



PUBLIC NOTICE

News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
TTY: 1-888-835-5322

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

DA 15-1313
Released: November 16, 2015

MEDIA BUREAU ANNOUNCES AUCTION 83 FILING WINDOW AND PROCESSING PROCEDURES FOR MUTUALLY EXCLUSIVE NONCOMMERCIAL EDUCATIONAL FM TRANSLATOR TECH BOX PROPOSALS; DECEMBER 16, 2015 DEADLINE SET FOR FCC FORM 349 APPLICATIONS

By this Public Notice, the Media Bureau (“Bureau”) announces a 30-day period beginning with the release of this Public Notice and ending December 16, 2015 (the “Application Deadline”), for mutually exclusive (“MX”) Auction 83 noncommercial educational (“NCE”) FM translator applicants to file FCC Form 349 FM translator applications. This filing window is limited to the 69 NCE FM translator “tech box” proposals identified in Attachment A. These NCE applications are mutually exclusive with at least one other NCE application from the Auction 83 Filing Window.¹ Accordingly, the Commission will use the NCE point system to compare and tentatively select applications from each MX group for grant.² This Public Notice provides an overview of the point system selection process and the Form 349 filing and documentation requirements.

Background. On February 6, 2003, the Media Bureau and the Wireless Telecommunications Bureau announced a March 10-14, 2003, auction filing window for non-reserved band (Channels 221 to 300) applications for new FM translator stations and major modifications to authorized FM translator facilities.³ Both commercial and NCE applicants were permitted to submit applications in the Auction 83 Filing Window.⁴ A noncommercial applicant is any applicant that either proposes to rebroadcast the signal of an NCE primary station,⁵ and/or that selected “NCE” status on its Form 175.⁶

¹ See *FM Translator Auction Filing Window and Application Freeze*, Public Notice, 18 FCC Rcd 1565 (MB/WTB 2003) (“*Auction 83 Window Public Notice*”). The filing window was subsequently extended to March 17, 2003. *FM Translator Auction Filing Window and Application Freeze Extended to March 17, 2003*, Public Notice, 18 FCC Rcd 3275 (MB/WTB 2003) (“*Auction 83 Filing Window*”). The Public Notice required that applicants interested in participating in the FM translator auction electronically file FCC Form 175, Application to Participate in an FCC Auction, and Section I, the Tech Box of Section III-A, and the Section VI Certification of FCC Form 349. These sections permitted the staff to determine mutual exclusivities among applicants.

² See 47 C.F.R. § 73.7003 (point system selection procedures).

³ See *supra*, note 1.

⁴ *Auction 83 Window Public Notice*, 18 FCC Rcd at 1565 n.1 (a window for proposals in the non-reserved band provides a filing opportunity for both NCE and commercial FM translator applicants). See 47 C.F.R. § 74.1202(b) (specifying that noncommercial FM translators may be authorized to operate on Channels 201-300).

⁵ See 47 C.F.R. § 74.1201(c).

⁶ The Bureau afforded Auction 83 applicants that had previously designated an NCE filing status and specified a corresponding NCE primary station in their Tech Box an opportunity to de-select their NCE filing status. See *Media*

(continued....)

The Bureau subsequently identified, by Public Notices, the groups of MX FM translator applications filed during the Auction 83 Filing Window, and opened a two-month window within which the applicants from each group could communicate with each other and attempt to resolve the conflicts through settlements or engineering solutions.⁷ Mutually exclusive commercial applications that were not resolved by the parties will proceed to auction.⁸ The remaining NCE FM translator proposals, identified in Attachment A,⁹ are currently mutually exclusive *only* to other, pending NCE FM translator proposals filed in the Auction 83 Filing Window.¹⁰ As such, these applicants are ineligible to participate in Auction 83.¹¹ Rather, these proposals will be resolved by the same point system selection procedures that the Commission established for reserved channels.¹² The NCE point system is a simplified, “paper hearing” process for selecting among mutually exclusive NCE applications.¹³

Point System Selection Criteria – Section IV of FCC Form 349. Each NCE applicant identified in Attachment A must file a complete Form 349 application, including Section IV, Point System Factors, by the Application Deadline. The Commission will then review the Section IV submissions to compare the mutually exclusive groups of NCE applications under the point system and tentatively select an application from each group for grant. The NCE point system awards a maximum of seven merit points, based on four distinct criteria: (1) established local applicant; (2) diversity of ownership; (3) state-wide network; and (4) technical parameters.¹⁴ These criteria are described in more detail below.

1. Established Local Applicant. First, the Commission will award three points to an applicant that can certify that it has been local and established for at least two years immediately prior to the filing

(Continued from previous page) _____

Bureau Announces April 8-17 Filing Window to Permit Amendment of Auction 83 Noncommercial Educational FM Translator Applications, Public Notice, 28 FCC Rcd 4132 (MB 2013).

⁷ See *FM Translator Auction 83 Mutually Exclusive Applications Subject to Auction*, Public Notice, 29 FCC Rcd 4868 (MB 2014); *FM Translator Auction 83 Mutually Exclusive Applications Subject to Auction*, Public Notice, 28 FCC Rcd 9716 (MB 2013). Applicants were also permitted to use the settlement period to modify primary station designations.

⁸ See 47 U.S.C. § 309(j); 47 C.F.R. § 73.5000(a).

⁹ Attachment A consists of mutually exclusive NCE applications for which no technical amendment or settlement was filed, or for which the submitted resolution was determined to be unacceptable.

¹⁰ Any NCE FM translator application that remained in conflict with a commercial FM translator application was returned as unacceptable for filing. See 47 C.F.R. § 73.5002(b).

¹¹ See 47 U.S.C. § 309(j)(2)(C); 47 C.F.R. § 73.5000(b) (applications for NCE broadcast stations, as described in 47 U.S.C. § 397(6), on non-reserved channels are not subject to competitive bidding procedures).

¹² See 47 C.F.R. §§ 73.7001, 73.7003.

¹³ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Notice of Proposed Rulemaking, 10 FCC Rcd 2877 (1995), *further rules proposed*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21167 (1998), *rules adopted*, Report and Order, 15 FCC Rcd 7386 (2000) (“*NCE Order*”), *vacated in part on other grounds sub nom.*, *National Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001), *clarified*, Memorandum Opinion and Order, 16 FCC Rcd 5074 (“*NCE MO&O*”), *Erratum*, 16 FCC Rcd 10549, *recon. denied*, Memorandum Opinion and Second Order on Reconsideration, 17 FCC Rcd 13132 (2002), *aff’d sub nom. American Family Ass’n v. FCC*, 365 F.3d 1156 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1000 (2004).

¹⁴ See 47 C.F.R. § 73.7003(b). Claims to qualify as established local applicants, for diversity of ownership, and as state-wide networks must be reported in the responses to Section IV, Questions 1-3 of Form 349, respectively. In Section IV, Question 4 of Form 349, applicants must report the area and population figures to be used in the analyses of technical parameters.

of the application. Applicants with a headquarters, campus, or 75 percent of their board members residing within 25 miles of the reference coordinates of the community of license are considered local.¹⁵ A governmental unit is considered local within its area of jurisdiction. Each applicant must certify that it has placed documentation supporting its certification in a local public inspection file, and that it has submitted evidence of its qualifications in an application exhibit.¹⁶ To qualify for localism points, each applicant must also be able to certify that its governing documents require that such localism be maintained.¹⁷

2. Diversity of Ownership. Second, the Commission will award two points for local diversity of ownership if the principal community contours of the applicant's proposed station do not overlap with those of any other station in which any party to the application holds an attributable interest.¹⁸ To be awarded such points, an applicant's governing documents must include a provision requiring that such diversity of ownership be maintained by the applicant *and* all board members in the future. Applicants that are organizations governed by state charters that cannot be amended without legislative action are permitted to base the governing document component of their local diversity certifications on other safeguards that reasonably assure that board characteristics supporting any diversity points claimed by the applicant will be maintained.¹⁹ To be awarded diversity of ownership points, an applicant must submit copies of pertinent governing documents to support its certification or, for applicants such as state universities that are governed by laws which cannot be amended without legislative action, an appropriate alternative showing.

3. State-wide Network. Third, the Commission will award two points for certain state-wide networks providing programming to accredited schools. These points are available only to applicants that cannot claim a credit for local diversity of ownership.²⁰ Applicants claiming points as a state-wide network must place supporting documentation in their local public inspection file and submit copies of the documentation as an application exhibit.²¹

4. Technical Parameters. Finally, the Commission awards up to two points to an applicant that proposes the best technical proposal in the group (*i.e.*, proposes service to the largest population and area,

¹⁵ A local headquarters or residence must be a primary place of business or residence and not, for example, a post office box, lawyer's office, branch office, or vacation home, which are more easily feigned and/or present less of an opportunity for meaningful contact with the community. *See NCE Order*, 15 FCC Rcd at 7410.

¹⁶ Examples of acceptable documentation include corporate material from the secretary of state, lists of names, addresses, and length of residence of board members and copies of governing documents requiring a 75 percent local governing board, or course brochures indicating that classes have been offered at a local campus for the preceding two years. *See Instructions to FCC Form 349* at 13.

¹⁷ *See* 47 C.F.R. § 73.7003(b)(1) ("applicant's own governing documents (e.g. by-laws, constitution, or their equivalent) [must] require that such localism be maintained"); *see also* FCC Form 349, Section IV, Question 1.

¹⁸ *See* 47 C.F.R. § 73.7003(b)(2). Parties with attributable interests are defined as the applicant, its parent, subsidiaries, their officers, and members of their governing boards. *See* 47 C.F.R. § 73.7000. Interests of certain entities providing more than 33 percent of the applicant's equity and/or debt are also attributable. *Id.* Applicants must consider whether there are attributable interests in overlapping radio stations (AM or FM stations and FM translators), but need not consider any attributable TV station for purposes of claiming this point. *See Instructions to FCC Form 349* at 13.

¹⁹ *See NCE MO&O*, 16 FCC Rcd at 5095.

²⁰ *See* 47 C.F.R. § 73.7003(b)(3). The state-wide network credit is an alternative for applicants that use multiple stations to serve large numbers of schools and, therefore, do not qualify for the local diversity of ownership credit.

²¹ *See Instructions to FCC Form 349* at 13 (detailing preferred documentation to support this point claim).

excluding substantial areas of water). An applicant will receive one point if its proposed service area *and* population are ten percent greater than those of the next best area and population proposals, or two points if both are 25 percent greater than those of the next best area and population proposals, as measured by each proposed station's predicted 60 dBu signal strength contour.²² If the best technical proposal does not meet the 10 percent threshold, no applicant will be awarded points under this criterion. Applicants must include an application exhibit explaining how it calculated the technical parameters.²³

The Commission will then tally the total number of points awarded to each mutually exclusive applicant. The applicant with the highest score in an MX group will be designated the "tentative selectee."

Tie-Breakers. In the event MX applicants are tied with the highest number of points, the tied applicants will proceed to a tie-breaker round.²⁴ The first tie-breaker for NCE FM translator applicants is the number of radio station authorizations attributable to each applicant.²⁵ The applicant with the fewest attributable authorizations prevails.

If the tie is not broken by this first factor, the Commission will apply a second tie-breaker: the number of pending radio station applications attributable to each applicant. When reporting pending applications, applicants are required to include new and major change radio applications, including the subject application and all other applications filed in this window by the Application Deadline. Applicants should not include requests to participate in an auction filed on Form 175. If that second factor fails to break the tie, the Commission will select the "first applicant to file."²⁶

Timely Documentation of Comparative Qualifications. The FCC Form 349 is certification-based, but requires applicants to document their claims by submitting supporting information both to the Commission and to a local public file.²⁷ We caution applicants that the basis for applicant point claims must be readily ascertainable from timely-filed application exhibits.

Certifications which require the applicant to submit documentation, but which are not supported with any such timely documentation, will not be credited. For example, every applicant claiming points for diversity of ownership must certify that the proposed station's service area would not overlap that of an attributable existing station, that its governing documents require that such diversity be maintained, and "that it has placed documentation of its diversity qualifications in a local public file and has submitted to

²² 47 C.F.R. § 73.7003(b)(4).

²³ The applicant should specify the year and blocks of census information used and the method used to determine area. Area must be measured in square kilometers; population should be measured using the most recent census block data available from the United States Bureau of Census.

²⁴ 47 C.F.R. § 73.7003(c). Tie-breaker information must be reported in responses to Section IV, Questions 5 and 6, respectively, of FCC Form 349.

²⁵ *Id.* § 73.7003(c)(1). Applicants are required to count all attributable full service commercial and NCE radio stations and certain FM translator stations providing non-fill-in service. *See also supra*, note 18.

²⁶ *NCE MO&O*, 16 FCC Rcd at 5077. *See also NCE Order*, 15 FCC Rcd at 7427, 7444; Instructions to FCC Form 349 at 14 (explaining that if the tie cannot be broken by the first or second factor, the "Commission will select the first application received."). For purposes of this final tie-breaker, we will select the first to file the complete *broadcast* Form 349 application, *not* the first to file the initial short-form *auction* FCC Form 175 application. Each applicant must submit its comparative qualifications, including the tie-breaker information, for the first time in the complete Form 349 application.

²⁷ *See NCE Order*, 15 FCC Rcd at 7423.

the Commission copies of the documentation.”²⁸ While there is some flexibility in the type of documentation an applicant may provide, an applicant submitting no timely documentation at all cannot be found to have made a valid certification and will not receive the claimed points. The Commission will not consider documentation to support a claimed comparative point if it is submitted in a post-filing window amendment.²⁹ Accordingly, we caution applicants to review their supporting documentation thoroughly before filing.

“Snap Shot” Date for Establishing Points. The FM translator applicant’s qualifications for points will be initially determined “as of the closing of the filing window” i.e., the Application Deadline, for the complete Form 349 application.³⁰ For example, NCE organizations will be considered “established” if they have operated as local entities since December 16, 2013, *i.e.*, for at least two years prior to December 16, 2015, the Application Deadline. These “snap shot” applicant characteristics establish an applicant’s maximum points and its maximum position in a tie breaker.³¹

Any changes made after the Application Deadline may potentially diminish, but cannot enhance, an applicant’s comparative position and point total. Accordingly, the Commission will take into account any amendments that adversely affect an applicant’s point total. The Commission will not consider any amendments filed after the close of the Application Deadline that improve an applicant’s comparative position. For example, an applicant may lose claimed points, such as the diversity of ownership points, as a result of acquiring an overlapping station after the Application Deadline. In contrast, if an applicant certifies that it does not qualify for one of the point factors, it cannot later amend its application to claim such points. This is the case even if the applicant actually would have qualified for the point it is seeking at the time it filed the application.

Following the Application Deadline, each applicant must continue to maintain the accuracy and completeness of the information in its application and notify the Commission of any substantial change that may be of decisional significance to that application.³²

Technical Minor Amendments. The applicants identified in Attachment A may make minor changes to their initial tech box proposals by the Application Deadline. Any technical change must be a “minor”

²⁸ See FCC Form 349, Instructions, Section IV, Question 2. With respect to documenting current diversity, the preferred supporting information documentation is a map showing no overlap or a statement that none of the parties to the application holds an attributable interest in any other station. To document future diversity, the applicant would generally submit a copy of the governing documents referenced in the certification.

²⁹ An NCE applicant’s qualifications for points are established at the close of the filing window and cannot be enhanced after that time. See 47 C.F.R. § 73.7003(e); *NCE Order*, 15 FCC Rcd at 7423 (noting that point system documentation filed at the Commission should be submitted “concurrently with filing”).

³⁰ See Instructions to FCC Form 349 at 12; see also 47 C.F.R. § 73.7003(e) (“an applicant’s maximum qualifications are established at the time of application...”). Although the rules and instructions do not specifically address this unique situation, we interpret “time of application” and “closing of the filing window” to be the Application Deadline for the complete *broadcast* Form 349 applications, not the initial short-form *auction* FCC Form 175 application. The initial tech box proposals were filed over 12 years ago. The use of the complete FCC Form 349 filing “snap shot” date more accurately reflects the current characteristics of the applicants. Further, under the Commission’s two-step auction process, the Commission does not require the submission of comparative information and does not consider an applicant’s comparative qualifications until the long-form application stage.

³¹ A common reference date provides a level competitive field for applicants, with their qualifications all compared as of the same time. See, e.g., *NCE MO&O*, 16 FCC Rcd at 5082-83.

³² See 47 C.F.R. § 1.65.

change, as defined by the rules,³³ to the engineering proposal specified in the initial Auction 83 tech box application and must not create new mutual exclusivity or application conflicts. A Form 349 application that, as of the Application Deadline, specifies a “major change”³⁴ to the facilities specified in the original Auction 83 tech box proposal and/or creates a new conflict to a pending Auction 83 tech box proposal, or to any prior-filed Form 349, will be dismissed without further opportunity to amend.

Filing Instructions. The NCE FM translator applicants identified in Attachment A must file *complete* FCC Form 349 applications **electronically** through the Media Bureau’s Consolidated Database System (CDBS) online electronic forms filing system by December 16, 2015, the Application Deadline. Additional information regarding electronic application filing is provided in *Public Notice, Media Bureau Implements Mandatory Electronic Filing of FCC Forms 301-CA, 346, 349 and 350*.³⁵

When filing the FCC Form 349, applicants must select “Long Form Application for FM Translator Auction Window 83” on the Pre-form for Form 349 (Question 2 – Application Purpose). In addition, the CDBS file number previously issued to the original Auction 83 tech box application submitted in the FM translator Auction 83 Filing Window must be entered in the field “Eng. Proposal File Number.” Instructions for use of the electronic filing system are available in the CDBS User’s Guide, which can be accessed from the electronic filing web site at:

https://licensing.fcc.gov/prod/cdbs/forms/prod/cdbs_ef.htm

Applicants may begin to complete applications *immediately*. We encourage applicants to access CDBS, prepare their applications at their earliest convenience, and submit their applications early during the window to ensure proper submission. In accordance with Section 1.1116(c) of the Commission’s Rules, these Form 349 applications are exempt from application filing fees.³⁶

Application Dismissals. The Media Bureau staff will dismiss, without further processing, the previously filed technical submissions of any applicant listed in Attachment A that fails to electronically submit the complete FCC Form 349 long form application by December 16, 2015. The filing deadline will be strictly enforced.

Forthcoming Staff and Commission Actions. Following the filing window, the Commission will apply the point system to tentatively select applications from each MX group for grant.³⁷ The Bureau staff will examine the applications of each tentative selectee for application defects. If a tentative selectee’s application is found unacceptable for filing, it will be returned. The applicant will be given one opportunity to submit a curative amendment.³⁸ A tentative selectee that is unable to cure the defect with a minor amendment will be disqualified, and the applicant with the next highest point tally will become the new tentative selectee.³⁹

³³ See 47 C.F.R. § 74.1233(a). Minor changes include, but are not limited to, changes to power, height, directional pattern, and channel.

³⁴ 47 C.F.R. § 74.1233(a).

³⁵ 17 FCC Rcd 8575 (MB 2002).

³⁶ 47 C.F.R. § 1.1116(c).

³⁷ The point system analysis must be considered by the Commission because this analysis is considered a simplified “hearing” for purposes of 47 U.S.C. § 155(c)(1).

³⁸ See 47 C.F.R. § 73.3522(b)(2).

³⁹ See 47 C.F.R. § 73.7004(d).

The tentative selectees, *i.e.*, the single applicant with the highest point total from each MX group, will be identified in a subsequent Commission order or public notice. The applications of the tentative selectees will then be accepted for filing, triggering a 30-day period for the filing of any petitions to deny.⁴⁰ If, after the petition to deny period has run, there is no substantial and material question concerning the grantability of a tentative selectee's application, the Bureau staff will, by public notice, dismiss the mutually exclusive applications from the group and grant the tentative selectee's application.

Additional Information. For additional information, please contact:

- Electronic filing assistance: David Trout, (202) 418-2662
- Engineering inquiries: James Bradshaw or Rob Gates, (202) 418-2700
- Legal inquiries: Amy Van de Kerckhove, (202) 418-2700
- Press inquiries: Janice Wise, (202) 418-8165

This Public Notice contains the following Attachment:

Attachment A: Mutually Exclusive NCE FM Translator Applications

⁴⁰ See 47 C.F.R. § 73.7004(b).