

NEW POINTERS ON THE POINT SYSTEM

Rev. 3.3

by Michael Couzens

How the Point System Works in General. Applications are permitted only during days announced by a published filing “window.” The general embargo on filings is suspended only when any window opens. This practice creates heavy pent up demand and numerous conflicting claims for limited spectrum. When more than one Noncommercial Educational FM (NCE) or Low Power FM (LPFM) application is filed for a locality, and not all can be granted, the applicants are described as mutually exclusive, or “MX.” The FCC has developed a checklist of things it likes in an applicant, and awards points. The MX applicant with the most points wins. This is known as the point system.

A Snapshot Printed with Indelible Ink. The close of a filing window marks the last minute at which any point-related proposal may be modified. After that, no amendment that fixes or upgrades a point system claim will be credited. As times do change, in practice this can make the process very formulaic and wooden. An applicant must design its proposal painstakingly for maximum points. Any fudging, confusion or sloppiness in claimed points will be permanent, and will become an invitation for a competitor to shoot the application down.

The Point System Acquired Some New Tweaks. The old point system was used to select applicants during the filing windows for NCE applicants in 2007 and in 2010. It was used in 2013 for a Low Power FM filing window. In December of 2019 the FCC adopted a formal decision, making a number of tweaks to the point system.¹ New application forms, Form No. 340 for NCE, Form No. 318 for LPFM, are being created to integrate these changes, and only the latest editions will be usable .

In this briefing, changes introduced by this action are highlighted as **New2020**.

NEW FILING PROCEDURES AND WEB ADDRESSES

Alphabet Soup: CDBS, LMS and FRN. Broadcast applications used to be filed, and in some cases still are, in a system known as CDBS:

1. Report and Order in MB Docket 19-3, FCC 19-127, December 11, 2019
The rule making can be accessed through the FCC’s Electronic Comment Filing System: <https://www.fcc.gov/ecfs/> Specify proceeding as: 19-3

<https://licensing.fcc.gov/document/DA-22-29A1.pdf>

The FCC has migrated most of this activity to another web platform, known as LMS: <https://enterpriseefiling.fcc.gov/dataentry/login.html>

That is where applications for new NCE's and LPFM's will need to be filed going forward.² To use this platform, you need to register and get an FCC Registration Number (FRN). That is done at this platform:

<https://apps.fcc.gov/cores/userLogin.do>

The registration process asks for your Employer Identification Number or Taxpayer Identification Number (personal social security number). These numbers are easily obtained and issued by the Internal Revenue Service, but not from the FCC. (The IRS is most welcoming to any person or entity acquiring a number so as to become a potential taxpayer.) The FCC issues you a ten-digit user number and you get to create the password, for FRN and LMS purposes. Once you have generated your FRN number and password combination, do not lose them.

BASIC ELIGIBILITY

All-broadcast Eligibility. FCC ownership qualifications are not onerous. Certain drug possession and antitrust convictions are disqualifying. Not less than 80 per cent of the owners (in noncommercial, usually the board members) must be U.S. Citizens. In LPFM, any past involvement with extra-legal broadcasters (“pirate” broadcasters) creates an automatic lifetime ban for any board member or officer.³ A word to the wise: an organization will not be able to rid itself of a disqualifying board member for eligibility purposes, post-filing, simply by accepting a resignation. **New2020:** The new rules reiterate that post-filing amendments to remove a board member who ever engaged in “pirate” radio will not be allowed, even when the applicant entity was unaware of the ‘blotch’ on the board member's resume. So it's necessary to check out each director carefully for possible qualification problems before filing.

NCE Basic Eligibility. In NCE generally there is no localism requirement,

2. A filing for NCE will come under Form 2100, Schedule 340. But you have to forage for this in the pull-down menus. Form titles are shown, but no form numbers. The Public Notice announcing any new filing window for NCE or LPFM will need to provide clear guidance on how to file in the new system.

3. 47 U.S.C. Sec. 632(a)(1)(b); *Ruggiero v. Federal Communications Commission*, 317 F.3d 239 (D.C. Cir. *en banc* 01/31/2003).

and there are no multiple ownership rules. These are saved for later, in the point system. For NCE's, 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 an NCE or other "noncomm," and just to state the file number of the granted application. Other easy ways are to be a state-recognized or sponsored educational institution, to possess some educational accreditation, or to be a Native American Tribal Entity. If none of this fits, you must (Form 340 – Section II): 1. Set forth your educational program through submitted documents such as articles of incorporation and bylaws; 2. give a narrative of your educational objective and how the proposed station serves it. For new entities, the best approach is to have this in mind at incorporation, and to write those lofty educational service purposes into the Articles or Bylaws.

LPFM Basic Eligibility. Proof of noncommercial status is about the same in LPFM as for NCE's. You need an exhibit to set out your existence as an educational institution, a Tribe or Tribal Entity, or showing non-profit incorporation or other existence as an entity under state law. In LPFM if you are not "local" you may not apply and you are subject to being dismissed. This is not a point factor. Then as with NCE's, you set out an educational mission, stated in by laws or other demonstrable form, and how the station will further it.

Tribal Eligibility. Tribes are defined as any band or nation recognized by the Federal Government. Tribal Organizations – such as a private non-profit entity or a foundation – can qualify if they are at least 51 per cent owned or controlled by a Tribe or Tribes. The FCC's application reviewers are not necessarily going to understand the fine points of Tribal governance, so it's best to provide documents and detailed descriptions to make the eligibility clear.

Proving LPFM's are "local". Local in LPFM is stated as a formula: An applicant in a Top 50 urban market must be physically headquartered or have a branch within 16.1 km (10 miles) of the transmitter. Outside the Top 50 markets the distance expands to 32.1 km (20 miles). A Tribe can qualify as local if there are Tribal Lands within the proposed service area of the station. Similarly, public health and safety services such as volunteer fire departments or police are qualified anywhere within their defined jurisdiction (by law or under contract with a public agency). Entities claiming localism should give a street address, not a P.O. Box.

Alternatively, 75 per cent of the board of directors can be shown to reside (specify address) within the stated km distance. Practically speaking, the board member approach to basic qualification is riskier, because board members might move, resign or demise in the years while the application is pending. Board

turnover is common.

If qualifying by headquarters or branch, you need a provable presence (power bill?), not a P.O. Box. It can be a residence, but there must be some evidence that ongoing business is conducted from there. If you are qualifying via board members, you need to select the transmitter site, the board composition, or both with this criterion very much in mind. An excessively distant board member or members could result in dismissal. Tribal applicants need an exhibit to establish that qualification.

Restrictions on LPFM Ownership. In LPFM the licensees, directors, parent entities and subsidiaries face restrictions against multiple ownership (Sec. 73.855) . Again, this is an *absolute bar* to applying. The same owner may not own two LPFM's. (A Tribal Entity is permitted a maximum of two.) With a narrow exception for FM translators, cross-ownership of an LPFM with any other broadcast facility, as well as daily newspapers or cable TV, is forbidden (Sec. 73.860(a)). (Public safety entities can acquire all they want, if not contested.) FM translator ownership is permitted (generally, cap of two; tribal entity cap of four), but under stringent rules, Sec. 73.858. Time brokerage agreements or Local Management Agreements, sometimes used by commercial entities to duck the ownership rules, will not work in LPFM. They are banned (Sec. 73.860(e)).

Site availability. Filers in the past were only making an implied representation that their transmitter site is available, whether by ownership, rental or letter of reasonable assurance. Both NCE and LPFM have been marred by problems with consultants being heedless of this, even some who have deliberately falsified their transmitter site. **New2020:** The new application forms now require an applicant to certify that it has obtained reasonable assurance from the tower owner, its agent, or authorized representative that the proposed site is available. The applicant also must include the name and telephone number of the person contacted to establish this. Site changing amendments will require these showing anew for the new site.

NONCOMMERCIAL FM POINT SYSTEM (NCE)

Peremptory Winners. An NCE applicant can win outright, regardless of the number of competitors, if it establishes Tribal Priority or has a first service or second service distribution priority. It wins without any point system comparison. To do so it must make all the showings for Tribal Priority or for its superior coverage claims. For a distribution claim to be winner, the applicant must not choose the same community of license as the competitor it is being compared with.

Tribal Priority. A Tribal Applicant on tribal land wins outright under this criterion, unless it is MX with another tribal applicant. But because it is an automatic winner, the required showings in the application are detailed and rigorous. To qualify, the applicant must show that: (1) it is a Tribal Applicant, defined as a federally recognized Indian tribe, band, nation, pueblo or village; (2) that the proposed facility will provide coverage to tribal lands, reservation lands or at least government-designated “near reservation” lands, over more than 50 per cent of the station's primary service area; (3) that the proposed community of license is located on reservation lands; and (4) that the proposed facility would be the first local tribally-owned noncommercial educational transmission service at the proposed community of license. Comment: The “slam dunk” winning aspect of this priority is attractive, but the four-fold showing needs to be complete and accurate, and may be impossible to amend after the initial filing.

First NCE and Second NCE Distribution Preferences. This preference is rooted in the Communications Act, 47 U.S.C. Section 307(b), which mandates “a fair efficient and equitable distribution of radio” among the several states and communities. The population served from a transmission site is determined through the art of radio engineering, using an ellipse or circle, defined by FCC rules and known as the primary service contour. Provided your selected community of license is not the same as the competitor's, you get this trump card preference and win outright, if:

- within the primary contour (60 dBu), more than 10 per cent of your population will be getting first or second reserved-band noncommercial service; and
- that unserved or underserved population is more than 2,000 people.

This requires some tricky engineering. Perhaps you need to expand your 60 dBu contour toward pockets of underserved population, to get your total pop. count above 2,000. Perhaps you need to shrink your contour, to exclude the “over served” and make sure the underserved represent more than 10 per cent of the population served. Once this is done:

- New noncommercial 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.

Only if no one prevails under the Tribal Priority or on the first and second new service population criterion, the group then moves on to point system

analysis.⁴

The Point System. In NCE 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). That is to say, technical coverage issues can figure in a peremptory win securing victory without point system analysis (see above) or again as a two-point comparative factor.

Established Local Applicant (3 points). Local applicant for NCE is defined somewhat differently from LPFM. It is a government entity throughout its jurisdiction, or an entity with two years of continuously having a headquarters, a campus or 75 per cent of board members residing within 25 miles of the community to be served. Note here: “community.” NCE is unlike commercial FM, where the community has been determined by a Table of Allotments, with channels matched to named communities (Sec. 73.202(b)). In NCE, the applicant is free to specify the “community of license,” so long as at least one-half that community or one half the population of the community are covered by a 60 dBu signal (Sec. 73.513). The 25 miles for “localism” are to be measured from the main post office, or other official (Commerce Dept.) coordinates. In this way the community can be chosen to fit the applicant and garner points (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).

Claims for status as an established local applicant and for lack of other ownership must be supported by documentation. For localism, two-year local incumbency is best shown by organizational documents confirming the entity's formation more than two years before the application is filed. Diversity is shown by a full explanation, excluding other ownership by the entity or its officers or directors or, for example, showing non-overlapping contours when there is an existing station ownership. **New2020:** Previously the Commission declined to

4. The engineers must use the decennial U.S. Census of population. Prior to any new window, the FCC needs to indicate uniformly whether the outdated 2010 Census will be used, or the new 2020 Census.

credit exhibits claiming these points, unless the formative documents contained language stating that the characteristics – localism and diversity – would be durably maintained in the future. This requirement has been dropped, but the showings still are required to establish currently that the entity has those attributes.

New2020: So far as overlapping ownership interests that would negate a diversity claim, the Commission now will credit all divestiture pledges or proposed resignations of a positional interests, if they are timely made before the end of the filing window. If the applicant prevails and is granted a construction permit, it must achieve divestment of the overlapping interest before it applies for new program test authority. Previously such pledges, to be effective, were limited only to certain FM translators.

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. Note that this point difference is unknowable until you see what competing applicants have offered in their proposals.

Tie-breakers. The **New2020** proposals noted that in the October, 2007 window about 3,600 applications were received. Nearly half were MX (in mutually exclusive groups). These were clustered into some 500 groups that were processed through the point system. In such an intense competitive environment, numerous applicants found themselves tied at five points. So then what? The best case is to find that all applicants are amenable to a settlement, whether by engineering tweaks to eliminate the MX conflicts or by payoffs to an applicant, limited to their documented expenses in filing. If none of that removes your MX, the group will be analyzed according to tie-breakers.

First, the applicant with the fewest attributable existing broadcast authorizations, commercial and noncommercial, prevails. As discussed, timely divestiture pledge in the application should be as effective as non-ownership.

Second, 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. That raises some game theory scenarios beyond the scope of this paper, but is relatively rare because most applicants are first-time would-be licensees.

New2020: Third and last, the Commission will prefer an applicant that applied in a previous window, was found qualified, and lost out on points or tiebreakers. The applicant would need to establish continuous legal existence since the previous filing, and could not have any other NCE ownership.

Oh, and we are still tied? The solution is voluntary or Commission-forced time-sharing among those applicants left standing (Sec. 73.7003(c)(3)). Not many applicant groups have ended up in either kind of time share, and for good reason. Success in radio broadcasting depends on building audience familiarity and loyalty, branding and station identity over a length of time. Chopping a 24-hour service into two or more segments run by completely independent programming services runs counter to all these goals. Instead, parties usually go to great lengths to find engineering fixes or to settle where they can.

New2020 Voluntary and Involuntary Time Sharing. Under the new policy, ties are identified in the Public Notice announcing tentative selectees. That starts a 90-day period to file a voluntary time-sharing. If the parties do not agree to share by written agreement, the Commission will impose time sharing on up to a maximum of three tied applicants. Applicant beyond the top three, ranked by length of established local existence, will be dismissed. To make this work, the application form will require applicants to indicate the date on which the applicant entity became formally organized. To discourage imposed time sharing, as they have done in the past, the Commission will issue time share grants that expire at the end of a single license term and cannot be renewed. To avoid this drastic result, the sharers are permitted to convert to a voluntary time share agreement.⁵

No cumulation of points by merger. As described in the next section, Low Power FM applicants can merge and aggregate their points. The 2020 Order decided not to apply this practice to NCE's.

Maintenance of Comparative Qualifications. The public interest benefits that flow from a point system award would be lost, if the winner were then able to sell its authorization to an entity that lacked equal or better point system *bona fides*. Both the previous rules and the new ones restrict transfers until a point system winner has obtained a license and operated for four years. **New2020:** *It appears* (para. 28) that an assignment or transfer will be allowed, provided the acquiring possesses and promises to retain the point system features of the previous winner, until the full four years have run.

5. It is unclear by when the applicants would need to do this, Report and Order, fn. 79.

Previously, an engineering winner under fair distribution criteria could not apply for a minor change in coverage, if there was any loss of the winning coverage area. **New2020**: Changes will now be allowed, provided that any loss of first or second service NCE population is offset by a gain of equal or greater coverage.

Numerical Limit. **New2020**: The FCC is working ahead to open a filing window for new and major change NCE's. Concerned about the expected volume of applications, the Agency has proposed a limit of ten on the number of applications that a single entity, directorship or officership could have in common during the filing window, *Public Notice*, FCC- 20-145, released October 19, 2020. That or, hopefully, a smaller number will be adopted as a definite rule shortly after the public comment periods close in November, 2020.

LPFM POINT SYSTEM

As mentioned, any past involvement with extra-legal broadcasting (“pirate radio”) even by a single board member, is definitively disqualifying on LPFM. **New2020**: The new ruling clarifies that such a defect cannot be fixed by amendment after the fact. Upon disclosure it becomes a fatal error to that application.⁶ Ignorance of that particular mustard stain on a director's tunic, they confirm, is no excuse.

Point System Factors. Conflicting applications in LPFM will be compared on points and a winner selected if one has more points. Only five points are possible (Sec. 73.872). One is awarded for a promise to originate locally at least eight hours per day (not the minimum of five hours that every applicant must intend). The second point is awarded for promising to have a publicly accessible main studio within 10 miles of the transmitter location (20 miles is rural areas). The application needs to specify the studio address and telephone number. If licensed because of a promise to originate, you will need to actually originate programming and not be just a repeater or automated station. A third point is awarded for making both the local origination pledge and the main studio pledge.

Because these three “promise” points are bagged quite easily, the battle often will turn on the fourth criterion, an “established community presence” for at least two years prior to application. To answer Section III Q. 1(a) with a “Yes,”

6. This, and only this qualifying factor constitutes a lifetime ban for the poor soul who has that mark on their record. By contrast almost any other misconduct will not be considered under FCC basic qualification, if it took place more than ten years ago, Policy Regarding Character Qualifications in Broadcast Licensing, Report and Order and Policy Statement, 102 FCC 2d 1179 at 1229 (1986).

you must certify that you have been in existence as a non-profit educational institution or organization continuously 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, for an NCE you do not need localism in order to apply, but anticipating competition you would be wise to have it, along with the implied, valuable comparative point.) Churches and schools can claim this point, based on having a local “campus.”

Alternatively, the localism point can be earned by Tribes and Tribal Organizations proposing to serve tribal lands. But the transmitter must be located on tribal lands, and the eligibility for the point must be shown with an exhibit at the time of filing. Validly created Tribal Organizations need only show that they exist at the time of filing, and do not need to have existed for two years prior to the filing. Public safety agencies, such as fire and police, can qualify for this point if they have had two years of jurisdiction in the proposed station's service area.

A fifth point is awarded on a showing that the applicant has no attributable interest in any other broadcast station.

Finally, a sixth point is awarded to Tribes or Tribal Organizations serving Tribal Lands. The transmitter must be located on Tribal Lands, including lands associated with the organizational members of a 51 per cent Native owned entity. Such an applicant has previously made the valid claim for local incumbency, so this point is in addition. In a close contest or in any densely populated area, some competitors well might be able to check all the other boxes, but it is only the Tribal Organization that has a valid claim to this point. It might prove dispositive of the case.

Voluntary Time Sharing. Where there are several applications in conflict, all may settle via merger or buyout (limited to documented expenses in the filing). Usually a partial settlement, for example, two applicants in a five-party group, leaves you stuck in the same MX as before. You still have to await the final selection process. But not in LPFM. The rules say that where two or several LPFM parties are equal on points and not surpassed by the points of another, they can choose to merge and agree to share time. Their points are magically added together, so they can crush all other applicants (Sec. 73.872(c)). The other applicants may not even know about it, until the merger is completed and filed. The required share of future broadcast time under the merger is extremely loose – each merging entity must program a minimum of 10 hours per week (of 168 if you are 24X7). Pre-merger, the parties must all have equal point showings.

New2020: Under the new rules, more than one party but no more than three can actively discuss or actually enter into a point sharing agreement, upon the initial filing or at any time up to the FCC's formal tentative selectee designations. The agreement must be conditioned on each party achieving tentative selectee status. Only parties that are tied for the point system lead in their MX group can use this technique, so it will not be allowed for runners up to leapfrog past an applicant who otherwise would stand in the point system lead. Any sharing agreement is filed after the tentative selectees in the MX group are announced. It is submitted as a minor amendment.

New2020: There is nothing in the new rules to prevent or even to discourage a group of prospective applicants from designing an application plan whereby two or three applications are submitted and a time sharing agreement is formally signed before filing. Because the time share is not submitted until after the tentative selection, this degree of cooperation may be unknown until after the tentative selection. To be clear, this allows cooperation in an area where previously the aggregators could be accused of gamesmanship, even of cheating in having a single entity wearing two or three masks for application purposes. With the new design, other applicants have to wait until the tentative selection to see their winning competitors “unmask.” But there is no ground to claim unfairness. And a cautionary word: An applicant taking one or the maximum of two timeshare partners needs to be sure that all will be tied with the maximum points. If one of them is defective and falls short on points, the sharing scheme will be disallowed.

OTHER CHANGES

The FCC long has held that a change in more than 50 per cent of the ownership of an applicant (in commercial, perhaps by a stock sale; in noncommercial by change in the board of directors) will result in the dismissal of the application. **New2020:** Going forward, during the pendency of an application, majority board changes generally will be allowed and treated as minor changes, provided they are gradual. A sudden transformation from one control group to another remains, potentially, problematic. In the case of a government entity, governance changes will all automatically be treated as minor.⁷

7. **New2020:** The new decision resolves a conflict in the rules, and states that majority board changes in LPFM for licensees and permittees are permitted at any time, provided the entity's mission remains the same, Sec. 73.865(e) of the Rules. This takes such changes out of the three-year holding period otherwise applicable to LPFM point system winners.

Post Grant Issues. **New2020** The FCC streamlined the process for a construction permit deadline to be extended via “tolling” - external events such as litigation or international coordination. (Report and Order, paras 60 – 62.). It also lengthened the construction permit for LPFM, formerly 18 months with liberal grant of 18 month extensions, to a flat three years (Report and Order, 63-64). Tolling is not easy to establish, and without tolling, the new 36 months will be the final word. No extensions.

Post-grant Assignment and Transfer. The FCC had a ban on any conveyance of an LPFM construction permit (“CP”). **New2020:** A new rule permits conveyancing of a CP, provided it occurs after the first 18 months of the new three-year construction period. Consideration is capped at no more than the Seller's reasonable expenses. The Buyer must meet all LPFM eligibility criteria and, if the Seller was a point system winner, must meet or exceed those point system attributes until four years after licensing. Aside from the embargo on conveyance during the first 18 months, this new approach closely matches the established rules for NCE.

GO AHEAD AND FILE

Sources. Once the rule making is completed and the new forms approved, Form No. 340 for NCE and Form 318 for LPFM, they should be available in much the same way from the FCC web site. The forms and their detailed instructions and work sheets are valuable, even necessary homework. No one should file one of these applications until the answer to every question has been worked out or obtained in advance. Do not guess. Once a filing window is announced, there should be ample time for you to identify and refine your proposal. You can see that success turns on getting some good advice, getting ready, and keeping momentum. The ornate criteria can be a pain in the back side. On the other hand, there is no filing fee. You won't know whether you would have succeeded unless you try. When the time comes, Go for it! On behalf of the communities who badly need your voices, thank you very much.

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