

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Auction of FM Translator Construction)	AU Docket no. 17-351
Permits Scheduled for June 21, 2018)	Auction 83

Directed to: Office of the Secretary
Attention: Chief, Wireless Telecommunications Bureau and
Chief, Media Bureau

COMMENTS REGARDING MAJOR CHANGES IN OWNERSHIP

Frank G. McCoy (“McCoy”), applicant for a new FM translator station included in Auction 83, File No. BNPFT-20030312AQJ, by his counsel, hereby submits his Comments in response to the “Public Notice,” *Auction of FM Translator Construction Permits Scheduled for June 21, 2018*, DA 18-11, released January 16, 2018 (“*Auction 83 Notice*”). In that Public Notice, the Wireless Telecommunications Bureau and Media Bureau have sought comments on the procedures to be applied to pending Auction 83 applications. In particular, the Bureaus have requested comments as to whether to waive Section 1.2105(b)(2) of the Commission’s Rules, which ordinarily would prohibit major changes in a pending application through an assignment or transfer of control. McCoy hereby expresses his opposition to any such waiver grant, and especially to one that would be applied generally to all pending applicants. Granting such a waiver would violate long-settled expectations and would be contrary to fundamental fairness.

From the first announcement of Auction 83, it has been made quite clear that once the filing window for initial, short-form applications had closed, no major changes in applications filed during that window would be allowed. In the “Public Notice” announcing the filing window, *FM Translator Auction Filing Window and Application Freeze*, DA 03-359, released

February 6, 2003, the Commission clearly enunciated that window applicants would not be allowed to “make major modifications to their applications (e.g., ... change control of the applicant ...). *Id.* at A-3. Thus, all applicants were put on notice from the very moment that they first thought of participating in FM Translator Auction 83 that no major changes, such as transfers of control or assignments of the application, would be allowed. Thus, all applicants entered into this auction proceeding with the same expectations. Nothing has happened over the past years to disturb those expectations.

Furthermore, as the Commission noted in the above-captioned “Public Notice,” DA 18-11, the rule prohibiting major changes in ownership or control is necessary in order to know who the relevant parties in the auction are and to be assured that all of the necessary certifications contained in applications remain valid and enforceable during the entire time that the applications remain pending. *Auction 83 Notice* at 5. Furthermore, precluding major changes in ownership ensures that other applicants are not blindsided by sudden changes in control of an applicant, and that all applicants are operating on a level playing field with regard to access to information about competing applicants. If assignments and transfers of control are allowed at this late date, applicants that have longstanding expectations about the parties against whom they will be competing for an authorization would suddenly be confronted with a whole new cast of characters. While the changed party will have had substantial time to study a competing bidders likely strengths and weaknesses, it will itself have been hiding behind the mask of former qualifications, only to be revealed in its true form shortly before the auctions is scheduled to begin. Allowing such charades is fundamentally unfair.

As the Commission has long recognized, an application which is modified by a major amendment becomes in essence a new application, long after the opportunity for filing new

applications has ended. *McKissick Enterprises*, 22 FCC Rcd 18596, 18597 n. 8, *citing*, *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures; Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use – 4660-4685 MHz*, 13 FCC Rcd 374, 416 (1997). As noted above, allowing new entrants into a proceeding to compete against remaining applicants upsets long settled expectations for both other applicants and the Commission's staff. Not only would other applicants be uncertain of precisely who might be behind a particular applicant, but the Commission would not be certain as to the identities of its applicants.

Furthermore allowing such major changes would encourage speculative applications. If a party knows that, if a particular proceeding drags on a bit, it can simply sell its interest in an application, parties will be encouraged to submit applications without giving them much thought. The result will be large numbers of insincere applications and abuses of the Commission's processes. Even if the Commission were to limit permissible assignments or transfers to those coupled with the sale of interests in existing stations, such a limitation would be unfair to those parties seeking their first authorization. Moreover, the translators sought in this particular auction are not necessarily coupled with any other existing station.

McCoy recognizes that Auction 83 has occupied a much greater length of time than is normally expected. That circumstance standing alone, however, is insufficient justification for eviscerating one of the Commission's longstanding rules. Every auction proceeding takes some amount of time and involves some amount of delay. At what point in time does the delay become so long as to justify a change in the Commission's established and announced procedures? If a sale of an application is not allowed after more than three years (*McKissick Enterprises*, 22 FCC Rcd 18596), what about after six years? While some could argue that a

lapse of 15 years is sufficient to justify allowing major changes in applications, what about nine or ten years? The Commission has faced similar circumstances in the past and has not allowed for major amendments in applications. For example, in the early days of allowing broadcast auctions, many of the applications included in the closed broadcast auction, Auction 25, had been pending for many years. Nonetheless, the Commission explicitly warned applicants that submitting an auction application was to be considered as a certification that there had been no major changes, which would include an assignment or transfer, in their long-pending applications. *Closed Broadcast Auction*, DA 99-1346, released July 9, 1999. The applications included in that auction included some that had been pending 16 years or more. *See id.* at Attachment A. The Commission should follow its past precedent and refuse to allow major modifications based solely on passage of time and ensuing voluntary changes in ownership interests.

In particular, the Commission has sought comment on a request by certain subsidiaries of Clear Channel Communications, Inc. (“Clear Channel”) for waiver of Section 1.2105(b)(2) in light of a transfer of control of Clear Channel that took place back in 2008. As noted by the Commission, that waiver request was not filed until 2013. *Auction 83 Notice* at 5 n. 19. Section 1.2105(b)(4), however, requires that auction applicants report changes in information contained in their applications within no more than five business *days* not five years. Furthermore, in light of the other waivers and special provisions needed in connection with the transfer of control, it would have made substantially more sense to submit the waiver request in the context of the Commission’s proceeding culminating in its decision, *Existing Shareholders of Clear Channel Communications, Inc.*, 23 FCC Rcd 1421 (2008). While it is possible that Clear Channel simply forgot about its pending translator applications, decided that they were of little concern, or failed

to appreciate the significance of the transfer of control with regard to those applications, neither Clear Channel's possible oversight nor potentially cavalier attitude would be a sufficient reason to alter the fundamental expectations of other parties in Auction 83.

Additionally, while Clear Channel has tried to argue that the transaction was a large one and that the Commission found the transfer of control to be in the public interest, these arguments also are unavailing. Every transfer of control or assignment of license approved by the Commission requires a finding that the proposed action is in the public interest. Thus, this consideration would apply to any and all transfers or assignments approved by the Commission.

Likewise, it is unclear why the size of the transaction should determine whether a particular rule is applicable or not. First of all, there is the problem of delineating how big a transaction is big enough. If a deal involves 25 stations, is that enough, but not if it only involves 24? Secondly, it is not clear why the applicability of a particular rule should be different based upon how many other interests a party holds in addition to the new authorization sought. Surely, Clear Channel does not mean to indicate that the Commission's rules should apply differently to different parties depending upon the amount of wealth and power each respective applicant holds.


As the Commission has previously determined, "any arguable public benefit to be derived from our failing to apply Section 1.2105(b)(2)'s prohibition on major changes ... is far outweighed by the public benefit in affording all auction applicants reasonable certainty as to the fair and predictable application of our auction rules and procedures." *Koch Broadcasting Corporation*, 21 FCC Rcd 147, 146 (WTB/MB 2006), citing *See, e.g., Application of Winstar Broadcasting Corp.*, 20 FCC Rcd 2043, 2053-54 (2005); *Letter to Gregg Skall, counsel to Sainte Partners II*, DA 05-1919 (July 8, 2005). All applicants entered the Auction 83 proceeding with

one set of expectations and one set of rules. Changing the applicability of those rules for some applicants midstream is contrary to fundamental fairness. Therefore, McCoy must oppose granting waivers of Section 1.2105(b)(2) to applicants that have had voluntary assignments or transfers of control.

Respectfully submitted,

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