

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FILED/ACCEPTED

MAR 21 2013

In the Matter of)
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Implementation of Section 309(j) of the) MM Docket No. 97-234
Communications Act -- Competitive Bidding)
for Commercial Broadcast and Instructional)
Television Fixed Service Licenses)
)
)
Amendment of Service and Eligibility Rules for FM) MB Docket No. 07-172
Broadcast Translator Stations) RM-11338
)
)

Federal Communications Commission
Office of the Secretary

To: Office of the Secretary
Attn: Audio Division, Media Bureau

REQUEST FOR DECLARATORY RULING

Bond Broadcasting, Inc. and East Kentucky Broadcasting Corp., commercial for-profit entities with FCC applications pending in FM translator Auction 83 (hereafter, the "Commercial Applicants"), hereby request of the Audio Division a declaratory ruling clarifying that the Auction 83 procedures announced in *FM Translator Auction Filing Window and Application Freeze*, DA 03-359, February 6, 2003 (hereafter, the "Auction 83 Public Notice") will not be altered without a notice and comment proceeding so as to allow for heretofore prohibited major changes to long-pending FCC Form 175 applications of non-commercial educational (hereafter "NCE") applicants that specify non-commercial educational status.

BASIS FOR THIS DECLARATORY RULING REQUEST

1. This request for a declaratory ruling is necessitated by informal public comments made by Audio Division staff that suggest that, at some unknown future point in the Auction 83 processes, applicants who designated their Form 175 "Applicant Status" as "noncommercial

educational” will be able, contrary to now-settled auction rules and procedures, and contrary to the *Auction 83 Public Notice*, to file a major amendment to their Form 175 applications to change their status. The allowance of such a major amendment would be contrary to stated Auction 83 procedures and would significantly upset mutually-exclusive relationships now existing between Auction 83 Form 175 short-form applications that have now been on file for over ten years.

2. Allowing the filing of such a major change to applications at this late stage of Auction 83 processes would be highly prejudicial to applicants who filed with a commercial applicant status in Auction 83, and would ill-serve the public interest. A grant of a waiver allowing for NCE applicants to file major amendments to their Forms 175 to become instead commercial applicants will result in unknown numbers of Auction 83 mutually-exclusive groups of applicants being subject to an auction rather than in many cases there being a sole commercial broadcaster in an Auction 83 mutually-exclusive group and thus given the opportunity to file a long-form application in conformance with the *Auction 83 Public Notice* and the FCC’s rules. A grant of such a waiver would also disadvantage commercial applicants in the Auction 83 settlement window.

3. Many commercial broadcasters, and the listening public, have now been waiting more than ten years since filing Auction 83 FM translator applications for the enhanced service that their applications, when acted upon, will provide.¹ A change now in the Auction 83 procedures would substantially harm commercial broadcasters who relied upon the FCC’s rules and policies to continue to prosecute Auction 83 FM translator applications in good faith reliance upon the published procedures.

¹ It is worth emphasizing that the Auction 83 application filing window specified in the *Auction 83 Public Notice* closed almost exactly ten years ago on March 17, 2003.

THE AUCTION 83 PUBLIC NOTICE SPECIFICALLY CONTEMPLATED AN AUCTION ONLY FOR COMMERCIAL APPLICATIONS

4. The *Auction 83 Public Notice* specifically contemplated that only commercial applications would proceed to auction and stated such:

Commercial applications that remain mutually exclusive after the settlement period closes will proceed to auction (emphasis added).²

The undersigned Commercial Applicants with pending Auction 83 commercial applications request that the Commission now follow its established Auction 83 auction procedures and proceed to auction only with commercial applications.

5. There is no commercial broadcaster that comes anywhere near to having the numbers of FM translator applications pending before the Commission as apparently do a number of non-commercial applicants. Rather, most commercial broadcasters, if having multiple applications at all, have Auction 83 translator applications numbering no more than in the single digits. The FCC has not yet made public the Form 175 applications for Auction 83.³ Therefore, it might be concluded that the composition of mutually-exclusive FM translator application groups is unknown as a formal matter. But, by comparing an applicant's Form 349 short-form submissions stating the primary station to be re-broadcast, compared with the same applicant's long-form applications already granted based upon its Form 175, in most cases enables a fairly conclusive determination of the commercial or NCE status of the Auction 83 applicant.⁴

² *Auction 83 Public Notice* at Appendix A.

³ See e.g. <https://auctionfiling.fcc.gov/form175/search175/index.htm> which currently fails to list the Form 175s for Auction 83 applicants thus necessitating for reasons that are unclear this guessing game. It would be much more productive for the FCC, particularly since ten years have elapsed since the filing of the Auction 83 Form 175 applications, to simply make the Auction 83 Form 175 applications public.

⁴ See Footnote 16 below.

6. The intention of an applicant to re-broadcast a non-commercial station as the primary station is a fundamental and critical distinction in discerning the intention of the applicant to apply for an NCE station. This is apparent from previous grants of waivers in Auction 84 and Auction 37. The FCC has specifically defined procedures for choosing between mutually-exclusive non-commercial applicants.⁵ Commercial applicants have proceeded from the 2003 filing window and made their auction plans over the past ten years with the knowledge of the NCE status of many pending applicants and the knowledge that under FCC rules that those applicants will not, and cannot, proceed into the formal auction.

7. The Commission itself noted, prior to the winnowing down of the number of pending FM translator applications under the recent caps requirement,⁶ that two commonly-owned active FM Auction 83 filers filed 4,219 proposals, constituting almost one-third of all Auction 83 filings. Those same filers have since sought to assign more than 50 percent of the 1,046 construction permits they were awarded through the window,⁷ suggesting that such applications may have been filed more for speculative purposes than for providing service to the public. A cursory review of those applications reveals that most appear to be NCE applications.

8. The Commission in *Creation of a Low Power Radio Service and Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations* voiced concern that such heavily-skewed filing activity compromised the integrity of FM translator licensing procedures. Giving mass-filing NCE applicants the opportunity to submit major amendments to their

⁵ See e.g. Section 73.7000 through Section 73.7005 of the Commission's rules, and Section IV of the FCC Form 349 upon which FM translator applications are filed.

⁶ See *Public Notice (DA 12-2073) Media Bureau Announces January 10 - January 25, 2013 Filing Window for Auction 83 FM Translator Application Selections and Caps Showings*, released December 21, 2012.

⁷ See *Creation of a Low Power Radio Service and Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Third Further Notice of Proposed Rulemaking, 26 FCC Rcd 9986, 9989 (2011).

applications to change their filing status, particularly after having taken advantage of such filing status to avoid payments of FCC application filing fees and regulatory fees on the likely several thousand applications already granted, hardly serves either the FCC's procedural concerns or the public interest. It would be unjust to the FCC and to the public to allow many NCE applicants, for the past ten years, to prosecute and have granted *some* of their Auction 83 applications under an FCC Form 175 that specified an applicant status of non-commercial educational but then, in the late stages of the Auction 83 proceedings, to contemplate allowing such NCE applicants to now take advantage of proceeding to auction with a major change to their Forms 175 despite long-settled and announced Auction 83 procedures that such non-commercial applicants could not proceed to auction.

9. Each of the Commercial Broadcasters filing this request long-ago analyzed its pending FM translator short-form application mutual-exclusivity. Each has now concluded that each was mutually-exclusive only to NCE applicants. While each will do whatever it can to effectuate a settlement in the upcoming settlement window, hopefully with an engineering settlement, each has based its ten years of continuing efforts to prosecute its pending Auction 83 application on the fact that NCE applicants could not compete with it in the auction if mutual-exclusivity remained after the settlement window. Each will be substantially harmed if the Commission fundamentally changes the auction rules as to which applicants can participate in the auction.

10. In addition, in the upcoming settlement window, granting a major change waiver to NCE applicants would give Auction 83 mass-filers one more opportunity to speculatively profit by extracting payments as a result of their mass filings from commercial broadcasters who, if the NCE applicants threaten to go to auction, would at a minimum be required to submit and

pay the Auction 83 upfront payment irrespective if the former NCE applicant itself proceeded to auction. As an example, if a mutually-exclusive group consisted of one commercial broadcaster and one former NCE mass-filer applicant, the former NCE mass-filer may easily give the commercial broadcaster the ultimatum that either it is paid \$10,000, or the commercial broadcaster will have to pay a minimum of a \$15,000 upfront payment to go to auction, even if the former NCE mass-filer applicant does not itself go to auction. A grant by the Audio Division of a major change waiver will simply result in one more unnecessary FCC-produced windfall for these FM translator mass-filer speculators and work to thwart the goal already expressed by the FCC of stemming Auction 83 mass-filing abuses.

11. Finally, many actions and choices based upon possible mutually-exclusive relationships, *and applicants' NCE or commercial status*, have already been compelled of the Auction 83 applicants in choosing which applications to continue to pursue, and which applications to dismiss.⁸ The analyses performed by the applicants in choosing which Auction 83 applications to continue to prosecute, and which applications to dismiss, heavily relied upon predictions as to the NCE status of mutually-exclusive applicants and the expectation that NCE applicants would not be eligible to participate in any eventual auction. Those choices are already made and are irreversible. To now change the status of Auction 83 applicants for the purposes of auction participation eligibility significantly upsets the bases upon which Auction 83 applicants have made decisions that cannot now be revisited.

⁸ See e.g. *Public Notice (DA 12-2073) Media Bureau Announces January 10 - January 25, 2013 Filing Window for Auction 83 FM Translator Application Selections and Caps Showings*, released December 21, 2012 requiring many Auction 83 applicants to choose which applications would continue to be prosecuted and which would be dismissed.

MUTUALLY EXCLUSIVE NON-COMMERCIAL EDUCATIONAL APPLICATIONS CANNOT GO TO AUCTION

12. It is established Commission procedure that NCE applications are subject to dismissal if mutually-exclusive with an application filed for a commercial station unless all applicants successfully effect a settlement agreement or provide an engineering solution removing the mutual exclusivity.⁹ As noted above, *Auction 83 Public Notice* at Appendix A was clear in stating that:

Commercial applications that remain mutually exclusive after the settlement period closes will proceed to auction.

Thus, NCE applicants at the time of the filing of Auction 83 applications had no expectation that their applications would go to auction.

13. The status of secondary service applicants, including FM translator auction applications on the non-reserved band, was resolved in early 2003. That status is controlled by what paragraph 22 of *Reexamination of the Comparative Standard for Noncommercial Educational Applicants*, MM Docket No. 95-31, FCC 03-44, 18 FCC Rcd 6691 (2003) states with respect to the Form 175:

Applicants that seek an NCE station license must identify themselves by checking the box labeled “noncommercial educational,” which will serve as a preliminary showing that they intend to use the station to advance an educational program and that they meet all other Commission eligibility requirements for NCE stations. Applicants that do not check this box will be considered, as a matter of law, applicants for commercial broadcast stations.

⁹ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691, 6699-6700 (2003). See also *Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15978-15980 (1998), recon. granted in part and denied in part, *Memorandum Opinion and Order*, 14 FCC Rcd 8724 (1999), further recon. granted in part and denied in part, *Memorandum Opinion and Order*, 14 FCC Rcd 12541 (1999).

Because an applicant's self-identification as "noncommercial educational" affects its eligibility to hold an NCE station license and therefore its eligibility to participate in an auction, we will treat any applicant's attempt to change its self-identification as a major amendment, which is prohibited after the short-form application filing deadline. As a result, we decline to adopt the suggestion that applicants for NCE stations can change their status once they learn they have filed an application that is mutually exclusive with a commercial applicant, as at least one commenter suggested; instead, we limit this opportunity in a manner that is consistent with our current rules, which permit major amendments before the short-form filing deadline, but not after (emphasis added – footnotes omitted).

14. An Auction 83 applicant's status and intention is what it says it is on the Form 175 and is confirmed by the status of the primary station it is proposing to carry on the Form 349 short-form application pursuant to Section 74.1201(c) of the Commission's rules. This should be distinguished from a commercial applicant who may specify the carriage of an NCE station but files on the Form 175 as a commercial applicant which, once granted, will be deemed to be a non-commercial FM translator [Section 74.1201(c)]. Under those circumstances, the commercial applicant does not become an NCE applicant for the purposes of the FM auction rules unless it specifically checks the NCE box on the Form 175.

15. *Auction 83 Public Notice* Exhibit B "Guidelines for Completion of Form 175 and Exhibits" states in **BOLD** that "Applicants that seek a noncommercial educational ("NCE") FM translator station license must indicate their status as noncommercial educational [on the Form 175]":

Applicant Status: Applicants are requested to indicate their status as a rural telephone company, minority-owned business and/or women-owned business, so that the FCC can monitor its

performance in promoting economic opportunities for these designated entities. **Applicants that seek a noncommercial educational (“NCE”) FM translator station license must indicate their status as noncommercial educational** (Bold lettering for emphasis in Appendix B itself).

There is little opportunity for confusion here with the requirements being in bold lettering on the *Auction 83 Public Notice* Exhibit B “Guidelines for Completion of Form 175 and Exhibits” itself.

PREVIOUS AUCTION 84 AND AUCTION 37 WAIVER REQUEST GRANTS ARE INAPPLICABLE PRECEDENT FOR AN AUCTION 83 NCE APPLICANT WAIVER

16. In two previous broadcast station auction proceedings, the FCC granted a waiver to those applicants who specified NCE status on their Form 175 applications to allow NCE applicants to submit a major change to their Form 175 applications to specify that they were commercial, rather than NCE, applicants. This waiver from NCE to commercial application status was granted in September, 2004 to FM applicants *for commercial stations* in Auction 37¹⁰, and in February, 2009 to one AM applicant *for commercial stations* in Auction 84.¹¹

17. The critical distinction is that Auction 84 and Auction 37 involved exclusively commercial stations. Thus, the intent of an applicant filing an FCC Form 175 in either Auction 84 or in Auction 37 was clear – it was intending to be a commercial licensee applying for a commercial station and a claim of mistakenly checking a box erroneously on the Form 175 necessarily reflected a purely ministerial error for which fundamental notions of fairness properly allowed corrective measures.

18. With Auction 83 applications for new FM translator stations, however, the commercial or non-commercial status of the translator is determined both by the NCE status of

¹⁰ See *American Family Association*, 19 FCC Rcd 18681, 18685 (MB/WTB 2004).

¹¹ See *Christian Broadcasting, Inc.*, 24 FCC Rcd 2212 (MB/WTB 2009).

the applicant and by the primary station carried pursuant to Section 74.1201(c) of the Commission's rules.¹² Thus, unlike Auction 84 and Auction 37, applicants in Auction 83 had the clear opportunity to apply for a commercial station or a non-commercial station. Those who checked the NCE status box on Form 175 should not be heard to complain that they really meant to be a commercial broadcaster, particularly when the translator facility applied for will be classified as a non-commercial translator pursuant to Section 74.1201(c) of the Commission's rules and when they have now for over ten years prosecuted, and had many grants of, such applications.

19. Another significant distinction is that the waiver requested in Auction No. 37 was quickly and timely filed within weeks of the FCC's effective date of *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*.¹³ In Auction 84, only one applicant filed complaining of being confused, and even then that waiver request was filed within four years and only applied to three discrete groups of mutually-exclusive applications.¹⁴ Hundreds of applicants in those proceedings were not subject to over ten years of basing their plans and strategies for an upcoming auction upon NCE applicants actually being NCE applicants nor was the waiver request filed as a timely petition for reconsideration applicable to possibly hundreds of mutually-exclusive groups of applications as it would be in Auction 83.

20. In Auction 83, more than ten years after the release of *Reexamination of the Comparative Standards for Noncommercial Educational Applicants* and more than ten years

¹² Section 74.1204(b)(2) specifies that non-commercial FM translators may be authorized on any of Channels 201 to 300.

¹³ See *American Family Association*, 19 FCC Rcd 18681, 18682 (MB/WTB 2004) noting that the waiver request there was filed as a petition for reconsideration of *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*.

¹⁴ See *Christian Broadcasting, Inc.*, 24 FCC Rcd 2212 (MB/WTB 2009).

after the *Auction 83 Public Notice*, no Auction 83 applicant has filed a waiver request asking it be allowed to file a major change in its NCE status. Conversely, commercial applicants in Auction 83 in possibly hundreds of groups of mutually-exclusive applications *for over ten years* have relied upon settled law and auction procedures which are now threatened to be upset by a precipitous and unfair change in the rules and procedures.

21. As importantly, the waiver in Auction 37 was granted based upon the specific finding that the circumstances were “unique to this auction” and the applicants’ intention was “not that they intended to apply for NCE stations ...”.¹⁵ Certainly the FCC’s observations in Auction 37 that the circumstances for a waiver were “unique to this auction” gave no expectation to any applicants in any other auction that like waivers would be forthcoming.

22. Likewise, the finding of the applicants’ intentions not to apply for an NCE station is a critical distinction as in neither Auction 84 nor in Auction 37 were any NCE licenses being offered. Instead, in both Auction 84 and in Auction 37 only commercial licenses were being offered. In this FM translator Auction 83, however, both NCE and commercial licenses are being offered.

23. Since the commencement of the Auction 83 processes over ten years ago, many of the short-form applications filed pursuant to the Form 175 application have resulted in non-commercial NCE licenses being granted. There are many Auction 83 long-forms granted from Form 175 NCE applicants who in the subsequently filed license applications clearly confirmed their status as “non-commercial educational licensee/permittee”.¹⁶ It is wholly unclear under the

¹⁵ See *American Family Association*, 19 FCC Rcd 18681, 18684 (MB/WTB 2004). *Accord Christian Broadcasting, Inc.*, 24 FCC Rcd 2212, 2213 (MB/WTB 2009).

¹⁶ See e.g. FCC File No. BLFT- 20070907AAW in which the applicant clearly indicated its status as a “Non-Commercial Educational Licensee/Permittee” in response to Section I, Question 3 on an Auction 83 license application.

FCC's rules and procedures how an Auction 83 applicant could have some applications granted under Auction 83 procedures as an NCE applicant, and later have applications granted under Auction 83 procedures as a commercial applicant. Or, more to the point, any claim by an Auction 83 NCE applicant that a ministerial error or mistake was made by designating itself with an NCE status is belied by the subsequent actions of many NCE applicants in filing long-forms for, and licensing, Auction 83 singletons as NCE applicants on the FCC Form 350.

24. Further, there were not substantial numbers of applicants in the Auction 84 and Auction 37 proceedings that had already reaped the benefits of filing the Form 175 with a non-commercial educational status with no FCC filing fees being due for long-form applications filed under that Form 175. Auction 83 is wholly different in that many applicants filing with a non-commercial educational status on their Form 175 have already had substantial numbers of applications granted. It is difficult to frame a legal theory, and indeed there is none, under which an Auction 83 Form 175 applicant could be a non-commercial educational entity for *some* of its Auction 83 applications (i.e. those already applied for and granted as singletons) yet magically transform itself into a commercial applicant for those that are mutually-exclusive with a commercial broadcaster's application.

25. Finally, as noted above, *Reexamination of the Comparative Standard for Noncommercial Educational Applicants* was released in early 2003. Auction 83 NCE applicants who might have been confused and wrongly checked the noncommercial educational status box on their Form 175 have now had over ten years to file a request for a waiver to make a major change in their Form 175. No such public notice of the filing of a waiver request nor a ruling thereupon has been forthcoming from the FCC for the ten years. Any "confusion" that might have been caused by the release in early 2003 of *Reexamination of the Comparative Standard for*

Noncommercial Educational Applicants could have been remedied at any time during the past ten years. That no waiver requests were filed, and none was put on public notice nor acted upon by the FCC, is a significant indication that none should now be accepted nor acted upon at this extremely late date in the Auction 83 proceedings.

26. Given the tremendous passage of time, waivers such as those granted to NCE applicants in Auction No. 84 and Auction No. 37, even if now filed, should be summarily denied for Auction 83. Rather, as contemplated in the *Auction 83 Public Notice*, once Auction 83 is scheduled, NCE applications in Auction 83 should simply remain on file if mutually-exclusive only to other NCE applications with the NCE prevailing applicant to be chosen by settled NCE procedures, or dismissed if mutually-exclusive with any commercial application.

CONCLUSION

27. Contrary to informal recent statements by Audio Division personnel, the rules and procedures of Auction 83 should not now be altered, especially now that it has taken more than ten years from the time that the FCC announced the auction to get to the point of actually holding Auction 83. The Commercial Broadcasters filing this Request for Declaratory Ruling, and many similarly-situated commercial broadcasters, have continued to prosecute their Auction 83 Form 175 applications based upon settled auction procedures announced over ten years ago in the *Auction 83 Public Notice*. Indeed, many commercial broadcasters are now spending significant resources in making filings mandated by the LPFM proceedings in MM Docket No. 99-25.¹⁷

28. If the FCC was to have changed its Auction 83 procedures, the time for that was many years ago. The FCC had ample opportunity throughout the past ten years to make changes,

¹⁷ See e.g. *Public Notice (DA 13-283) Media Bureau Announces FM Translator Auction 83 Filing Window and Filing Procedures*, released February 26, 2013, and *Public Notice (DA 13-427) Media Bureau Announces April 1 - April 19 Filing Window for FM Translator Auction 83 Preclusion Showings*, released March 14, 2013.

after appropriate notice and comment, to its Auction 83 procedures. Hundreds of Auction 83 commercial applicants are now spending significant resources in the continued prosecution of their Auction 83 applications. It would therefore be manifestly unfair for the FCC to precipitously change its long-settled Auction 83 procedures by allowing applicants who chose non-commercial educational status on their Forms 175 to now amend their applications with a major change to specify commercial status. A declaratory ruling is requested affirming that the current Auction 83 rules and procedures will not be changed without further proceedings consistent with the Administrative Procedure Act.

Respectfully submitted,

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