



# PUBLIC NOTICE

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## Media Bureau Announces April 8 – April 17 Filing Window to Permit Amendment of Auction 83 Noncommercial Educational FM Translator Applications

Today, the Media Bureau announces an April 8 – April 17, 2013, window to permit Auction 83 applicants identified in Attachment A to de-select their “noncommercial educational” filing status.<sup>1</sup>

**Background.** On February 6, 2003, the Media Bureau and the Wireless Telecommunications Bureau released a public notice announcing a March 10-14, 2003, FM translator auction filing window for non-reserved band (Channels 221 to 300) applications for new FM translator stations and major modifications to authorized FM translator facilities.<sup>2</sup> Applicants for noncommercial educational (NCE) FM translator stations were allowed to submit applications in the Auction 83 Filing Window.<sup>3</sup> Several weeks after the close of this window, the Commission released the *NCE Second Report and Order*.<sup>4</sup> Under the new procedures adopted therein, an auction applicant’s attempt to change its self-identification from NCE to commercial is considered a major amendment, which is prohibited after the Form 175 filing deadline.<sup>5</sup> Moreover, any application for an NCE station that remains mutually exclusive with any application for a commercial station, after any settlement opportunities expire, is returned as unacceptable for filing.<sup>6</sup>

<sup>1</sup> See *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402 (2012).

<sup>2</sup> See *FM Translator Auction Filing Window and Application Freeze*, Public Notice, 18 FCC Rcd 1565 (MB/WTB 2003) (“Auction 83 Filing Window”). The window was subsequently extended to March 17, 2003. *FM Translator Auction Filing Window and Application Freeze Extended to March 17, 2003*, Public Notice, 18 FCC Rcd 3275 (2003).

<sup>3</sup> *Auction 83 Filing Window Public Notice*, 18 FCC Rcd at 1565 n.1 (a window for proposals in the non-reserved band provides a filing opportunity for both NCE and commercial FM Translator applicants. See 47 C.F.R. § 74.1202(b) (specifying that noncommercial FM Translators may be authorized to operate on Channels 201-300)). Applicants seeking an NCE station license were instructed to check the box labeled “noncommercial educational” in response to the “applicant status” question on the FCC Form 175 application.

<sup>4</sup> *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691, 6699-6700 (2003) (“*NCE Second Report and Order*”); Memorandum Opinion and Third Order on Reconsideration, 23 FCC Rcd 17423 (2008) (“*MOTOR*”). The *NCE Second Report and Order* was adopted on March 4, 2003, and released on April 10, 2003.

<sup>5</sup> 47 C.F.R. § 1.2105(b)(2).

<sup>6</sup> 47 C.F.R. § 73.5002(b).

On reconsideration of the *Second Report and Order*, the Commission recognized the “unfairness” of dismissing applications that “had sought to be licensed as NCE stations . . . without knowledge of the consequences of this decision.”<sup>7</sup> Accordingly, it directed the Media Bureau to announce a window for the sole purpose of providing an identified group of long pending NCE FM (full power) applications with a one-time opportunity to amend their applications to apply for commercial stations.<sup>8</sup> The Commission to date has waived Section 1.2105(b)(2) on three separate occasions to allow auction applicants to “de-select” NCE filing status.<sup>9</sup> These same considerations are controlling here with regard to the remaining Auction 83 applicants. At the time that the window closed, Auction 83 applicants did not know and could not have known that “checking” the NCE box could be irreversibly fatal in any “mixed” commercial/NCE mutually exclusive FM translator application group. The public interest is best served by waiving the prohibition against post-window major amendments for the limited purpose of permitting these applicants to de-select their prior NCE “applicant status” selection.

Equitable considerations also strongly favor providing this relief. Most importantly, strict enforcement of the major change prohibition would be inconsistent with basic due process requirements. As the Court has noted, “[F]undamental fairness . . . requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration on the merits, be accompanied by full and explicit notice of all prerequisites for such consideration.”<sup>10</sup> Obviously, such notice was lacking here. We find unpersuasive the counterargument that commercial applicants may have relied on the expectation that the Commission would strictly enforce Section 1.2105 in making decisions about which Auction 83 proposals to prosecute.<sup>11</sup> This waiver relief – to “give applicants for NCE stations one opportunity to reevaluate their long pending plans in the context of *full and complete information about how the licensing process will work*”<sup>12</sup> – is identical to the relief which the Commission has provided repeatedly to essentially identically situated applicants. Thus, competing applicants could have reasonably anticipated that the Commission would afford these applicants an opportunity to participate in the upcoming auction. In particular, we note that the Commission has provided this relief to applicants with proposals that have been pending in mixed MX groups for up to fifteen years.<sup>13</sup> We find without merit the claim that relief is

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<sup>7</sup> *MOTOR*, 23 FCC Rcd at 17427-28.

<sup>8</sup> *See id.* *See also Window Opened to October 30, 2009, to Permit Amendment of Applications for Noncommercial Educational Stations in Pending, Closed Mixed Groups*, Public Notice, 24 FCC Rcd 12188 (MB 2009) (“*Auction 88 Waiver PN*”).

<sup>9</sup> *See American Family Association, et al.*, DA 04-3037, Letter, 19 FCC Rcd 18681 (MB/WTB 2004) (Auction 37); *Supplemental Notice Concerning Status of FCC Form 175 Applications to Participate in Auction 37*, Public Notice, 19 FCC Rcd 18696 (MB/WTB 2004); *Christian Broadcasting, Inc.*, Letter, 24 FCC Rcd 2212 (2009) (providing a 30-day opportunity to amend certain Auction 84 applications); *Auction 88 Waiver PN*, 24 FCC Rcd at 12188.

<sup>10</sup> *Salzer v. FCC*, 778 F.2d 869, 871-72 (D.C. Cir. 1985).

<sup>11</sup> *See Bond Broadcasting, Inc. and East Kentucky Broadcasting Corp.*, Request for Declaratory Ruling, MM Docket No. 97-234 and MB Docket No. 07-172 (filed Mar. 21, 2013) at 6 (“*Request for Declaratory Ruling*”).

<sup>12</sup> *MOTOR*, 23 FCC Rcd at 17428 (emphasis added).

<sup>13</sup> *See Auction 88 Waiver PN* at 12189-95. The *Request for Declaratory Ruling* erroneously asserts that prior waivers have involved only commercial applications. *See Request for Declaratory Ruling* at 9-10.

unwarranted because NCE applicants should have individually requested “de-selection” earlier.<sup>14</sup> It is simply unfair and unrealistic to fault an applicant for failing to seek a waiver of the rule prohibiting major amendments to its Form 175, especially when the Commission’s established practice is to open an all-inclusive amendment window for this purpose.

We also reject as misguided the argument that commercial applicants “will be substantially harmed” if mutually exclusive NCE applicants are permitted to de-select their NCE status.<sup>15</sup> This argument conflates the private self-interest of commercial applicants with the benefits of providing all applicants *an* opportunity to make an informed decision as to whether to participate in a future auction. The public interest is better served by encouraging maximum bidder participation<sup>16</sup> and promoting recovery of the value of auctioned spectrum.<sup>17</sup> We find immaterial the fact that an applicant’s clear intention to seek an NCE station can be independently established by its specification of an NCE primary station on the tech box component of its Auction 83 application. Primary station specification and “NCE” filing status selection are equally problematic because applicants made both of these decisions without any understanding of their consequences. For these reasons, we find that a waiver of Section 1.2105(b)(5) is warranted.<sup>18</sup> Accordingly, the applicants identified in Attachment A will be permitted to file major amendments to their Form 175s for the limited purpose of de-selecting their earlier “noncommercial educational” status election during the upcoming window.

***Amendment Filing Procedures:*** Attachment A to this Public Notice identifies the Auction 83 applicants for NCE FM translator stations. Applicants must submit a de-selection amendment, in triplicate, with the Commission’s Secretary, Marlene Dortch, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street S.W., Room TW-A325, Washington, DC 20054. The amendment must also be emailed to [FXshowings@fcc.gov](mailto:FXshowings@fcc.gov). The de-selection amendment must explicitly state that the applicant had previously applied for an NCE FM translator station in the Auction 83 Filing Window and now seeks to amend its pending Auction 83 application to apply for a commercial FM translator station. An applicant’s decision to de-select its earlier NCE status election applies to all of its remaining tech box proposals.

**De-selection amendments must be received by April 17, 2013.** Only applicants for NCE FM translator stations listed in Attachment A will be allowed to amend their Auction 83 application. Amendments for purposes other than applying for a commercial FM translator station will not be accepted

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<sup>14</sup> *Id.* at 12-13.

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2377 (1994).

<sup>17</sup> *Elleron Oil Company WVI Partners, Inc.*, Order, 13 FCC Rcd 17246, 17250 (WTB 1998), citing 47 U.S.C. § 309(j)(3)(C). *Cf. Paging Systems, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 4036, 4055-56 (2010) (observing that while in any particular auction individual bidders may prefer to have fewer competitors and thus a greater chance of winning at lower prices, there is a disparity between bidder objectives and the Commission’s, which is to facilitate a more economically efficient assignment of license by increasing auction competition).

<sup>18</sup> *See NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008) (waiver of a Commission rule is appropriate only if special circumstances warrant a deviation from the general rule and such deviation better serves the public interest).

during this window.<sup>19</sup> For additional information, contact James Bradshaw or Lisa Scanlan of the Audio Division at (202) 418-2700.

***This Public Notice contains the following Attachment:***

**Attachment A:** Auction 83 Applicants for NCE FM Translator Stations

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<sup>19</sup> Applicants will be afforded an opportunity prior to auction to amend their primary station specification on their respective Auction 83 tech box. A primary station amendment will be treated as a minor amendment. Primary station specification amendments will not be accepted at this time.