

Commission rules set forth the current eligibility rule for FM stations: "A noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon showing that the station will be used for the advancement of an educational program." Section 73.621(a) of the rules sets forth the current eligibility rule for TV stations: "(N)oncommercial educational broadcast stations will be licensed only to nonprofit educational organizations upon showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service." Weaving together these various regulatory and statutory provisions, in the manner the Act instructs, under section 397(6)(A), an NCE station is either an FM or TV station that is licensed to a nonprofit educational organization that shows that the station will be used to advance an educational program. A TV station must also show that the station will be used to furnish a nonprofit and noncommercial service that will serve the educational needs of its community. The Commission has also licensed AM stations that satisfy the FM station eligibility rules, as well as FM translators that rebroadcast the signals of an NCE FM station, as NCE stations, and has done so both before and since the November 1978 effective date of section 397(6). In terms of paragraph 397(6)(B), an NCE station is also any station that is owned and operated by a municipality and transmits only noncommercial programs for educational purposes, regardless of the Commission's eligibility rules. We conclude that applicants are exempt from auctions, pursuant to section 309(j)(2)(C), only when they file applications for broadcast stations expressly defined by sections 397(6)(A) and 397(6)(B).

11. This construction of the governing legal standards for NCE stations is consistent with our current practice. The Commission has long licensed nonprofit educational organizations, such as universities, to provide commercial service on non-reserved channels. When licensed to operate commercial broadcast stations, these nonprofit educational organizations are subject to the requirements applicable to all commercial stations. For example, they must pay filing fees; by contrast, fees are not required with respect to any station that a nonprofit educational

organization is licensed to operate as an NCE station.

## 2. LPTV and TV Translators

12. *Background.* We also sought comment on the applicability of the auction exemption in section 309(j)(2)(C) to LPTV and TV translator stations specifically. The Commission does not now issue, and has never issued, licenses for NCE stations in these services. As a result, we asked whether the auction exemption extends to applicants for LPTV and TV translator licenses that could qualify as applicants for NCE stations in other services. If the fact that we have not licensed LPTV and TV translator facilities as NCE stations in the past means that applicants must compete for these license at auction, we asked whether, and if so how, we should create an NCE LPTV and TV service. Even if we took such action, we sought comment on whether it would have any impact on the auctions exemption, given that section 397(6)(A) of the Act defines NCE stations in terms of our eligibility rules as they existed on November 2, 1978.

*Discussion.* We conclude that no licenses for LPTV and TV translator facilities fall within the scope of section 397(6)(A), and that adopting new NCE eligibility criteria for these services would not bring applicants for such services within the scope of the auction exemption. LPTV and TV translator facilities, however, qualify as NCE stations under section 397(6)(B) of the Act, if they are owned and operated by municipalities and transmit only NCE programs. This definition does not turn on our eligibility rules, and so applicants of the latter type are exempt from auction.

13. Section 397(6)(A) of the Act defines the NCE stations that are exempt from auction in terms of the Commission's eligibility rules in effect on November 2, 1978. We did not license LPTV and TV translator facilities as NCE stations as of that date. Indeed, the Commission did not create the LPTV service until 1982, and at that time expressly rejected the approach of licensing these facilities as NCE stations. With respect to the LPTV service, the Commission stated that

Whether a low power applicant or licensee is noncommercial or not-for-profit is a decision properly made by the licensee on the basis of applicable corporate and tax law, pertinent requirements of the Corporation for Public Broadcasting and perceived characteristics of the market in which it proposes to operate. Section 73.621 of the Commission rules (the eligibility and programming rules regarding NCE TV

stations) will not apply to lower power stations.

The same applies to TV translators, because LPTV and TV translators are virtually the same; the difference between the two is that LPTV licenses can originate more programming than TV translator licensees, but licensees can switch between the two through simple letter notification to the Commission. Although we have exempted LPTV and TV translator licensees from administrative fees on certain conditions, we do not license these facilities as NCE stations, with the result that the programming and service requirements for NCE stations do not apply. Given that we do not license LPTV and TV translator facilities as NCE stations, and did not do so as of the effective date of section 397(6), these stations (other than those defined in section 397(6)(B)) do not fall within the scope of section 309(j)(2)(C).

14. Section 397(6)(B) defines an NCE station as one that "is owned and operated by a municipality and which transmits only noncommercial programs for education purposes." This definition does not incorporate the Commission's eligibility rules for NCE stations. LPTV and TV translator stations that are owned and operated by municipalities and transmit only noncommercial programming for educational purposes are exempt from auction under section 309(j)(2)(C).

## B. Licensing of Non-Reserved Spectrum

15. *Background.* In the 2FNPRM, we offered two different proposals for licensing noncommercial educational applicants on non-reserved spectrum. As one option, we proposed to hold applicants for NCE station licenses simply ineligible for non-reserved spectrum. As an alternative, we proposed to accept applications for both commercial and NCE stations in the non-reserved spectrum, with the latter applications subject to dismissal if they were mutually exclusive with the former. We also asked whether we should amend the anti-collusion rule to permit mutually exclusive commercial and NCE applicants for AM stations a prior opportunity to resolve their conflicts through settlements.

16. *Discussion.* We adopt our proposal to allow applicants for NCE stations to submit applications for non-reserved spectrum in a filing window, subject to being returned as unacceptable for filing if there is any mutually exclusive application for a commercial station. We also will allow applicants for AM stations and secondary services a prior opportunity to resolve their mutually exclusive applications through