



PUBLIC NOTICE

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FM Translator Auction 83 Mutually Exclusive Applications Subject to Auction

Media Bureau Announces Immediate Opening of Settlement Period

Settlement Agreements and Primary Station Specification Amendments Due by July 22, 2013

Today, the Media Bureau announces a two-month period beginning with the release of this Public Notice and ending July 22, 2013 (the “Settlement Period”), for Auction 83 applicants with proposals in the mutually exclusive (“MX”) groups identified in Attachment A to enter into settlement agreements or otherwise resolve their mutual exclusivities by means of engineering solutions.¹

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.² By this Public Notice, the Media Bureau provides, as Attachment A, a list of all pending window filed applications that it has identified as mutually exclusive with other applications submitted in the filing window. Accordingly, these applications are subject to the Commission’s competitive bidding procedures.³ If an applicant believes that a Form 349 Tech Box proposal has been erroneously omitted from Attachment A, i.e., the Tech Box proposal is in conflict with at

¹ See *Creation of a Low Power Radio Service*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364, 3386-87 (2012) (“*LPFM Fourth Report and Order*”).

² See *FM Translator Auction Filing Window and Application Freeze*, Public Notice, 18 FCC Rcd 1565 (MB/WTB 2003) (“*Auction 83 Filing Window Public Notice*”). 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 (MB/WTB 2003). Applicants were required to file FCC Form 175, Application to Participate in an FCC Auction, and certain sections of FCC Form 349, Application for Authority to Construct or Make Changes in an FM Translator or FM Booster Station, which permitted the staff to determine mutual exclusivities between applicants.

³ See 47 U.S.C. § 309(j); 47 C.F.R. § 73.5000(a); see generally *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 (1998) (“*Broadcast First Report and Order*”), on recon., Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999) (“*Broadcast First Reconsideration Order*”), on further recon., Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

least one application listed on Attachment A, it should contact immediately the staff listed at the end of this Public Notice.

Prohibited Communications. The prohibition on certain communications set forth in Sections 1.2105(c) and 73.5002(d) of the Commission’s rules became effective upon the filing of FCC Form 175 and applies to all broadcast service auctions.⁴ However, in certain circumstances, the Commission’s rules provide for a limited opportunity to settle, or otherwise resolve mutual exclusivities, following the filing of the FCC Form 175 applications.⁵ Specifically, pursuant to Section 73.5002(d)(3) of the rules,⁶ the MX group applicants listed in Attachment A are permitted to resolve their mutual exclusivities by means of engineering solutions or settlements during the Settlement Period. However, once this Settlement Period is closed, the prohibition on certain communications will again take effect for such applicants. The MX groups listed in Attachment A include applications specifying locations in both “Spectrum Limited” and “Spectrum Available” markets,⁷ and also locations outside of all markets.

Settlement Agreements. Applicants resolving their mutual exclusivities by settlement must ensure that their settlement agreements comply with the provisions of Section 311(c) of the Communications Act of 1934, as amended (“the Act”), and the pertinent requirements of Section 73.3525 of the Commission’s rules, including, *inter alia*, reimbursement restrictions.⁸ In the interest of expediting new FM translator service to the public, the Commission will accept both universal – in which all applicants in the particular MX group participate – and non-universal settlements. Universal settlements, however, are encouraged. Non-universal settlement proposals must eliminate all mutual exclusivities between at least one application and all other applications in the MX group.⁹ Parties to the settlement agreement must submit a joint request for approval of settlement, a copy of the settlement agreement, the affidavits required by Section 73.3525(a) of the rules, and any necessary amendment(s) to their FCC Form 349 Section III-A Tech Box(es) prior to the close of the Settlement Period.¹⁰ The staff will request complete FCC Form 349 applications from the surviving applicant(s) upon approval of the settlement agreement.¹¹

⁴ See 47 C.F.R. § 1.2105(c), 73.5002(d).

⁵ See *Broadcast First Report and Order*, 13 FCC Rcd at 15927, 15980-81; *Broadcast First Reconsideration Order*, 14 FCC Rcd at 8753-8759 (extending limited settlement opportunities to mutually exclusive auction applications in the broadcast secondary services). See also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691 (2003) (“*NCE Second Report and Order*”).

⁶ 47 C.F.R. § 73.5002(d)(3).

⁷ See *LPFM Fourth Report and Order*, 27 FCC Rcd at 3398-3406.

⁸ See 47 U.S.C. § 311(c); 47 C.F.R. § 73.3525.

⁹ See 47 C.F.R. § 73.5002(e).

¹⁰ See 47 C.F.R. § 73.3525(a); see also “Filing Procedures,” *infra*.

¹¹ When submitting the complete FCC Form 349, surviving applicants must simultaneously submit the required Form 349 application filing fee and a Form 159, Remittance Advice. See Schedule of Charges at 47 C.F.R. § 1.1104. Method and forms of payment are addressed in 47 C.F.R. §§ 1.1111, 1.1112. See also the Media Services Application Fee Filing Guide and the FCC Form 349 instructions. The general exemptions to charges are specified in 47 C.F.R. § 1.1116. Governmental entities are exempt from this fee requirement. Also exempt are applicants for noncommercial educational FM translator facilities, as defined in 47 C.F.R. § 74.1201(c). When filing a fee-exempt application, an applicant must complete Section I, item 3 of Form 349 and provide an explanation.

Technical Resolution Amendments. Applicants resolving their mutual exclusivities by means of technical resolution amendments, described *supra*, may do so by submitting an amended FCC Form 349 Section I, the Section III-A Tech Box, and the Section III Preparer’s Certification (October 2009 version). Technical resolution amendments may be non-universal but the amendment must resolve all mutual exclusivities between the application and all other applications in the pertinent MX application group.¹² A technical resolution amendment must be a “minor” change, as defined by the rules,¹³ to the engineering proposal specified in its original Form 175 application and must not create new mutual exclusivity or application conflicts. Applicants must include a Preclusion Showing for any Tech Box amendment specifying a transmitter site within 39 kilometers of any Appendix A Market grid and/or within any Top-50 Spectrum Limited Market. Detailed instructions on completing Preclusion Showings are provided in prior Media Bureau public notices.¹⁴ A technical resolution amendment which creates new application conflicts or does not include a required Preclusion Showing will be returned. The staff will request complete FCC Form 349 applications for technically acceptable proposals.¹⁵

Potential Dismissal of Certain NCE FM Translator Applications. Both commercial and noncommercial educational (“NCE”) applications were submitted in the 2003 Auction 83 filing window.¹⁶ To better serve the public interest and to avoid the harsh result of dismissal based on subsequently adopted processing rules,¹⁷ the Commission allowed certain applicants in prior broadcast auctions to amend their station designations from “NCE” to “commercial.”¹⁸ To afford the similarly situated Auction 83 FM translator applicants an opportunity to participate in the upcoming auction, the Media Bureau recently waived the prohibition against major amendments to Form 175 filings and allowed NCE FM translator

¹² See 47 C.F.R. § 73.5002(e).

¹³ See 47 C.F.R. § 74.1233(a).

¹⁴ See *Media Bureau Announces April 1 – April 19 Filing Window for FM Translator Auction 83 Preclusion Showings*, Public Notice, 28 FCC Rcd 2495 (MB 2013); *Media Bureau Provides Additional Guidance on Preclusion Showing Filing Requirements for Auction 83 FM Translator Applicants*, Public Notice, 28 FCC Rcd 2840 (MB 2013).

¹⁵ See *supra* note 11.

¹⁶ *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)).

¹⁷ Under the rules adopted in the *NCE Second Report and Order*, 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. See 47 C.F.R. § 1.2105(b)(2). 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. See 47 C.F.R. § 73.5002(b).

¹⁸ 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 (MB/WTB 2009) (providing a 30-day period to amend certain Auction 84 applications); *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) (Closed Broadcast Auction 88).

applicants to de-select their earlier “noncommercial educational” status election.¹⁹ Attachment B identifies the commercial/NCE status of each Attachment A applicant as specified on its Form 175 as of the close of the April 8-April 17 de-selection filing window.

An applicant is required to identify the primary station for each proposed translator in the FCC Form 349, Section III-A Tech Box.²⁰ Pursuant to the FM translator rules,²¹ specification of an NCE primary station in the Tech Box defines an FM translator station as NCE and therefore renders an application proposing such facilities as ineligible to participate in Auction 83.²² However, as stated in the *De-selection PN*, Auction 83 FM translator applicants that had previously designated an NCE filing status (in the 2003 Auction 83 filing window) and specified a corresponding NCE primary station in their Tech Box, would be afforded an opportunity prior to auction to amend their primary station specification on their respective Auction 83 Tech Box. Accordingly, we will permit primary station amendments during the Settlement Period. A primary station amendment will be treated as a minor amendment. **Notwithstanding the de-selection of its NCE filing status in the April 8-April 17, 2013, filing window, an FM translator applicant that specifies an NCE primary station as of the close of the Settlement Period, and is not otherwise subject to a pending settlement agreement or technical resolution, is statutorily barred from participating in Auction 83.**

In accordance with Section 73.5002(b) of the rules, an NCE FM translator application that remains in conflict with a commercial FM translator application after the close of the settlement window will be returned as unacceptable for filing, and the remaining applications for commercial FM translator stations will be processed in accordance with competitive bidding procedures.²³ For these purposes, any applicant that either proposes to rebroadcast the signal of an NCE primary station, **or** that selected “NCE” status on their original Form 175 and did not timely file a de-selection amendment, will be considered noncommercial educational. The Commission will proceed to auction with any remaining mutually exclusive commercial proposals that are not resolved by the parties.

Filing Procedures. Joint requests for approval of settlement agreement must be filed in original and two copies, plus one additional copy for each applicant that is a party to the settlement, **on or before July 22, 2013**, with the Commission's Secretary, Marlene Dortch, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., Room TW-A325, Washington, DC 20554. In addition, it is requested that a courtesy copy of all such filings be delivered to James Bradshaw, Audio Division, Media Bureau, Federal Communications Commission, 445 Twelfth Street, S.W., Room 2-B450, Washington, DC 20554.

Applicants filing a technical resolution amendment must submit an amended FCC Form 349 Section I, the Section III-A Tech Box, and the Section III Preparer's Certification (October 2009 version)

¹⁹ See *Media Bureau Announces April 8-April 17 Filing Window to Permit Amendment of Auction 83 Noncommercial Educational FM Translator Applications*, DA 13-587, Public Notice (MB, rel. April 2, 2013) (“*De-selection PN*”).

²⁰ FCC Form 349, Section III-A Tech Box, Item 2.

²¹ See 47 C.F.R. § 74.1201(c) (defining a “noncommercial FM translator” as an FM broadcast translator station which rebroadcasts the signals of a noncommercial educational AM or FM radio broadcast station).

²² See 47 U.S.C. § 309(j)(2)(C); 47 C.F.R. § 73.5000(b) (applications for NCE broadcast stations, as described in 47 U.S.C. § 397(6), on non-reserved channels are not subject to competitive bidding procedures).

²³ 47 C.F.R. § 73.5002(b).

electronically through the Media Bureau's Consolidated Database System (CDBS) online electronic forms filing system. When filing a technical resolution amendment, applicants must select "Amendment to Short Form application for FM Translator Auction Window 83" on the Pre-form for Form 349 (Question 2 – Application Purpose).²⁴ In addition, the CDBS file number previously issued to the Form 349 Section I and Section III-A Tech Box filed in the FM translator Auction 83 filing window must be entered on the Pre-form in the field "Eng. Proposal File Number."²⁵ Instructions for use of the electronic filing system are available in the CDBS User's Guide, which can be accessed from the electronic filing web site at: <http://www.fcc.gov/online-filing>.

Applicants amending their specified primary station must file an amended FCC Form 349 Section I and the Section III-A Tech Box electronically through CDBS. When filing a primary station specification amendment, applicants must select "Amendment to Short Form application for FM Translator Auction Window 83" on the Pre-form for Form 349 (Question 2 – Application Purpose). The CDBS file number previously issued to the Form 349 Section I and Section III-A Tech Box filed in the FM translator Auction 83 filing window must also be entered on the Pre-form in the field "Eng. Proposal File Number."

A surviving NCE FM translator applicant in a settlement agreement, or an NCE FM translator applicant that proposes to resolve its mutual exclusivities through a technical resolution amendment, must also file electronically FCC Form 349.²⁶ In accordance with Section 1.1116(c) of the Commission's rules, these Form 349 applications are exempt from application filing fees.

The mutually exclusive applicants' FCC Form 349 Section I and Section III-A Tech Box submissions filed during the Auction 83 filing window are available for review in CDBS Public Access. For assistance with electronic filing, call the Audio Division Help Desk at (202) 418-2662.

For additional information, contact James Bradshaw, Rob Gates, Larry Hannif-Ali, or Lisa Scanlan of the Audio Division at (202) 418-2700.

This Public Notice contains the following Attachments:

Attachment A: FM Translator Mutually Exclusive Applications Subject to Auction

Attachment B: Auction 83 Applicants' NCE or Commercial Status Selection, as of the Close of the April 8-April 17 De-Selection Filing Window

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²⁴ When subsequently directed to file the complete FCC Form 349, applicants must select "Long Form Application for FM Translator Auction 83" on the Pre-form for Form 349 (Question 2 – Application Purpose).

²⁵ The CDBS file number issued to the Form 349 Section I and Section III-A Tech Box filed in the FM translator Auction 83 filing window is listed in Attachment A to this Public Notice.

²⁶ These non-mutually exclusive NCE FM translator applicants do not need to fill out Form 349 Section IV-NCE Point System Factors.