



Virginia Association of Broadcasters Legal Review



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ENFORCEMENT REMINDER: STATIONS MAY FACE FINES FOR LATE APPLICATIONS AND EXPIRED CONSTRUCTION PERMITS

The Commission recently reminded broadcasters of the risks associated with missing deadlines for a license application while a construction permit is outstanding. In a *Memorandum Opinion and Order* (the “*Order*”) canceling a fine, the FCC warns of future enforcement action against unauthorized operation after the expiration of a construction permit (“CP”) and the filing of late applications for licenses to cover CPs. The *Order* also clarifies the FCC’s policy regarding limited, 30-day waivers of these deadlines for newly constructed stations.

The *Order* addresses a petition for reconsideration filed by a radio station that was fined for unauthorized operation and a late license application. In 2004, the station filed a construction permit application to rebuild its facilities after its tower was destroyed. The Commission granted the application and issued a CP valid until July 19, 2007. The station failed to file a license-to-cover application by that expiration date. On May 23, 2011, the station filed a license application. As a result of this nearly four-year delay, the FCC fined the station for failure to file the license-to-cover application and for unauthorized operation of the station after the CP expired.

The station challenged the fine on the grounds that the Commission previously did not impose fines for similar violations and ordinarily granted waivers of the automatic expiration of a CP. The station argued that such a departure from prior policy would be unfair under the rationale of the recent *Fox* Supreme Court decision, which evaluated changes in the Commission’s indecency enforcement policy. The FCC agreed with the station, canceled the fine, and granted the station’s late-filed license application.

Although the station won its challenge in this case, the *Order* makes very clear that the FCC intends to enforce license application and CP expiration deadlines strictly going forward. The *Order* also reiterates the Commission’s policy that stations should not expect notification from the Commission of the expiration of their permits—it is the permittee’s responsibility to track its CP expiration date.

According to the *Order*, the FCC will consider requests to waive the automatic expiration of a construction permit period and accept a late-filed license-to-cover application in the following “rare circumstances”: where (1) the permittee demonstrates conclusively that construction was complete and the station was ready for operation by the CP expiration date; and (2) the covering license application is filed within 30 days of the expiration date. The 30-day waiver would only be available to permittees who have in fact completed construction of their facilities in accordance with their CP.

If your station has questions about construction periods or license application deadlines, please consult with your communications counsel.

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FCC REJECTS REQUESTS FOR RELIEF FROM AUCTION BID WITHDRAWAL PAYMENTS

The FCC has released a *Memorandum Opinion and Order* (the “*Order*”) denying requests from five bidders in an auction of FM broadcast construction permits for relief from the payment obligations arising from their withdrawals of provisionally winning bids. The amounts still owed by the bidders range from \$231,340 to \$1,293,170. Commission rules require a bidder that withdraws a provisionally winning bid during an auction to pay the difference between the withdrawn bid and the subsequent winning bid if the subsequent winning bid is less than the withdrawn bid. No payment is owed if the subsequent winning bid is more than the withdrawn bid.

The *Order* points out that the Commission adopted the bid withdrawal payment rule to discourage “insincere bidding” because such bidding reduces the efficiency of the auction process.

The bids at issue in the *Order* were part of a 2004 auction of FM broadcast permits (“Auction 37”). Prior to Auction 37, the Commission released a Public Notice outlining the terms, conditions, and procedures for the auction, and notifying potential bidders that withdrawal of a standing high bid from a previous round during the auction would subject the high bidder to liability for bid withdrawal payments. The Public Notice also described how interim and final bid withdrawal payments would be calculated and informed potential bidders that if a high bid were to be withdrawn during Auction 37, and the permit remained unsold at the end of the auction, then an interim bid withdrawal payment would be assessed and a final bid withdrawal payment would be calculated once the permit sold during a subsequent auction.

During Auction 37, the five bidders subject to the *Order* withdrew a total of six provisionally winning bids in the later rounds of the auction. All of the permits remained unsold at the close of Auction 37. An interim bid withdrawal payment of three percent of the withdrawn bids was assessed and each of the permits received a winning bid in a subsequent auction held in 2006. At the close of the 2006 auction, the final bid withdrawal payment obligations were set forth in a Public Notice for the bidders who had withdrawn bids in Auction 37. The amount owed was the difference between the withdrawn Auction 37 bid and the lower subsequent winning bid for the permit (less the amount originally withheld for the interim bid withdrawal payment). Each of the five bidders was later issued a payment demand letter providing instructions for payment of the amount owed—calculated by setting forth its final bid withdrawal payment obligation less its interim bid withdrawal payment(s).

After the issuance of the payment demand letters, each of the five bidders sought a reduction or cancellation of its assessed bid withdrawal payment through a waiver. The requests were initially rejected by the Commission’s Wireless Telecommunications Bureau and appealed to the full Commission, where they were consolidated for review.

The *Order* notes that under the “good cause” standard used by the Commission to grant waivers, waivers are only appropriate if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.

The five bidders argued that their requests for reduction or cancellation of their bid withdrawal payments were treated differently than a similar request by earlier bidders in 2007, when the Bureau granted a waiver on the basis that the absolute and relative amount of the final bid withdrawal payment was higher than necessary to serve the purpose of the rule. The *Order* rejects this analysis, noting that the earlier bidders failed to meet the required showing under the Commission’s auction rules that the bid withdrawal payments should not be set so high as to “discourage the efficient aggregation of licenses or compel the bidder to keep the high bid and re-sell the license in the after-market.” The *Order* stops short of rescinding the 2007 waiver but declined to extend waivers to the five bidders in this case.

The *Order* also predicts that a waiver policy based on the size of the payment would encourage bidders to either try to strategically “game” the system or fail to carefully consider the costs imposed on the auction process in determining whether to place or withdraw bids.

The apparent lesson of the *Order* is for parties to follow through on their bids and to be sincere in making their bids in radio allotment auctions or to be prepared to pay (literally) the consequences for failing to do so.

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TV STATION FINED FOR FAILING TO FILE CHILDREN’S TELEVISION PROGRAMMING REPORTS

The Commission has fined a television station \$13,000 for failing to file the station’s Children’s Television Programming Reports for all quarters in the years 2006 through 2010 and for failing to place the reports in its public inspection file.

In its defense, the station admitted that it failed to prepare and file most of the Children’s Reports. But the station argued that the failure occurred because it retransmits the programming of another co-owned television station, and it inadvertently filed only reports for the originating station. The station also indicated that it had belatedly filed all of the required Children’s Reports, placed them in its public inspection file, and implemented procedural safeguards to ensure timely compliance going forward. The FCC summarily rejected the station’s arguments and pointed out that human error and inadvertence are not a basis for excusing a licensee’s rule violation. The Commission also stated that corrective action did not relieve the licensee of liability for violations that had already occurred.

This case serves as an important reminder that the FCC may enforce the Children’s Television Programming Report rules with significant penalties—and, of course, with the advent of online public files, it has become even easier for the FCC to do so. In light of the FCC’s interest in enforcement of these rules and the substantial penalties associated with violations, stations may wish to review their policies and online public files to ensure compliance.

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FCC REOPENS PROCEEDING REGARDING BIENNIAL OWNERSHIP REPORTS

The FCC has reopened its proceeding regarding data collection for Biennial Ownership Reports. The Commission again proposes to collect sensitive data as a part of the Biennial Ownership Report filing process and now seeks comment on this and other proposals relating to FCC Form 323.

In 2009, the Commission redesigned the ownership report form, Form 323, and the accompanying rules call for all parties with attributable interests in a licensee (such as officers, directors, and certain shareholders) to provide on Form 323 their FCC Registration Numbers (“FRNs”). As a technical matter, the Biennial Ownership Report filing database and FRN registration database are two separate systems. However, to properly file a Biennial Ownership Report, FRNs generally must be obtained through the FRN database for all attributable parties.

To obtain an FRN, an attributable party must provide a Social Security or tax identification number. Alternatively, the FCC permitted attributable parties to obtain a “special use” FRN, which does not require the submission of a Social Security or tax identification number to identify the owner. However, the “special use” FRN may only be used under limited circumstances. Still, the electronic process of filing Form 323 proved to be cumbersome and problematic as a practical matter, and the data collection issue has continued to trouble broadcasters and industry advocates. The Commission has defended the collection of sensitive Social Security number data on the grounds that it is essential to tracking and analyzing ownership trends, particularly in the areas of diversity and minority ownership.

Now, in a *Sixth Further Notice of Proposed Rulemaking* (the “Notice”), the Commission has reintroduced the general FRN registration and reporting requirement with renewed focus. Importantly, the *Notice* tentatively concludes that all individuals with attributable interests in licensees should be required to obtain a general FRN, which requires registrants to provide their Social Security or tax identification numbers.

The *Notice* seeks comment on whether the practice of allowing the “special use” FRN to be used instead of a general FRN should continue and under what circumstances.

The *Notice* proposes that a “special use” FRN should only be permitted when the filer is unable, after reasonable and good faith efforts, to obtain a general FRN from an individual or entity with an attributable interest in a licensee. The requirement could be enforced by potential fines against those who fail to provide a general FRN or the means of obtaining one (for example, the individual’s Social Security number) to the filer. Further, the *Notice* asks whether broadcasters should be required to warn shareholders (and potential investors) of the reporting requirement. The *Notice* also asks whether the requirements should be expanded to capture data for interests that are ordinarily exempt and not reportable (for example, shareholders who, under the current rules, own unreportable minority interests in a corporation with a single majority shareholder).

The *Notice* asks if the same reporting obligations and filing restrictions should apply to *noncommercial* stations who file Ownership Reports on FCC Form 323-E. On the current Form 323-E, licensees of noncommercial stations are not required to provide a general FRN for attributable interest holders. If the proposal is adopted, licensees of noncommercial stations would also be obligated to provide the race or ethnicity and gender of individuals with attributable interests.

The *Notice* also invites comment on a proposal to extend the Biennial Ownership Report filing period to December 1, allowing broadcasters an additional month to prepare and file Form 323.

The comment period in this proceeding closed March 1, 2013. We will keep you apprised of important developments in this proceeding.

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SPECTRUM AUCTION INFORMATIONAL WEBSITE REDESIGNED FOR BROADCASTERS

The Commission has launched a new website intended to provide information to broadcasters regarding spectrum incentive auctions and related proposals. The new website’s content includes a summary of the proposed auction process prepared by FCC staff and answers to “Frequently Asked Questions” on the subject.

The new broadcaster website is available at the following URL:
<http://www.fcc.gov/learnprogram>.

The FCC encourages broadcasters with an interest in the auction to visit this website and use its tools and resources.

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If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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