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Special Bulletin to Broadcasters

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FCC Creates New Low Power FM Service and Adopts New EEO Rule

Note: The following information is based on statements made by the FCC at its January 20, 2000 open meeting and the press conference conducted by Commission staff immediately thereafter. Nonetheless, since the texts of the FCC decisions are not yet available, the information is necessarily preliminary.

FCC To Allow Two Classes of Low Power FM Stations But Requires That They Be Noncommercial

After nearly a year of effort, the FCC adopted, on a 4 to 1 vote (with Commissioner Powell dissenting in part, and Commissioner Furchtgott-Roth dissenting), two new classes of low power FM (LPFM) radio stations: LP10 (maximum power 10 watts) and LP100 (maximum power 100 watts). The Commission also decided that the new stations would be restricted to noncommercial operation. In creating the low power FM service, the Commission retreated from the suggestion in its *Notice of Proposed Rulemaking* that a third class, operating at 1000 watts, also be authorized. The Commission expressed confidence that creation of LPFM stations will not impede the development and eventual implementation of in-band, on-channel digital audio broadcasting (IBOC DAB).

LP10 stations will be limited to a maximum height above average terrain (HAAT) of 30 meters, and may operate with as little as one watt of power or as much as 10 watts, giving them a coverage area with a radius of one to two miles. LP100 stations will be limited to a maximum HAAT of 30 meters as well, and may operate with power ranging from a minimum of 50 watts to a maximum of 100 watts, giving them a coverage area with a radius of approximately 3.5 miles.

Applicants for new or modified LPFM stations will be required to meet minimum separation requirements to protect the service contours of the following: (a) authorized commercial and noncommercial FM stations of all classes; (b) existing FM translator and booster stations and LP100 stations; and (c) full-service FM, FM translator and LP100 facilities proposed in applications filed with the FCC. The mileage separations were apparently computed so as to protect existing stations and provide them with an added "buffer zone" of 20 kilometers.

LPFM stations will not be restricted to the noncommercial portion of the FM band. According to FCC staff evaluations, given the limited amount of spectrum available in major markets, it appears that only one LP100 station will be available in the Philadelphia market, two in the San Francisco market, three in the District of Columbia market, and four in each of the Dallas and Miami markets.

The FCC decided that in order to further its goals of diversity and the creation of opportunities for new voices, no existing broadcaster or other media entity can have an ownership interest, or enter into any program or operating agreement, with any LPFM station. In order to encourage local origination of programming, LPFM stations will be prohibited from operating as translators. In addition to use by churches, community groups and educational institutions, LPFM stations will also be available for use in providing public safety radio services.

With regard to eligibility, for the first two years only local entities that certify that they are physically headquartered, or have a campus, or have 75% of their board members residing within 10 miles of the station that they seek to construct and operate, are eligible to apply. During that two-year period, no entity may own more than one LPFM station in any given community. After the two-year period (which will begin when the first LPFM applications are accepted by the FCC), applications will be accepted from non-local entities. In addition, during the two-year period, no entity will be permitted to operate more than one LPFM station nationwide. After the two-year period, eligible entities will be allowed to own up to five stations nationwide, and after an additional year, up to 10 stations nationwide. Ownership holdings of national entities will not be attributed to any local affiliates or chapters.

Pirate broadcasters will be disqualified from owning LPFM stations unless they certify that: (a) they voluntarily ceased engaging in unlicensed operations no later than February 26, 1999, without specific direction from the FCC to do so; or (b) they ceased engaging in unlicensed operations within 24 hours of being directed to do so by the FCC.

The Commission said that LPFM stations would be granted eight-year license terms, but that transfers of licenses would not be allowed. LPFM stations would enjoy the same degree of license renewal expectancy accorded to full power stations, and they will receive four-letter call signs with the suffix "-LP." The stations will also be subject to the same character qualifications standards as full power broadcast stations.

The FCC expects to open a five-day application filing window in May of this year, and will give 30 days' notice before the window opens. The first window will be only for applications for LP100 stations. After the bulk of the LP100 applications are processed, the Commission will announce a window for the filing of applications for LP10 stations. Electronic filing of applications will be allowed, but will not be mandatory.

In cases of mutually exclusive applications for LPFM stations, the FCC will use a point system to choose between competing applicants: one point will be awarded to an entity that has been in existence for two years or more prior to the filing of the application; one point will be awarded to entities that propose to broadcast at least eight hours per day of locally originated programming; and one point will be awarded to entities that propose to operate at least 12 hours per day. If mutually exclusive applicants have the same number of points, timesharing proposals will be considered. In cases where ties cannot be resolved, a group of up to eight applicants will receive successive license terms of at least one year, for a total of eight years. Such eight-year shared licenses will not be renewable.

The FCC said that its rules on political broadcasting (including the obligations to provide reasonable access and equal opportunities to federal candidates, and to maintain a political file) will apply to LPFM stations, as will Commission rules on indecency, obscenity, station identification and sponsorship identification (presumably this means underwriting, since the service is to be noncommercial). LPFM stations will not have to comply with the FCC rules regarding main studios or public inspection files. The new stations will have to pass through Emergency Alert System messages, but will not be required to perform encoding. The Commission will require LPFM stations to operate a minimum of 36 hours per week, which is currently the minimum for full power noncommercial educational stations.

The Commission's decision does not address the issue of whether LPFM stations will be counted as "media voices" in broadcast markets for purposes of the multiple ownership rules, although Commission staff at the press conference said that the issue will be addressed in the FCC's forthcoming decision on reconsideration of the local ownership rules.

We will report additional information to our clients as necessary. The Commission's decision will not become effective until 60 days after its publication in the *Federal Register*, meaning that the earliest the new rules could be effective is late March.

New EEO Rule Focuses on Station Outreach Efforts

Nearly 17 months after the FCC had its broadcast EEO rule declared unconstitutional by the U.S. Court of Appeals for the District of Columbia Circuit in *Lutheran Church - Missouri Synod v. FCC*, 154 F.3d 494 (1998), the Commission announced a new rule

which will apply to all radio, television and cable companies, as well as to multichannel video programming distributors. The new rule, which was approved by a 4 to 1 vote (with Commissioner Furchtgott-Roth dissenting, and Commissioner Tristani dissenting in part) focuses on licensee outreach efforts, with the Commission placing a premium on the "wide dissemination" of job availability information by broadcasters and cable operators. Such "wide dissemination" apparently can be accomplished by use of newspaper advertising, websites, Internet job bank postings and other methods, including the broadcast of job notices on the licensed facilities, but the details are not clear yet.

In the *Lutheran Church* case, the court also had asked the Commission to determine whether it had the authority to address complaints of discrimination, or whether such complaints should be addressed solely by other government agencies such as the U.S. Equal Employment Opportunity Commission (EEOC). Yesterday, the Commission reaffirmed its stance that discrimination is fundamentally inconsistent with the public responsibilities of a licensee. While the FCC will generally defer to the EEOC to make initial findings of discrimination and to provide specific remedies, the FCC will not hesitate to act independently if it sees the need to do so.

As to affirmative action requirements, the Commission stated that it will not require nor pressure broadcasters to hire particular applicants. Instead, its new rules are designed to encourage broad availability of job opening information.

In addition to the "wide dissemination" requirement, licensees are required to implement one of two supplemental recruitment methodologies. Under the first approach, stations are expected to: (1) send job vacancy announcements to recruiting organizations that request them; and (2) select from a "menu" of non-vacancy specific outreach methods, including job fairs, internship programs, and direct interaction with educational and community groups. The specific number of such outreach efforts that must be utilized has not been announced. Under the second approach, if licensees believe that they can accomplish "wide dissemination" without use of the supplemental measures, they may design their own program, but will then be required to keep detailed records on recruiting sources and race, gender and ethnicity of applicants, in order to be able to monitor the effectiveness of their self-designed program.

The *Report and Order* continues to allow religious broadcasters to establish religious belief or affiliation as a job qualification for all employees. In

addition, broadcast stations with less than five fulltime employees and cable operators with less than six fulltime employees will not be required to demonstrate compliance with the EEO program requirements.

Licensees subject to the rule will be required to place an annual EEO report describing in detail their outreach efforts in their public inspection file. In addition, licensees will be required to file a Statement of Compliance every second, fourth and sixth year of their license terms, certifying compliance with the new rule. Television stations and radio stations with more than 10 fulltime employees must also submit their annual EEO reports to the FCC at midterm of their license term, and at license renewal time. The Commission will conduct license midterm and renewal reviews of licensee outreach efforts based on those filings. Cable operators will be required to submit their annual EEO reports as part of the supplemental information required by statute to be filed with the FCC every five years.

Finally, the FCC has reinstated the requirement that broadcasters file an annual EEO report listing the number of employees in various categories by race, ethnicity and gender. According to the Commission, these reports will be used merely to assess industry trends and will not be relied on in connection with any evaluation of the licensee's hiring performance.

The precise effective date of the new rule cannot be determined until its publication in the *Federal Register*. For more information on the new rule, please contact the firm.

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