



# PUBLIC NOTICE

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## **FCC ADOPTS LIMIT FOR NCE FM NEW STATION APPLICATIONS IN OCTOBER 12 – OCTOBER 19, 2007 WINDOW**

### **MM Docket No. 95-31**

On April 4, 2007, the Media Bureau (“Bureau”) of the Federal Communications Commission (“Commission”) announced a filing window opening on Friday, October 12, 2007 and closing on Friday, October 19, 2007 for FM reserved band (channels 201 – 220) applications for noncommercial educational (“NCE”) FM new station and major change applications.<sup>1</sup> On August 9, 2007, the Commission issued a public notice (the “*Notice*”) seeking comment on a proposed limit of ten NCE FM new station applications during the window for any party.<sup>2</sup> For the reasons stated below, the Commission is adopting the proposed ten-application limit on NCE FM new station applications filed by any party during the window.

### **Summary of Comments**

More than 10,000 comments were filed in response to the *Notice*. The overwhelming majority of the commenters support the proposed limit of ten new station applications filed by any party during the window.<sup>3</sup> In addition to thousands of individual commenters, the supporters of the proposed cap include Native Public Media, Akaku Maui Community Television, Colquitt Community Radio, Inc., Omni Center for Peace, Justice, and Ecology, Interlochen Public Radio, Kol Ami Havurah, Capital Community Television, Driftless Community Radio, Inc., Prometheus Radio Project, DIYmedia, Free Press, Minority Media and Telecommunications Council, National Federation of Community Broadcasters, National Hispanic Media Coalition, Office of Communication of the United Church of Christ, Station Resource Group, Public Radio Capital, Pacifica Foundation, Public Radio International, California Public Radio, Western States Public Radio, College Broadcasters, Inc., Eastern Region Public Media, Brown Broadcast

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<sup>1</sup> See *Media Bureau Announces NCE FM New Station and Major Modification Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, 22 FCC Rcd 6726 (2007). The Bureau subsequently released a Public Notice announcing the procedures and filing requirements for that filing window. See *Media Bureau Announces NCE FM New Station and Major Change Filing Procedures For October 12 – October 19, 2007 Window; Limited Application Filing Freeze to Commence on September 8, 2007*, Public Notice, DA 07-3521 (rel. Aug. 9, 2007).

<sup>2</sup> See *FCC Seeks Comment on Proposed Application Limit for NCE FM New Station Applications in October 12 – October 19, 2007, Window*, Public Notice, FCC 07-145 (rel. Aug. 9, 2007).

<sup>3</sup> The *Notice*, at p. 2, n. 5, stated that comments should be limited to the issue of the proposed application cap in the NCE FM filing window. Accordingly, to the extent that any of the comments address other issues, those issues will not be discussed herein.

Services, Reclaim the Media and Common Frequency. Many parties emphasized that the proposed 10 application limit would permit the orderly processing of applications. The overwhelming majority of individual commenters generally argued that the 10 application limit would foster localism and diversity.

Only a few commenters support a lower cap. A few individuals support a cap of one or two applications.<sup>4</sup> Alaska Educational Radio System (“AERS”) argued for a limit of five applications. AERS noted that past low power television filing windows had a cap of five applications, resulting in expeditious processing and fewer application conflicts, which in turn “resulted in many singleton applications that were rapidly processed, granted, and constructed.”<sup>5</sup>

Timothy C. Cutforth, a Professional Engineer who represents parties seeking to provide service to isolated villages in Alaska, argues that the cap of ten applications should exclude any application proposing service to a “White Area” or a “Gray Area” (*i.e.*, an area with no existing radio service or only one existing radio service). Alleycat Communications (“Alleycat”) proposes certain relaxations of the Commission’s settlement rules for applications filed during the window, but alternatively argues for a limit of 20 applications, of which a maximum of ten would be grantable. Alleycat supports a settlement window prior to Commission processing of applications, to encourage parties to reach settlements to receive up to ten grants. Upon expiration of the settlement window, the Commission would then unilaterally dismiss each party’s remaining applications over the limit of ten, starting with applications that are mutually exclusive with other applications.

A few commenters support a higher cap.<sup>6</sup> They argue that the proposed limit of ten applications is too low in light of the pent-up demand for new NCE stations, and that a cap of 15 or more applications will help NCE entities file applications to upgrade FM translator stations to full power stations. For example, Network of Glory, LLC (“NOG”) suggests that the goal of limiting speculative applications could be addressed by other means, such as a filing fee and/or a trafficking restriction, and supports a limit of 40 applications if those alternative approaches are not adopted.<sup>7</sup>

Educational Media Foundation (“EMF”) is the only party that argued against any method of limiting applications.<sup>8</sup> EMF argues that the complexity of the NCE FM application form and the Commission’s point system for deciding between mutually exclusive applications will deter speculative applications. EMF also argues that the proposed cap would violate the *Ashbacker*<sup>9</sup> rights of potential applicants “to file for channels in which they might be interested.”<sup>10</sup> Alternatively, EMF argues that the application limit should not apply to an application filed to replace an operating FM translator station.<sup>11</sup> Opposing parties

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<sup>4</sup> See, e.g., Comment of George Robbins.

<sup>5</sup> Comment of AERS at 1.

<sup>6</sup> See Comments of National Public Radio, Inc. (“NPR”), Minnesota Public Radio, Radio Training Network, Inc., Illinois Bible Institute, Cedar Cove Broadcasting, Inc. and KSBJ Educational Foundation.

<sup>7</sup> See also Comments of WAY-FM Media Group at 1-2 and Comments of Western Inspirational Broadcasters, Inc. at 3-4.

<sup>8</sup> EMF filed more than 800 applications in the 2003 FM translator filing window.

<sup>9</sup> See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (“*Ashbacker*”).

<sup>10</sup> Comments of EMF at 4.

<sup>11</sup> *Id.* at 5 (suggesting an exception for one application for a new station that would cover at least 50% of the 1 mV/m service area of the FM translator station).

argue that this proposed exception would defeat the Commission's stated goals of deterring speculative applications and facilitating the prompt processing of applications.<sup>12</sup>

## Analysis

For the reasons stated in the *Notice* and in the overwhelming majority of comments in this proceeding, we conclude that an application limit is an appropriate procedural safeguard to deter speculation and permit the expeditious processing of the window-filed applications with limited Bureau resources. We also conclude that the application limit is consistent with the *Ashbacker* doctrine.<sup>13</sup> With respect to alternative methods suggested by certain commenters for limiting applications, we conclude that those methods are not consistent with applicable statutes.<sup>14</sup>

We agree with the majority of comments that ten applications is an appropriate limit. Our examination of the record confirms our concern, based on factors set forth in the *Notice*, that failure to establish a limit on the number of NCE FM applications that a party may file in the window would lead to a large number of speculative filings, creating the potential for extraordinary procedural delays. We find unpersuasive EMF's argument that speculative filings will be deterred adequately by the complexity of the NCE FM application form and the NCE FM point system. The vast majority of commenters support our proposal to impose a limit of ten applications. We believe that a ten-application limit is consistent with the localism and diversity goals reflected in the NCE FM point system and appropriately balances our goals of deterring speculative filings, facilitating the expeditious processing of window-filed applications with limited Commission resources, and providing interested parties with a meaningful opportunity to file for NCE FM new station licenses.<sup>15</sup>

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<sup>12</sup> See, e.g., Reply Comments of NPR at 8 (noting that there are 2,558 FM translators operating in the NCE FM spectrum and that the increased value in a full power station versus a translator station would provide an incentive to submit applications for speculative reasons).

<sup>13</sup> The *Ashbacker* decision holds that "where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity [to a hearing] which Congress chose to give him." 326 U.S. at 333. The decision does not prevent the Commission from establishing eligibility requirements or limits on the number of applications an entity can file. All potential applicants will have an equal opportunity during the upcoming window to file NCE FM new station applications, and no party will be deprived of the right to consideration of a timely-filed application subject to the acceptability criteria that we adopt herein. See *Glazer v. FCC*, 20 F.3d 1184, 1186 (D.C. Cir. 1994) ("There can be no doubt of the FCC's authority to impose strict procedural rules in order to cope with the flood of applications it receives or expects to receive.").

<sup>14</sup> Specifically, NOG's filing fee proposal is inconsistent with the longstanding exemption for NCE stations. In the Report and Order establishing a program for the collection of fees pursuant to Congressional mandate, the Commission exempted applications for NCE stations from fees, based on the language and legislative history of Section 8 of the Communications Act of 1934, as amended (the "Act"), and the Omnibus Budget Reconciliation Act of 1985. See *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, Report and Order, 2 FCC Rcd 947, ¶ 73 (1987). In addition, we believe that NOG's proposed seven-year restraint on transfer of a new NCE permit would be inconsistent with the Commission's decision to impose a four-year holding period for new NCE stations awarded following an evaluation under the point system. See 47 C.F.R. § 73.7005. Moreover, we do not believe that a trafficking restriction would serve our goal of facilitating the expeditious processing of window-filed applications as effectively as the application cap that we adopt herein. With respect to Alleycat's proposal for granting up to ten applications out of twenty allowed to be filed, we note that such a procedure for dismissing applications accepted for filing is inconsistent with Section 309 of the Act and the *Ashbacker* doctrine.

<sup>15</sup> With respect to entities that have expended funds on preparation of more than ten applications, we note that any engineering work performed prior to the *Notice* must have been preliminary in nature because the Bureau had not

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We recognize the pent-up demand for new NCE FM channels, but we believe that managing the number of applications effectively is the key to an efficient licensing process that will promote the rapid expansion of new NCE FM service throughout the country. The application limit that we adopt herein will help restrict the number of mutually exclusive applications (including “daisy chains” of mutually exclusive applications), thereby reducing the delay in processing applications and initiating service to the public on new stations. In addition, to the extent that the number of applications filed in this window is manageable, the next filing window can be opened without undue delay. We conclude that a higher application limit of 15, 40 or somewhere in between would not serve our goals as well as the cap that we adopt herein, as the potential benefits to a few applicants would be outweighed by the detriment to all interested parties in the form of additional processing delays.

We conclude that an exception to the ten-application limit that we adopt herein for applications proposing new White Area or Gray Area service is not administratively feasible at this time. The NCE FM construction permit form (FCC Form 340) currently approved by the Office of Management and Budget (“OMB”) does not call for a showing of that information,<sup>16</sup> and it would take several months to revise the form.<sup>17</sup> Accordingly, we cannot implement such an exception in time for the Friday, October 12, 2007 opening of the upcoming filing window. We will consider the possibility of adding this type of exception for future NCE FM filing windows.

We also decline to adopt EMF’s proposed exception for applications filed to replace an operating FM translator station.<sup>18</sup> We recognize the desire to protect existing service to the public by upgrading NCE FM translators to NCE FM full service stations. However, each licensee of an NCE FM translator recognized and accepted the secondary status of its construction permit and constructed its station notwithstanding the inherent risk that its station is always subject to displacement by a full service station. The exception proposed by EMF would undermine the application limit and the policy goals that are the basis for the limit.

We also acknowledge the concern expressed by some commenters about the potential for attempts to circumvent the application limit.<sup>19</sup> We note that the Bureau retains the discretion to conduct

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yet “frozen” minor change applications. Accordingly, we believe that this work, most likely involving identification of potential transmitter sites, may have some value in the future. We also note that these engineering costs are minor in nature compared to the cost of constructing and operating the proposed stations. With respect to legal costs, it is unlikely that there is a material difference in the legal costs based on the number of applications contemplated at that early stage of the process. In any event, to the extent that the cap we adopt herein disrupts the expectations of certain parties, we conclude that it is necessary and appropriate to do so here in the service of our administrative goals. *Cf. Bachow Communications, Inc. v. FCC*, 20 F.3d 683, 687 (D.C. Cir. 2001) (“As we have recognized before, the Commission may make midstream rule adjustments, even though it disrupts expectations and alters the competitive balance among applicants.”).

<sup>16</sup> OMB Control No. 3060-0034. Section III of Form 340 asks for information about first or second NCE service to the proposed service area. However, proposals to provide a first or second NCE service are far more common than proposals to serve a White Area or Gray Area.

<sup>17</sup> The Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 *et seq.* (the “PRA”), would require Federal Register notice and an opportunity for public comment, as well as OMB approval, for either a change in Form 340 for this purpose or a separate requirement to submit information about service to White Areas or Gray Areas.

<sup>18</sup> *See* Comments of EMF at 5.

<sup>19</sup> *See, e.g.,* Comments of Hardy, Carey, Chautin & Balkin, LLP.

investigations and, where there is a substantial and material question of fact regarding real parties in interest, the Commission will designate applications for hearing to determine whether the applications comply with the Commission's rules and policies.

## Procedural Matters

*Final Regulatory Flexibility Certification.* The Regulatory Flexibility Act of 1980, as amended ("RFA"),<sup>20</sup> requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."<sup>21</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>22</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>23</sup> A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").<sup>24</sup>

Pursuant to Section 605(b) of the RFA,<sup>25</sup> we certify that the application limit adopted in this *Public Notice* imposes no significant economic impact on a substantial number of small entities. The application limit will benefit small entities seeking to establish a new NCE FM service on a local or regional basis by expediting the review and processing of applications filed during the filing window opening on Friday, October 12, 2007. In the Commission's rulemaking proceeding on comparative standards for NCE applicants, the Commission reserved the right to establish by public notice a limit on the number of NCE applications by a party in a filing window.<sup>26</sup> In the *Notice*, the Commission explained that numerous entities involved in NCE FM operations urged the agency to establish an application limit for the filing window to prevent mass filings of speculative applications. The vast majority of comments filed in response to the *Notice* agreed with the Commission's tentative conclusion that ten applications is an appropriate limit to deter speculative applications and facilitate the prompt processing of applications. Based on the record in this proceeding, we have concluded that a lower limit would not effectively meet the demand for new NCE FM channels, whereas a higher limit would impose unacceptable processing delays on all applicants, overriding any potential benefits to a few applicants interested in filing more than ten applications in this window. The limit excludes both pending applications by NCE FM stations and applicants and new major change applications by existing NCE FM stations seeking to modify their existing authorizations, so the limit involves no detriment to those applicants. This *Public Notice* and

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<sup>20</sup> The RFA, *see* 5 U.S.C. §§ 601–612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>21</sup> 5 U.S.C. § 605(b).

<sup>22</sup> 5 U.S.C. § 601(6).

<sup>23</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>24</sup> 15 U.S.C. § 632.

<sup>25</sup> *See* 5 U.S.C. § 605(b).

<sup>26</sup> *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7422 (2000) ("*NCE R&O*"), *aff'd*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001).

final RFA certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register.

*Paperwork Reduction Act.* This *Public Notice* was analyzed with respect to the PRA<sup>27</sup> and does not contain any information collection requirements.

*Congressional Review Act.* The Commission will send a copy of this *Public Notice* in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.<sup>28</sup>

## **Conclusion**

The number of comments filed in response to the *Notice* underscores the importance of the upcoming NCE FM filing window and the high level of public interest in that window and in the NCE FM service. We appreciate the interest shown on this issue and the viewpoints expressed by the commenters. We adopt the following limitation on applications in the upcoming NCE FM filing window:

**A party to an application filed in the NCE FM filing window opening on Friday, October 12, 2007 may hold attributable interests<sup>29</sup> in no more than a total of ten applications filed in the window. If it is determined that any party to an application has an attributable interest in more than ten applications, the Bureau will process only the ten applications that were filed first (based on file number). The Bureau will dismiss all other applications. Major modification applications will not count toward the limit. Pending new and major change applications filed under former licensing procedures also will not count toward the limit.**

Action by the Commission on October 10, 2007: Chairman Martin, Commissioners Copps, Adelstein, Tate and McDowell.

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<sup>27</sup> See n. 17 *supra*.

<sup>28</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>29</sup> See 47 C.F.R. § 73.3555(f).