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POINTERS ON THE POINT SYSTEM  
NEW NONCOMMERCIAL FM'S AND NEW LPFM'S  
by  
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Competitive Environment. New FM applications have been frozen for many years. The anticipated general FM window will be the first filing opportunity in ages, and probably the last opportunity for years to come – or ever. LPFM filings are frozen. New filing opportunities are rare and unfortunately becoming rarer. In either service, expect intense competition for channels. Expect competing filings. Expect your own filing to be gone over very carefully for defects by an adversary eyeing the same locality. If there is something wrong, expect a petition to deny.

How the Point System Works in General. When more than one noncommercial FM or LPFM application is filed for a locality and not all can be granted, the FCC has now developed a checklist of things it likes in an applicant, and awards points. The applicant with the most points wins. In practice, this becomes very formulaic and wooden. An applicant must design its proposal painstakingly for maximum points. Any fudging, confusion or sloppiness to earn points is an invitation for a competitor to shoot the application down.

Sources. The FCC application forms are downloadable Acrobat files from the FCC Web Site at <http://www.fcc.gov/formpage.html>. (Go to the home page, and looking down the left-hand column click Forms.) The forms must be filed electronically. The printable Acrobat versions are valuable, even necessary homework. Form 340 (March 2001 ed.), for new noncommercial FM and Form 318 (March 2000 ed.) for LPFM have detailed instructions (Form No. 314, 14 double-column pages and work sheets; Form No. 318, 11 pages and work sheets.) No one should file either of these applications until the answer to every question has been worked out or obtained in advance. *Do not guess.*

As many as five sources may need to be consulted: 1. The questions in the form; 2. the instructions; 3. the work sheets with the forms; 4. the FCC rules and regulations; and 5. the Public Notice announcing the future filing opportunity. *These filings are not last minute projects!*

## BASIC ELIGIBILITY

All-broadcast Eligibility. If you look around, some very bad people have broadcast licenses. The qualification criteria are not onerous. Certain drug possession and sale convictions are disqualifying. Not less than 80 per cent of the owners (in noncommercial, usually the board members) must be U.S. Citizens. Past extra-legal broadcasters (“pirate” broadcasters) are permanently barred, 47 U.S.C. Sec. 632(a)(1)(b); *Ruggiero v. Federal Communications Commission*, 317 F.3d 239 (D.C.Cir. 01/31/2003).

LPFM Basic Eligibility. Noncommercial status is about the same in LPFM as for noncommercial FM. Unless you are an educational institution, you need an exhibit to set out an educational program and how the station will further it. LPFM is limited to local applicants for the first two years after the first window for LP100 or LP10 filings (Sec. 73.853(b)). The Public Notice for a window will indicate whether this limit applies. “Local” in LPFM is stated as a formula: The applicant, or a chapter or a branch is physically headquartered within 16.1 km (10 miles) of the transmitter; or 75 per cent of the board of directors live within 16.1 km (10 miles) of the transmitter; or it is a public safety entity (example, a fire district) with jurisdiction in the area. If qualifying by headquarters or branch, you need a provable presence (power bill?), not a P.O. Box or the upstairs bedroom. In LPFM this is not a point factor. If you are not “local” you may not apply and you are subject to being dismissed. If you are qualifying via board members, you need to select the transmitter site with this criterion very much in mind. And you need to measure. One 17 km board member might sink the ship.

In LPFM the licensees, directors, parent entities and subsidiaries face restrictions against multiple ownership (Sec. 73.858) . Again, this is an absolute bar to applying. The same owner may not own two LPFM's within 12 km (seven miles) of one another. Cross-ownership of LPFM with any other broadcast facility, including FM translators, as well as daily newspapers or cable TV, is forbidden (Sec. 73.860(a)). (An exception is

made to encourage uncontested student-station applications.) Over time, the FCC plans to relax limits on the number of LPFM's in common ownership, from only one, to five, eventually to ten. (Public safety entities can acquire all they want, if not contested.) The commercial folks' workarounds of these ownership limits via time brokerage or Local Management Agreement will not work. Those are banned, Sec. 73.860(c).

Noncomm Basic Eligibility. In noncommercial FM there is no localism requirement, and there are no multiple ownership rules. These are saved for later, in the point system. For noncomm, the major eligibility hurdle is a narrative exhibit showing how the applicant will be providing a noncommercial, educational broadcast service (Sec. 73.503). The easiest way to show this is to be previously licensed as a noncomm, and just to state the file number. Another easy way is to be a state-recognized or sponsored educational institution or to possess some educational accreditation. If neither of these fits you, you must (Form 340 – Section II) 1. Set forth your educational program through documents such as articles and bylaws; 2. give a narrative of your educational objective and how the station serves it. For new entities, the best approach is to have this clearly in mind from the beginning, and to write those lofty educational purposes into the initial Articles of Incorporation.

Summary. You are beginning to see the outline of a plan of attack. Is it LPFM, noncommercial FM, or both? In both services, competing applications are resolved through a point system, and the systems are not identical. They have one key feature in common. After the application is filed, in each service, there comes a time when your position is frozen and you can do nothing to improve your point score. For this reason it is imperative to understand the scoring basis, not just before filing, but before even organizing your filing project.

### LPFM POINT SYSTEM

Conflicting applications in LPFM will be compared on points and a winner selected if one has more points. Only three points are possible (Sec. 73.872). One is awarded for a promise to operate at least 12 hours per day (not the minimum of five hours). An applicant would need to have a head of cabbage where most folks have a brain not to make this promise. A second point is awarded for a promise to originate locally at least eight

hours of programming a day, from a facility within ten miles of the transmitter. It would be advisable to have the studio location picked out, but it is once again easy to promise, promise, promise and worry about the detailed implementation later. If licensed, you will need actually to originate and not be just a repeater or automated station.

Because these points are bagged quite easily, the battle often will turn on the third criterion, an “established community presence” for at least two years prior to application. To answer Section III Q. 1(a) with a “Yes,” you must certify that you have been in existence as a non-profit educational institution or organization for two years and that for two years you were physically headquartered, had a campus, or had 75 per cent of board members residing within 10 miles of the transmitter location (Sec. 73.872(b) (1)). (We saw above, you need this localism stuff at the minute of filing, to apply for LPTV at all.)

What to do if your organization had not existed as an actual non-profit for two years? To begin with, you should see if there is an existing noncomm in your area that could be suited to the LPFM criteria. Because most noncomms generally are exempt from franchise, filing, and other taxes, there tend to be a lot of them. Many are only slightly active, while others have been dozing for years like Rip Van Winkle. An existing moribund noncomm, a dust broom, a new coat of wax and a new board of directors might be just what you need.

You also can file for non-profit incorporation in your State now, and let the two years happen. (A state incorporation will suffice, even if you do not have an I.R.S. 501(c) exemption.) The rarity of filing windows makes this option much less desirable. Least desirable, faking the two years, by documenting the occasional bake sale, is not likely to work. If you have friends in public safety, then an interesting exception, or workaround, is to show that the entity applying (fire, police, public health, disaster preparedness) had the location in its jurisdiction for two years.

The local presence, as defined for LPFM and for noncommercial FM, works a bit differently in each one. In LPFM, you must be local as of the date you filed your FCC application, and you are bonused for the two years prior. In noncommercial FM, you need not ever be local, but two years' local presence gets you a point system plus that could decide any contest.

The established community presence definitely gives an LPFM edge to schools and churches, but even these still can lose the point if they did not match their headquarters (or board residences) with the exact distance from the transmitter coordinates they specified. Often they are part of hierarchical organizations, where the true local control could be challenged. Board members like all Americans move around, so the 75 per cent placidly residing for a continuous two years would be subject to verification.

Voluntary Time Sharing. Where there are several applications in conflict, all may settle by merger or buyout (most of the time limited to expenses). Usually a partial settlement, for example, two applicants in a five-party group, accomplishes nothing. You still have to await the final selection process. But not in LPFM. The rules say that where two parties merge and agree to share time, their points are magically added together, so they crush all other applicants (Sec. 73.872(c)). The other applicants may not even know about it, until the merger is completed and filed and the others are sunk. The required time share under the merger is extremely loose – each merging entity must program a minimum of 10 hours per week (of 168 if you are 24X7). If you think about this before the filing window, it could actually make sense to encourage your good buddies to make a second or third application in conflict with you, provided they can bring point system points to the table. You merge, and you win. But they had better be truly independent, because a “sham” application would be trouble for everyone who left their fingerprints.

## NONCOMMERCIAL FM POINT SYSTEM

In noncommercial FM a total of seven points can be awarded, three for an established local applicant; two for either lack of other ownership or certain defined educational institutions; and up to two for a big coverage differential (Sec. 73.7003).

Local Applicant (3 points). Local applicant is defined somewhat differently from LPFM. It is a government entity throughout its jurisdiction, or an entity with two years of having a headquarters, a campus or 75 per cent of board members residing within 25 miles of the community to be served. (Work Sheet #4 is strict on what is a residence, and requires a by-law provision to say that the qualifications must continue – easily done

at the next board meeting – but vital to do before filing.)

Note here: “community.” Noncommercial is unlike commercial FM, where the community is determined by a Table of Allotments, with channels matched to named communities (Sec. 73.202(b)). In noncommercial, the applicant is free to pick the community, so long as at least one-half that community or one half the population of the community are covered by a good (60 dBu) signal (Sec. 73.513). The 25 miles for “localism” are to be marched off from the main post office, or other official (Commerce Dept.) coordinates. So the community can be chosen to fit the applicant (3 points), rather than the applicant being chosen to fit the community.

Local Diversity of Ownership (2 points) Two points are awarded for the complete absence of attributed other interests in radio broadcasting that overlap with the applicant's coverage (TV ownership is ignored). However, a school district, school system, or multiversity (or a program supplier for one of these) can be ineligible for this credit and still get 2 points by showing that the proposal will increase the number of schools or campuses regularly served (the University of California at Merced exception).

FM translators within the overlap are attributed ownership, unless they are fill-ins rebroadcasting a primary FM inside its contour. But a specific question in the form makes it easy to name a nearby FM translator (described in an exhibit), and then make it subject to a divestiture pledge. If the FM applicant prevails, it must dump the translator when it applies for a license and begins broadcasting under program test authority. This special question inviting FM divestiture all but encouraged FM translators chains to see if they can “step up” to full FM at the window.

Big Coverage Differential (up to 2 points). You need an engineering exhibit to prove it, but having the best proposal by a margin of both 10 per cent of square mile area and 10 per cent of population garners 1 point. If your top-shelf proposal is provably better by 25 per cent in miles and 25 per cent in population than the next best, it gets 2 points. For applicants covering the same general area, and having competent engineering design, a vast disparity like that seems improbable.

Tie-breakers. The noncommercial FM point system rules have not had an actual field test. The first window is yet to come. In crowded metro

areas, channels are hard to find to begin with, and finding a channel where your engineer can miraculously identify both 10 per cent more miles and 10 per cent more listeners seems like a stretch. The action, especially anywhere around the top 25 markets, is going to be among several or many applicants who have or claim local diversity (3 points) and who have or claim no other ownership (2 points) and end up being tied at 5 points.

The first tie-breaker says that the applicant with the fewest attributable existing broadcast authorizations, commercial and noncommercial, prevails. A timely divestiture pledge in the application should be as effective as non-ownership (as with FM translators). This is an untested assumption, not discussed in the instructions. If it is correct, and you get the nod that way, the winner must then divest as promised.

If that tie-breaker does not apply, then the Commission will prefer the applicant with the smallest number of pending applications for new stations and major changes. This raises some game theory scenarios beyond the scope of this paper. Do you curtail filings to garner this unlikely preference, or maximize your chances by filing more, expecting never to get to this tie-breaker? The FCC's decision to penalize major changes, even as a tie-breaker, seems very odd, perhaps discouraging a licensee from applying to improve its service to the public, lest it thwart some other application.

Oh, and we are still tied? The solution is forced time-sharing among those applicants left standing, Sec. 73.7003(c)(3).

Community Preference (Noncomm FM only). In the commercial band, you may not apply unless there is a channel for that community already in the Table of Allotments. In noncomm, selecting your community and surrounding area of service, it's first-come, first served. An applicant for noncomm FM can win hands down, even against competitors with more "points," if it can select an underserved area for its community of license. The "areas" of coverage are compared, and the actual named community of license is completely disregarded.

The FCC is mandated to distribute service among communities equitably (Sec. 307(b) of the Act). It does this here by awarding decisive trump-card preference to an applicant that weaves its way through the following guidelines (Sec. 73.7002(b)). You get the trump card preferences

and win outright, if:

- within the primary contour, more than 10 per cent of your population will be getting first or second reserved-band noncomm service; and
- that unserved or underserved population is more than 2,000 people.

This requires some tricky engineering. Perhaps you need to expand your contour toward pockets of underserved population, or to get your total pop. count above 20,000. Perhaps you need to shrink your contour, to exclude the “overserved” and make sure the underserved represent more than 10 per cent of the population served.

-- First service to over 2,000 sweeps the board, and wins over second service to no matter how many people.

-- But if not that, a total of first and second service that is at least 5,000 more than anyone else's total will win.

Keep in mind that the Facilities Program (PTFP) has been dishing out equipment grants for more than 35 years, under criteria strongly favoring first noncommercial service. Maybe you will find a pocket of 5,000 more souls without first and second service than anyone else found. But it would be almost a miracle, a locality in some remote, but congested box canyon that just recently became annexed to the United States and repealed its laws against radio towers.

-- Only if we don't have a winner under this analysis does a conflict case go on to be evaluated under the point system.

Population counts are made using a computer program, most likely by your telecomm consulting engineer. Guesstimates won't help.

### GO AHEAD AND FILE

You can see that success turns on getting some good advice, getting good and ready, and keeping momentum. The ornate criteria are a pain in the back side. On the other hand, there is no filing fee. Stay focused. Do it. On behalf of the communities who badly need your voices, thank you very much.

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