

4. Engage Native communities in First Amendment, media reform policy, and media ownership.

NCAI exists as the country's oldest, largest, and most representative congress of American Indians and Alaska Natives. Established in 1944 in response to the U.S. policy of termination, NCAI's goal is to protect and enhance the trust relationship established between the United States of America and tribes. This trust relationship was established through treaties between the U.S. and Tribal Nations, Presidential Executive Orders, Acts of Congress, and rulings by the United States Supreme Court. NCAI monitors federal policymaking and coordinates efforts to inform the federal government and the general public on issues affecting tribal interests.

Since the inception of the LPFM service,² NPM and NCAI have supported the service both as an additional opportunity for Native Americans, and as a means of diversifying and expanding media ownership. NPM and NCAI fully support the goals of localism and diversity set forth in the Local Community Radio Act of 2010 ("LCRA"),³ and the FFNPRM's attempt to implement these goals while preserving the technical integrity of all FM services.⁴ The comments that follow focus primarily on eligibility and cross-ownership issues that affect Tribal applicants⁵ for LPFM stations.

² Creation of Low Power Radio Service, Report and Order, 15 FCC Rcd. 2205 (2000).

³ Pub. L. No. 111-371, 124 Stat. 4072 (2011).

⁴ FFNPRM at ¶ 2.

⁵ See 47 C.F.R. § 73.7000.

I. A WORD ABOUT TERMS

In the *Rural Radio First Report and Order* and *Rural Radio Second Report and Order*,⁶ the Commission adopted and refined the concept of a “Tribal Priority” that would, in appropriate circumstances, be awarded, pursuant to Section 307(b) of the Communications Act,⁷ to applicants for new noncommercial educational (“NCE”) FM Station and for proposed allotments in the non-reserved portion of the FM band. The criteria for a Tribal Priority are set forth in Section 73.7002(b) of the Commission Rules.⁸ Related terms, such as “Tribe,” “Tribal applicant,” “Reservations” and “Tribal coverage” are also defined.⁹

A “Tribe” is defined as “Any Indian or Alaska Native tribe, band, nation, pueblo village or community which is acknowledged by the federal government to constitute a government-to-government relationship with the United States and eligible for the programs and services established by the United States for Indians.” A “Tribal applicant” is defined as “(1) A Tribe or consortium of Tribes, or (2) An entity that is 51 percent or more owned or controlled by a Tribe or Tribes that occupy Tribal Lands that receive Tribal coverage.”¹⁰

The FFNPRM proposes to adopt a version of the Tribal Priority for LPFM applicants by establishing a “Native Nations” criterion for “Native Nations” LPFM applicants that serve “Native Nations communities” and “Native Nations” lands.¹¹ NPM’s mission statement is framed in terms of service to Native Nations, and as a general matter, it prefers the term “Native Nations” to “Tribe,” in part because “Native Nations” better conveys the principle of sovereignty

⁶ 25 FCC Rcd. 1583 (2010) and 26 FCC Rcd. 2556 (2011), respectively.

⁷ 47 U.S.C. § 307(b).

⁸ 47 C.F.R. § 73.7002(b).

⁹ See 47 C.F.R. § 73.7000.

¹⁰ Tribal coverage is defined in terms of coverage of a Tribal Applicant’s Tribal Lands or population living on Tribal Lands.

¹¹ See FFNPRM, ¶¶ 54-58 & 64.

that is essential to a governmental entity. NPM and NCAI are concerned, however, that a change in terminology at this point may cause confusion. The terms “Native Nations,” “Native Nations Lands” and “Native Nation’s communities” are not defined in the FCC’s Rules and therefore lack the legal authority that “Tribal Priority” and other defined terms possess. Moreover, the proposed change in terminology would not expand the scope of existing terms. Tribe is now broadly defined to include any “Indian or Alaska Native ... nation.” Adopting a new definition of “Native Nations” would thus create uncertainty as to which term is more comprehensive.

A change in terminology may also be counter-productive. Although LPFM stations are assigned to particular communities of license, their localism requirements are defined in terms of distance from a proposed transmitter site, not in terms of the geographic scope of a community nor the distance of the transmitter site from the reference coordinates of the community of license. An otherwise qualified Tribal applicant should not be disqualified because it does not propose to serve an entire “Native Nations community,” however that term may be defined. Given the limited service area of an LPFM station and restrictions on finding a suitable transmitter site, it may be impossible to serve an entire “community.”

The more flexible approach would be to parallel the approach taken in the definition of Tribal Coverage in reference to the full power Tribal Priority. That approach is framed in terms of service to Tribal Lands *or* to the population living on Tribal Lands. Although the requirement that at least 2,000 people be served is an unrealistically high threshold for 50% of the population covered by 60 dBu contour of an LPFM station, NPM and NCAI believe that a standard framed in terms of area or population rather than “community” is appropriate. NPM and NCAI therefore propose eliminating subsection (iii) of the definition of Tribal Coverage for Tribal applicants for an LPFM station (i.e., the provision that establishes a 2,000 person threshold). In order to

qualify for a Tribal Priority, a Tribal applicant would have to propose coverage at least 50 percent of which includes the Tribal applicant's Tribal Lands or at least 50 percent of which covers population on the Tribal applicant's Tribal Lands.

II. ELIGIBILITY OF TRIBES AND TRIBAL APPLICANTS

NPM and NCAI fully support the expansion of Section 73.853 of the Rules¹² to include Tribes and Tribal applicants. Although Tribes arguably already qualify as a "state and local government," Tribes who apply for an LPFM station may not wish to limit the station to "public safety radio services" as now required.¹³ In addition, recognition of Tribal applicants as eligible entities is necessary in order for them to claim a "Tribal Priority" for an LPFM station.

Consistent with the recognition of a Tribal applicant as a sovereign entity, NPM and NCAI also propose that Section 73.853 of the Rules¹⁴ be modified to recognize the intrinsically "local" nature of a Tribal applicant throughout its Tribal Lands. Such a modification would be consistent with the definition of a "Local applicant" for full-service NCE stations under Section 73.7000 of the Rules.¹⁵ Section 73.7000 deems a governmental entity to be local "within its area of jurisdiction." Unless Section 73.853 is modified to recognize Tribal applicants as local throughout their Tribal Lands, the relaxation of the multiple and cross-ownership restrictions discussed below would be ineffectual. Section 73.853 now defines a "local applicant" as one whose physical headquarters are located within 10 miles (for top 50 urban markets) or 20 miles (for other markets) of its transmitter site, or which has a governing board, 75% of which reside within the same distances from the transmitter site. Such a definition could make it impossible

¹² 47 C.F.R. § 73.853.

¹³ 47 C.F.R. § 73.853 (a)(2).

¹⁴ 47 C.F.R. § 73.853.

¹⁵ 47 C.F.R. § 73.7000.

for a Tribal applicant to qualify as “local” for multiple LPFM stations that specify sites that serve different portions of a large area of Tribal Lands.¹⁶

III. THE TRIBAL PRIORITY FOR LPFM APPLICANTS

NPM and NCAI support the adoption of a Tribal Priority for the LPFM service. While the LPFM Tribal Priority is grounded in the same rationale as the Tribal Priority for full-service NCE and commercial stations, NPM and NCAI believe that the Tribal Priority must be tailored to the LPFM service. In this regard, NPM and NCAI disagree with the proposal contained in the FFNPRM in some respects.

The FFNPRM proposes to “award a point to a Native Nation proposing LPFM service to its community if the transmitting antenna is located on the applicant’s Tribal lands.” It also suggests that the point may depend upon service to “tribal members.”¹⁷ NPM and NCAI propose instead that the Tribal Priority:

- Be available to all Tribal applicants;
- Be based on Tribal Coverage (discussed above), not on service to a Native Nation “community”;
- Be based on service to the population on Tribal Lands without regard to whether the population covered are “Tribal members”;
- Not require the location of the transmitting antenna on the applicant’s Tribal Lands.

As a practical matter, NPM and NCAI believe that a Tribal applicant will, in most cases, propose a transmitter site on the Tribal Lands it wishes to serve, but NPM and NCAI do not believe that the location of the transmitter site is essential to the definition of Tribal Coverage. It is easy to imagine circumstances in which the site which delivers the best, most affordable service to Tribal Lands is a developed antenna site located near, but not on, Tribal Lands. A

¹⁶ See 47 C.F.R. § 73.853(a)(1).

¹⁷ FFNPRM, ¶ 57.

Tribal applicant that otherwise meets the criteria for a Tribal Priority by providing Tribal Coverage to an area or population on Tribal Lands should not be disqualified because it chooses to lease an affordable, developed site that will achieve the Commission's policy goals.

Most importantly, NPM and NCAI do not believe that the proper credit for a Tribal Priority should be a "point" under the point system. Awarding a point for the Tribal Priority would reduce it to the equivalent of superior technical proposal.¹⁸ The rationale for the Tribal Priority is that it is grounded in Section 307(b) of the Communications Act, which provides for the "fair, efficient and equitable distribution" of radio service. The Tribal Priority is thus in the nature of a basic "fair distribution of service" preference, not a comparative preference based on the qualifications of the applicant or the technical parameters of its proposal.

IV. MULTIPLE OWNERSHIP RESTRICTIONS

Section 73.855 of the Commission's rules currently prohibits a party from holding an attributable interest in more than one LPFM station, and Section 73.860 of the Rules prohibits a party holding an attributable interest in any non-LPFM station from holding a license for an LPFM station.¹⁹ The FFNPRM proposes to relax these restrictions for Tribes and Tribal Applicants. NPM and NCAI support the FFNPRM's proposal.

As noted in the FFNPRM, relaxation of the multiple- and cross-ownership restrictions would permit Tribes and Tribal applicants to apply for more than one LPFM station to serve Tribal Lands which are often located in "large, irregularly shaped rural areas."²⁰ NPM and NCAI believe that the proposed relaxation of the ownership restrictions would advance, rather than undermine, the goals of localism and diversity, without compromising the noncommercial

¹⁸ See 47 C.F.R. § 73.7003(b)(4).

¹⁹ See 47 C.F.R. § 73.855 and 73.860.

²⁰ FFNPRM, ¶ 58.

nature of the LPFM service. In addition, the proposed relaxation of ownership restrictions for Tribes and Tribal applicants parallels an existing exemption for “governmental entities.”²¹ Such entities may be granted multiple licenses provided that only one application is granted as a priority application and that its remaining applications are not mutually exclusive with other applicants. The FFNPRM proposes similar limitations with respect to the applications of Tribal applicants. That is, a Tribal applicant could file multiple LPFM applications in the same filing window, but claim a Tribal Priority for only one. NPM and NCAI believe that this limited exemption from the ownership rules would advance service to Tribal Lands without unfairly prejudicing the rights of other applicants.

Accordingly, NPM and NCAI applaud the efforts of the Commission to improve service to Tribal Lands and support adoption of the proposals set forth in the FFNPRM, with the modifications set forth above.

Respectfully submitted,

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²¹ See 47 C.F.R. § 73.855(b).