



Broadcast Newsletter

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COMMERCIAL FM AUCTION SET FOR SEPTEMBER 1, 2009 – FM MINOR CHANGE FREEZE

In early April, the FCC proposed an auction for 122 commercial FM permits for September 1, 2009 and sought comment on its competitive bidding procedures for the auction. The assigned auction number is 79. Two weeks later, the Commission issued orders adopting its proposed rules for the auction and simultaneously issued a public notice freezing certain FM minor change applications for certain periods.

In the public notice, the Media Bureau announced that it will not accept FM commercial and non-commercial educational (NCE) minor change applications during the Auction 79 form 175 application filing window. That filing window, during which applicants may file expressions of interest and certain technical parameters in order to qualify to participate in the auction, will open on June 16, 2009 and close on June 25, 2009. In addition, the Media Bureau announced a freeze effective immediately on the filing of applications proposing to modify the reference coordinates of any of the 122 vacant non-reserve band FM allotments scheduled for Auction 79. That freeze will automatically terminate the day after the filing deadline for the Auction 79 long form application.

The temporary freezes set by the FCC are normal in advance of FM radio and similar auctions, and are designed to avoid conflicts between modification applications for existing stations and auction proposals, as well as to promote a certain and speedy auction process.

Any FM station – whether commercial or non-commercial – that is planning to file a minor modification in the future should evaluate the possibility that its minor change plans might be adversely affected by applications for the auctioned allotments. If such a risk exists, such stations should file the minor change application in advance of the freeze which begins on June 16, 2009. Should you or others be interested in participating in the auction, a list of the available channels is available on the FCC's website, or by emailing any of the attorneys at Hardy, Carey, Chautin & Balkin.

FCC CLARIFIES TV STATION OBLIGATION TO PUBLICIZE WALK-IN DTV HELP CENTERS

On April 10, the Commission issued a public notice to clarify an earlier published requirement mandating that television broadcast stations not yet transitioned to digital-only publicize the locations and hours of walk-in DTV help centers located in their market. The purpose of the notice was to clarify the requirement by explaining the term "Walk-In DTV Help Center".

Under the Commission's rules, specifically defined walk-in centers have to be identified in the station's consumer education campaign. The notice required stations to update their "Help Center PSA" within 10 business days of becoming aware of any new walk-in DTV help center, or a change in the operation of any existing centers in their DMA.

While recognizing that stations might have difficulty in ascertaining the existence and location of all of the walk-in DTV help centers they must publicize, the Commission nevertheless issued the clarification and required stations to actively engage in determining that information. In addition, broadcasters were encouraged to provide detailed information about all of the opportunities for face-to-face DTV education of which they were aware.

If your station has not yet transitioned to digital-only operations, it must comply with the clarified publication requirements for DTV walk-in help centers. We urge you to contact your state broadcaster association or other resources available to you in order to determine which centers are located in your DMA. Stations that have already transitioned, as well as Low-Power TV and Class A stations, do not have an obligation to air consumer education information about the digital television transition.

The Media Bureau's transition policies continue to evolve, and a further public notice is expected in coming weeks to detail minor changes to the established rules. Some of those changes were previewed at the recent NAB convention in Las Vegas.

MEDIA BUREAU CLARIFIES GUIDELINES FOR 18-MONTH CONSTRUCTION PERMIT EXTENSIONS

In early 2008, the Commission adopted an order that provided certain broadcast assignees with an opportunity to receive additional time to complete construction of new broadcast stations with expiring construction permits. The FCC's new rule provided that an "eligible entity" acquiring an issued and outstanding permit for a new, unbuilt broadcast station would have either the time remaining on the permit or 18 months from the consummation of the assignment of the permit, whichever is longer, within which to complete construction and file a license application.

The Media Bureau has just relieved a public notice providing additional guidance about how it will process assignment applications from eligible entities requesting additional time to construct. Additionally, the Bureau established a transition period, through May 31, 2009, during which it will provide greater flexibility to some applicants.

Under the guidance, eligible assignees wishing to avail themselves of additional time for construction must consummate the transaction prior to the permit's existing expiration date. In addition, applications seeking additional construction time must now be filed at least 90 days prior to permit expiration to allow time for the staff to act on the application and for the applicant to close on the transaction once approved.

Given these newly announced policies, the Bureau has stated that it will apply relaxed processing standards to eligible entity applications for a limited time. In particular, the Bureau will accept an application proposing the assignment of an expiring permit to an eligible entity, provided that the application is filed on or before May 31, 2009, and the permit has not expired prior to application filing. Any such assignment will be conditioned upon consummation within 30 days of the grant.

Beginning with applications filed on June 1, 2009, the Bureau has mandated that an eligible entity consummate an authorized acquisition of a permit prior to the permit's expiration date in order to avail itself of the additional period of time allowed for

construction.

The requirements for eligible entity showings are complex and should be carefully evaluated when certifications are being provided in an assignment application. When the permit is nearing expiration, a heightened scrutiny of the eligible entity showing is recommended.

MEDIA BUREAU ISSUES GUIDANCE TO NCE-FM STATIONS REGARDING TV CHANNEL 6 PROTECTION REQUIREMENTS

In early April, the Media Bureau issued a public notice clarifying its policy related to NCE-FM station interference protection for television Channel 6. As TV Channel 6 analog operations have terminated along with the digital television transition, several NCE-FM stations have filed applications at the FCC which do not protect existing TV Channel 6 analog operations. The Bureau has been inundated with such filings and determined that it was time to put a halt to these informal modification attempts unless they met certain established criteria in the rules. Otherwise, applicants would have received an advantage over others with regard to expanding their coverage areas when TV Channel 6 analog operations ceased.

At present, the FCC has announced that it will dismiss any NCE-FM station application that either fails to satisfy the existing interference protection requirements for any TV Channel 6 operation that existed as of September 7, 2008, or that does not include an unconditional consent letter from the affected television station concurring with the proposed NCE-FM facilities. An application which does not satisfy one of those requirements will not be entertained. In addition, amendments and petitions for reconsideration based upon subsequent termination of analog Channel 6 operations will not be entertained either. The same result will follow for applications requesting a waiver of the interference requirements.

The Commission made clear its recognition that the completion of the DTV transition will create opportunities for NCE-FM stations to improve their facilities. However, in order to ensure an orderly process for allowing such expansions, the Bureau has indicated that it will announce a future date at

which it will begin accepting applications premised on the termination of analog TV Channel 6 transmissions. The public notice announcing that date will be issued subsequent to the nationwide digital television transition which is slated to occur at midnight on June 12, 2009. More than likely, the Commission will initiate a separate proceeding to adopt rules and procedures governing this process so that stations will be treated equally.

If your NCE-FM station has the ability to obtain a consent letter from a TV Channel 6 operation in your market that it is currently protecting, we strongly recommend that you do so and immediately file a minor mod application for your improved facilities. Upon the filing of your application with TV Channel 6 consent, you will cut off any later applications for the same spectrum. To analyze your NCE station's situation, we encourage you to contact a qualified consulting engineer to determine what opportunities for improved coverage you may have once TV Channel 6 analog operations cease.

FCC MOVES TO COLLECT MORE DATA ON MINORITY AND FEMALE BROADCAST OWNERSHIP

In its April 8th meeting of three FCC commissioners, the FCC issued a news release announcing that it had adopted an order and a further notice of proposed rulemaking designed to improve its collection of data on minority and female broadcast ownership. Part of those efforts appears to be modifications to the ownership reporting form and requirements. Unfortunately, even though it officially voted to adopt these collection methods, the FCC's order and further notice of proposed rulemaking has not yet issued. Specific details will be forthcoming once the order issues.

It is not unusual for the commissioners to vote on a matter at a meeting, and for the official order that they adopt not to be issued for several days or weeks. In many cases, the order must be initially drafted or modified from its initial draft depending upon the developments at the meeting itself.

In separately issued statements regarding this measure, the existing commissioners indicated that they needed this data in order to support plans to

expand opportunities for minorities and females in broadcast ownership. The data collection efforts adopted by the Commission therefore appear to be a first step in what is likely to be a long process to explore and adopt such measures.

SPEAK NOW OR FOREVER REPORT

Webcasters who stream under the statutory rates that are set by the Copyright Royalty Board have a fairly limited reporting requirement. They only need to report the songs that they played over two one-week periods per quarter to SoundExchange, for a total of 8 weeks per year.

Their counterparts who accepted the reduced rates negotiated by National Association of Broadcasters earlier this year have a much more onerous reporting requirement, known as "census reporting". They have to report all songs that are played for the entire time of the stream. If the stream is on for 24 hours a day, 7 days a week, they are required to report, on a monthly basis, all songs that were played during the previous month.

The Royalty Board is now looking at making the statutory webcasters also do census reporting. However, they are mindful of the impact that this could have on small webcasters. Therefore, they are requesting comments on how census reporting would impact small webcasters and any alternatives that they might propose.

Comments are due May 26, 2009. If you would like to file comments, please contact us.

PENALTY BOX

\$4,000 FOR CONTEST RULES VIOLATION

The Commission has fined WNJX-FM, Boston, Massachusetts for broadcasting information about a contest without fully and accurately disclosing all material terms of the contest, and for failing to conduct the contest substantially as announced or advertised. The station's actions violated Section 73.1216 of the Commission's Rules regarding contest rules.

In this case, the Commission received a complaint from a listener alleging that the station had failed to conduct its "Win a Car" contest in accordance with the contest's advertised terms and the FCC's rules. The complainant claimed that contest promotions broadcast by the station stated that the winner would win one of three new cars. The complainant was a preliminary winner who received a cash prize and an automobile ignition key that he initially believed represented a chance to win the contest's grand prize, his choice of one of three cars. After qualifying for a chance to win the grand prize, the complainant learned that the prize was not the winner's choice of three available cars, but, instead, a 2-year lease of the selected car. In addition, he learned that the grand prize award was conditioned upon the winner further qualifying for credit with the car dealer supplying the leased car.

After a letter of inquiry from the FCC and a response by the station, the station claimed that its announcements were consistent with the fact that the winner would be able to choose from 3 different cars, that the complete rules for the contest were available on the station's website, and those rules spelled out that a 2-year lease would be offered for the car chosen as opposed to a title to the car. In addition, the station claimed that those rules stated that the winner would have to be qualified for credit by an organization that was the contest co-sponsor. However, the station admitted that its on-air announcements did not directly refer listeners to the station's website for the complete contest rules.

In rejecting the station's arguments, the Commission noted that material terms of a contest include those factors which define the operation of the contest and which affect participation. In addition, material terms include instructions on how to enter, participate and whether prizes can be won as well as the nature and value of the prizes and the time and means of selection of winners. The Commission found that the station had promoted its contest over the air with misleading information that did not fully disclose the material terms of the contest. Specifically, the on-air announcements did not include an accurate description of the contest's grand prize, the value of the grand prize, the eligibility requirements of the contestants, or how to access the complete contest rules. Based upon these facts, the Commission found a willful violation

of its contest rule.

\$9,000 FOR FAILURE TO MAINTAIN MAIN STUDIO

The Commission has fined WDTI-TV, Indianapolis, Indiana \$9,000 for failure to maintain a publicly-accessible main studio, a meaningful management and staff presence at its main studio, a listed local telephone number, and for failing to notify the Commission of the relocation of its main studio.

In this case, the Commission responded to a complaint alleging that WDTI did not have a main studio. An agent from the Commission's Chicago office inspected the station, discovering that the station's transmitter was surrounded by a locked fence in a windowless brick building. Further investigation revealed that the station had no office, studio space or other main studio location in the Indianapolis area. The Commission also found that WDTI's decision to designate its locked, inaccessible transmitter site as its main studio was contrary to the Commission's objectives underlying the main studio rule, as was its failure to maintain any presence at the studio. The Commission observed that apart from a full-time manager, who was not present at the station, WDTI did not employ any full-time staff other than the manager.

A station must maintain management and staff presence on a full-time basis during normal business hours to be considered meaningful, and both management and staff presence is required. WDTI, in addition to paying the fine, was required to report to the Commission the steps that it had taken to comply with staffing requirements at the main studio.

DATES TO REMEMBER

May 26, 2009

Comments on census reporting for statutory webcasters due to Copyright Royalty Board.

June 1, 2009

AM & FM Stations in DC, Maryland, Virginia & West Virginia: If employee threshold is met, complete annual EEO public file report, place in your public inspection file and post on station's website. In addition, unless exempt, complete and e-file biennial ownership report on form 323 or 323-E, and place copy in station public file.

Class A TV & TV Stations in DC, Maryland, Virginia, West Virginia, Arizona, Idaho, Nevada, New Mexico, Utah & Wyoming: If employee threshold is met, complete annual EEO public file report, place in your public inspection file and post on station's website.

AM & FM Stations in Michigan & Ohio: If employee threshold is met, complete annual EEO public file report, place in your public inspection file and post on station's website.

Class A TV & TV Stations in Michigan & Ohio: If employee threshold is met, complete and e-file mid-term FCC Form 397 EEO Report. Also, complete annual EEO public file report, place in your public inspection file and post on station's website.

TV Stations in Michigan & Ohio: unless exempt, complete and e-file biennial ownership report on form 323 or 323-E, and place copy in station public file.

AM & FM Stations in Arizona, Idaho, Nevada, New Mexico, Utah & Wyoming: If employee threshold is met, complete and e-file mid-term FCC Form 397 EEO Report. Also, complete annual EEO public file report, place in your public inspection file and post on station's website, if one exists. Unless exempt, complete and e-file biennial ownership report on form 323 or 323-E, and place copy in station public file.

June 12, 2009 (midnight)

All Full Power TV Broadcast Stations Still Operating in Analog: Cease all analog transmissions, and continue broadcasting in digital-only; file digital license-to-cover application for post-transition digital facilities if not previously done, unless station has obtained an extension of post-transition digital permit.

June 16-25, 2009

Window for filing Short Form 175 applications for commercial FM Auction 79.

Freeze on minor change applications for commercial and noncommercial FM stations/permits: This freeze is designed to avoid conflicts between modification applications for existing stations/permits, and the FM spectrum to be auctioned in Auction 79.

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Actual resolution of legal issues depends upon many factors, including variations of facts and applicable Federal laws. This publication is not intended to provide legal advice on specific subjects, rather, it seeks to provide insight into legal developments and issues that we feel could be useful to our clients and friends.

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