising paragraph (c) and (c)(3), strike paragraph (c)(2) and redesignate subparagraphs (3), (4), (5), (6) and (7) 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:

(1) Filings subject to paragraph (c)(4), site relocations of 5.6 kilometers or less for LPFM stations;

~~(2) Filings subject to paragraph (c)(5), site relocations of 5.6 kilometers or less for LP100 stations;~~

(3) [redesignate as (2)] Changes in ownership where the original party or parties to an application either: (i) retain more than a 50 percent ownership interest in the application as originally filed; or (ii) retain an ownership interest of 50 percent or less as the result of gradual governing board changes in a nonstock or membership applicant with little or no effect on such organization's mission. All changes in a governmental applicant are considered minor, provided that the applicant entity remains unchanged.

(4) [redesignate as (3)]

(5) [redesignate as (4)]

(6) [redesignate as (5)]

(7) [redesignate as (6)]

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§73.871 NOTES: The strike of paragraph(c)(2) is purely housekeeping and non-substantive. In *Sixth Report and Order*, when the "LP10" service class was eliminated, the "LP100" service was renamed "LPFM".⁷⁴ Prior to the *Sixth R&O*, paragraph (c)(1) applied a 3.2 kilometer minimum move for LP10 stations and paragraph (c)(2) applied a 5.6 kilometer minimum move for LP100 stations. Removing paragraph (c)(2) and its "LP100" language will remove a rule that is redundant and technically obsolete.

⁷⁴ - See Creation of a Low Power Radio Service, Sixth Report and Order, 27 FCC Rcd. 15402 et seq. (2012) ("Sixth R&O") at para. 202 and relevant rule changes.

7. Section 73.872 is amended by revising paragraphs (c)(1), (c)(2) and (c)(3); redesignating paragraph (c)(4) to (c)(5) and adding new paragraphs (c)(4), (c)(6) and (c)(7); revising paragraph (d)(1); amend the fifth sentence in paragraph (d)(2); and strike the eighth sentence in paragraph (d)(2) 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, two or 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 time, 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 and conditions 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.

(1) Time-share proposals shall be in writing and hand-signed by each time-share proponent and submitted with each application, and shall satisfy the following requirements:

(i) The proposal must specify the proposed operation of each time-share proponent;

(ii) The proposal must not include simultaneous operation of the time-share proponents unless the station was originally part of a mini-window o;

(iii) Each time-share proponent must propose to operate at least 36 hours per week including a minimum of 5 contiguous hours of operation between 6AM and 11:59PM at least 5 days per week; and

(iv) The proposed transmitter site for each time share proponent must be separated by a minimum of 500 meters.

(2) Where a station is authorized pursuant to a time-sharing proposal, a change of the regular schedule set forth therein will be permitted will be permitted only where a written agreement hand-signed by each time-sharing permittee and licensee and complying with the requirements in paragraphs (c)(1) through (iv) of this section is filed on FCC Form 319 individually by each station, prior to the date of change.

(3) For time-sharing agreements authorized prior to [date], the parties to the time-sharing agreement may apportion among themselves any air time that, for any reason becomes vacant.

(4) [Redesignate as (5)]

(4) For time-sharing agreements authorized after [date], if any air time that, for any reason becomes vacant, that time shall not be reapportioned and will remain reserved for a mini-window pursuant to Section 73.870(h) of this part.

(5) * * * * *

(6) In the event a tentatively accepted time-share agreement is dismissed, the Commission staff will release another public notice, initiating a subsequent 90-day period of all remaining tentative selectees within the affected MX group to enter into either a voluntary time-share agreement or universal settlement in accordance with paragraphs (c) or (e) of this Section. In the event that no time-share agreement or universal settlement is met, applicants with tied, grantable applications will be eligible for license terms in accordance with paragraph (d) of this section.

(7) In the event of multiple time-share agreements of equal aggregated points, the tie will be broken by adding the determining of number of days each applicant within a time-share agreement has been local, as defined in Section 73.853(b) of this Part for the longest period of time. The tie will be awarded to the group that has the highest sum of days among all members of the time-share group.

(d) *Involuntary time-sharing.*

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

(2) * * * * * If there are three tied, grantable applications, each applicant must rank their preference in the following 8-hour time slots: (1) 3:00 am – 10:59 am, (2) 11:00 am – 6:59 pm and (3) 7:00 pm – 2:59 am. * * * * * ~~The Commission shall award time in units as small as four hours per day.~~ * * * * *

§73.872 NOTES: The proposed language implements REC's Viable Time Share proposal. It also proposes to remove the "non-renewable" aspect of license terms. We are also making a one-hour shift to the involuntary time share hours to properly implement the 5-hour requirement on involuntary time-shares. Other than the group with 11AM-7PM, the other two groups will have 5 hours during the viable period and 3 hours during the non-viable period (12 midnight to 6AM). Proposed language in (c)(6) anticipates a rare instance where on the "second" 90-day window that another time-share agreement is dismissed. Proposed language in (c)(7) is our proposed tie-breaker criteria in the event of multiple aggregated point proposals with the same aggregated score.

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

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

* * * * *

(b) A new file number will be assigned to an application for a new station or for major changes in the facilities of an authorized station, when it is amended so as to effect a major change, as defined in paragraphs (a)(1) or (a)(2) of this section, or result in a situation where the original party or parties to the application do not retain more than 50 percent ownership interest in the

application as originally filed, and §73.3580 will apply to such amended application. However, a change in ownership is minor if the original party or parties to an application for a noncommercial educational full power television station retain an ownership interest of 50 percent or less in the application as originally filed as the result of a gradual governing board change in a nonstock or membership applicant with little or no effect on such organization's mission. An application for change in the facilities of any existing station will continue to carry the same file number even though (pursuant to FCC approval) an assignment of license or transfer of control of such licensee or permittee has taken place if, upon consummation, the application is amended to reflect the new ownership.

* * * * *

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

§ 73.3573 Processing FM broadcast station applications.

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

* * * * *

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

§73.3598 Period of construction.

(a) Except as provided in the last two sentences of this paragraph, each original construction permit for the construction of a new TV, AM, FM or International Broadcast; low power TV; low power FM; TV translator; TV booster; FM translator; or FM booster station, or to make changes

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

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

* * * * *

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

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

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

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

review of the grant of the construction permit under the Commission's direct purview, or (2) the condition on the commencement of operations under paragraph (b)(4) of this section.

* * * * *

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

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

* * * * *

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

* * * * *

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

§ 73.7003 Point system selection procedures.

* * * * *

(b) * * *

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

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

* * * * *

(c) * * *

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

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

(i) If a mutually exclusive group has three or fewer tied, grantable applications, the Commission will simultaneously grant these applications, assigning an equal number of hours per week to each applicant. The Commission will require each applicant subject to mandatory time-sharing to simultaneously and confidentially submit their preferred time slots to the Commission. If there are only two tied, grantable applications, the applicants must select between the following 12-hour time slots: 3 a.m.-2:59 p.m., or 3 p.m.-2:59 a.m. If there are three tied, grantable applications, each applicant must rank their preference for the following 8-hour time slots: 3 a.m.-10:59 a.m., 11 a.m.-6:59 p.m., and 7 p.m.-2:59 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.

* * * * *

§73.7003 NOTES: We are proposing a one-hour shift to the 3-party involuntary time share in order to align with LPFM and in the event that the Commission wishes to evaluate similar criteria for Viable Time-Share for NCE as we are proposing for LPFM.

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

§ 73.7005 Maintenance of Comparative Qualifications

* * * * *

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

(c) [Redesignate as (d)]

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