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## WINDOW DRESSING

### **Applications for a New Noncommercial FM Station in the February 2010 Window**

**By John Crigler\***

Beginning on Friday, February 19, 2010 and ending on Friday, February 26, 2010, the FCC will open a filing window (the “2010 Window”) for applications for new noncommercial educational (“NCE”) FM stations. The 2010 Window is the first opportunity to file for new NCE stations since October 2007 (the “2007 Window”).

The 2010 Window is different from the 2007 Window in several important respects. In the 2007 Window, applicants had freedom to select the community the station would serve and the frequency in the reserved band (88.1 – 91.9 MHz) that was best suited to serve that community. In the 2010 Window, applicants may apply only for specific frequencies which have been already “allotted” to specific communities. The frequencies and communities are listed in Attachment A. The frequencies in the 2010 Window are in the portion of the FM band normally used by commercial broadcasters (92.1 – 107.9 MHz). Specific frequencies within this band have been specially reserved for NCE use. The process by which some of these frequencies was reserved involved a demonstration that at least 10% of the population (and a minimum of 2,000 people) within the 1 mV/m contour of the proposed station received either no other NCE service, or only one other NCE service. These allotments are marked by a double

asterisk in the allotments that appear as Attachment A. Applications for these allotments must provide the first or second NCE service that was the basis for reserving the frequency.

#### The FCC's Filing System.

##### How to File.

All applications must be filed through the FCC's electronic Consolidated Database System ("CDBS") filing system, <https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.htm>. In order to file the application, an applicant must also obtain an FCC Registration Number (FRN) from the Commission Registration System (CORES). Instructions for obtaining an FRN are available on the FCC's website, <http://www.fcc.gov>.

##### What to File.

All applications must be filed on FCC Form 340, dated December 2008. This form and detailed instructions for completing it are available on the FCC's homepage. In order to complete the form online, an applicant must establish a password protected account in CDBS. Once a CDBS account is established, the application can be drafted at any time, although it cannot be filed until the window opens.

#### The Structure of the Application.

Form 340 is divided into seven sections which are briefly summarized below.

- Section I – Solicits general information about the applicant, its address, contact information, FRN (which will automatically be inserted upon filing the application), and the community of license.
- Section II – Solicits information relevant to the parties to the application (such as its directors, if the applicant is a corporation) and to whether the applicant is legally and financially qualified to hold a noncommercial license (discussed below). A “No” answer to most of these questions will result in the dismissal of the application unless the “No” is carefully explained in an exhibit.
- Section III – Solicits information relevant to determining whether the applicant will provide a first or second NCE service to at least 10% of the total population in its predicted service area (the 60dBu contour). This question is important for double asterisked allotments because applications for these allotments must demonstrate that they satisfy the requirements for which the channel was reserved. Because all applicants in this window must specify the same community of license, the FCC will not select a winning applicant based upon a “fair distribution of service” preference, awarded under Section 307(b) of the Communications Act (and known fondly as a “307(b) preference”). A 307(b) preference is awarded when

two or more mutually exclusive<sup>♦</sup> applications specify different communities of license.

Section IV – Asks the applicant to certify whether it qualifies for certain points awarded under the point system used to award a construction permit when there are two or more qualified mutually exclusive applicants who do not receive a 307(b) preference. The possible points are:

Established Local Applicant	–	3 points
Diversity of Ownership <i>or</i> Statewide Network	–	2 points
Superior Technical Proposal	–	1 – 2 points

Section V – Solicits information about attributable interests in licenses and construction permits for other stations (including full service commercial and noncommercial stations and translators). This information is used to break point system ties. The first tie-breaker awards a preference to the applicant with the fewest authorizations. If two or more applicants are still tied, the second tie breaker awards a preference to the applicant with the fewest pending applications.

Section VI – Requires the applicant to certify that the information contained in the application is “true, complete, and correct.” The certification should be signed by an authorized representative of the applicant. For corporations,

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<sup>♦</sup> For a more detailed explanation of terms such as “mutually exclusive,” attributable interest,” and “predicted contour,” as well as for a more detailed explanation of the point system, see *Public Radio Legal Handbook*, Chapter XI.

the representative should be an officer of the corporation. It is not necessary to submit an actual signature, but it is wise to keep a signed and dated copy of the application as evidence that the certification was proper.

### Application Guidelines.

1. Back to Basics. An applicant must establish that it meets certain “basic qualifications.” These include a showing that the applicant has an educational purpose which will be advanced by a radio station, that it possesses requisite “character” to be a broadcast licensee, that it complies with limits on foreign ownership, and that it is financially qualified. If these qualifications are not demonstrated, the application will be dismissed without ever advancing to a point system analysis. Similarly, if Section VII of the application does not establish that the technical facilities proposed comply with technical and environmental requirements, the application will be dismissed without regard to the applicant’s qualifications under the point system.

2. Expect no Mercy. Although the point system is technically a hearing designed to select the “best” applicant, it is applied in an unforgiving, even mechanical way. Late-filed applications or applications that do not provide required information will be dismissed. The FCC will generally assume the accuracy of any information contained in applications, but will not supply missing information. Competing applicants will have an opportunity to challenge the applicant who receives the highest score under the point system and becomes the “tentative selectee.”

3. Documentation Counts. Claims for localism and diversity credits must be documented. The documentation must not only demonstrate that the claims are valid at the time

the application is filed, but that the applicant has a binding commitment to abide by these principles in the future. The FCC will not award credit for undocumented claims.

4. The Establishment Clause.

In order to receive the localism credit, an entity must be both “established” and “local.” A nonprofit entity is “established” if the entity itself has been in existence for at least two years.

An established entity must also be local. Governmental entities are deemed to be local throughout the area within their jurisdiction. A non-governmental entity is considered local if its headquarters or the residences of 75% of its directors are within 25 miles of the reference coordinates for the community of license specified in the application. A non-local parent may not claim localism through a subsidiary, nor base its claim on the location of a “branch office,” rather than of its own headquarters.

5. Less Later is More Now.

A claim to advance diversity of ownership is awarded if the applicant does not have an attributable interest in another overlapping station. This claim is based upon a “snapshot” of the interests held by the applicant and its principals at the time the application is filed. The FCC has rejected a diversity claim based upon a promise that a director, who held an attributable interest in an existing overlapping station at the time the application was filed, would resign from that position if the application for the new station was granted.

One exception to this principle is that the Commission will award a diversity credit based upon an applicant’s commitment to divest itself of an overlapping translator station or Class D or LPFM station. The Commission concluded that, in these circumstances, a waiver of its rule was

justified in order to permit a secondary station to be replaced by a full-service station. An applicant that seeks to avoid attribution of an LPFM license must pledge to divest itself of the LPFM authorization before the grant of the construction permit for the new “full-service” station.

6. Best is Better.

Up to two points are awarded for the applicant with the “best” technical proposal. To be technically superior to another applicant, the preferred applicant must serve 10% (one point) or 25% (2 points) more area *and* population than the “next best” applicant. What if there is no “next best” applicant because one of two other applicants serves more area than the second, while the second serves more population than the first? The “best” still gets credit, provided the area and population it serves is superior to the area and population served by each of the other applicants.

7. One is the Loneliest Number.

To date, all ties have been resolved by using the first tie-breaker – the fewest existing authorizations. The Commission has nevertheless explained that in applying the second tie-breaker – the lowest number of pending applications – the applicant should always count its own application as a pending application. Thus, the lowest number of pending applications any applicant may claim is “one.”

8. Minor Majors and Major Majors.

Although the directors of a nonprofit organization typically do not own shares or hold other equity interests in the organization, directors are analogized to equity owners for purposes of applying the FCC’s rules concerning “attribution” and “major changes” of ownership. For

example, if a director of an applicant holds an interest in the licensee of another station, that interest will be “attributed” to the applicant. A change of more than 50% of the directors of a nonprofit corporation is ordinarily considered a major change that will result in the dismissal of an application. To avoid the harsh effect of applying this rule to applications that may be pending for years, the FCC has waived its major change rule when applicants show that “they have experienced gradual ownership changes over long periods and not as an outgrowth of the party’s desire to gain control over the NCE application.”

By contrast, the Commission has denied a waiver of the major change rule when changes in directors occurred “suddenly,” as a result of a struggle to gain control of the entity. In these circumstances, the Commission dismissed the application after concluding that the present applicant was “not the entity that originally filed the application.”

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**Commercial Vacant Allotments Reserved for  
Noncommercial Educational Use**

<b>No.</b>	<b>State</b>	<b>City</b>	<b>Channel</b>	<b>Class</b>
1	AL	Anniston**	261	C3
2	AZ	Pima**	296	A
3	AZ	Somerton**	260	C3
4	AZ	Willcox**	223	C3
5	CA	Hemet**	273	A
6	CA	McKinleyville**	277	C3
7	CA	Sutter Creek**	298	A
8	CA	Westley**	238	A
9	CO	Olathe**	270	C2
10	CO	Olathe**	293	C
11	FL	Big Pine Key**	239	A
12	FL	Horseshoe Beach**	234	C3
13	FL	Live Oak**	261	A
14	FL	Otter Creek**	240	A
15	GA	Reynolds**	245	A
16	IA	Keosauqua**	271	C3
17	IA	Moville**	246	A
18	IA	Rudd**	268	A
19	ID	Weiser**	247	C1
20	IL	Canton**	277	A
21	IL	Cedarville**	258	A
22	IL	Clifton**	297	A
23	IL	Freeport**	295	A
24	IL	Pinckneyville**	282	A
25	IN	Columbus**	228	A
26	IN	Farmersburg**	242	A
27	IN	Fowler**	291	A
28	IN	Madison**	265	A
29	IN	Terre Haute**	298	B
30	KS	Council Grove**	281	C3
31	KY	Smith Mills**	233	A
32	LA	Golden Meadow**	289	C2
33	LA	Homer**	272	A
34	LA	Ringgold**	253	C3
35	MA	West Tisbury**	282	A
36	MI	Hubbardston**	279	A
37	MO	Huntsville**	278	C2
38	MO	Laurie**	265	C3

## Attachment A

No.	State	City	Channel	Class
39	MT	Bozeman	240	C3
40	NC	Dillsboro**	237	A
41	ND	Berthold**	264	C
42	NM	Alamo Community**	298	A
43	NY	Amherst**	221	A
44	NY	Rhinebeck	273	A
45	OK	Cordell**	229	A
46	OK	Weatherford**	286	A
47	OK	Wynnewood**	283	A
48	OR	Dallas**	252	C3
49	OR	Madras**	251	C1
50	OR	The Dalles	268	C3
51	PA	Liberty**	298	A
52	PA	Susquehanna**	227	A
53	SC	Barnwell**	256	C3
54	TX	Burnet**	240	A
55	TX	Denver City**	248	C2
56	TX	Van Alstyne**	260	A
57	UT	Fountain Green**	260	A
58	VA	Shenandoah**	296	A
59	VI	Charlotte Amalie	226	A
60	WA	Chewelah	274	C3
61	WA	Oak Harbor**	233	A
62	WI	Ashland	275	A
63	WI	Augusta**	268	C3
64	WI	Hayward**	232	C2
65	WI	Washburn	284	A
66	WV	St. Marys**	287	A
67	WY	Jackson**	294	C2

\*\* - Allotments identified with a double asterisk were reserved by means of the third reservation test, *i.e.*, would provide a first or second NCE radio service to at least ten percent of the population within the 1mV/m contour. Applicants for these identified allotments must satisfy, again, the first or second NCE service provisions.