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THE COMMISSION ANNOUNCES FOUR POLICY CHANGES IN PROCESSING OF COMMERCIAL FM CONSTRUCTION PERMIT APPLICATIONS FOR NEW FACILITIES

In June 1985, in the Report and Order in MM Docket 84-750 ("Report and Order"), the Commission adopted new FM "hard look" filing window processing procedures which, among other things, restrict the period of time within which amendments going to the tenderability (*i.e.*, substantial completeness) of applications may be filed.¹ Under these processing procedures, applicants may perfect the tenderability of their applications and retain filing window status only by an amendment filed by the close of the applicable window. Nearly two dozen basic tenderability criteria were specified by the Commission in Appendix D to the Report and Order.

The Report and Order made no substantive change in existing policy governing acceptability of applications as defined in 47 C.F.R. § 73.3566(a), prior case law and the Commission's Public Notice concerning patently defective AM and FM construction permit applications.² (If an application is found tenderable, it is then studied for acceptability, which requires compliance with certain statutory and international treaty provisions, as well as technical rules for FM stations.) However, under the "hard look" processing system, an applicant is provided a 30-day period within which to perfect its application's acceptability for filing. This 30-day period is triggered by the application's appearance on a Public Notice as an application accepted for tender. After the period closes, the filing of amendments is severely constrained.³

Prior to the time these changes were made, the FM Branch had been returning approximately 40% of the tendered construction permit applications. Many errors in key portions of the applications remained undetected until considerable processing time and effort had already been expended. Discovery of fundamental errors so far along in the processing chain resulted in significant delays in disposing of the flawed applications, in processing

1 50 Fed. Reg. 19936 (1985). See para. 31 and Appendix D of the Report and Order, as well as 47 C.F.R. §§ 73.3522(a)(6) and 73.3564(a).

2 49 Fed. Reg. 47331 (1984), recon. denied, 57 RR 2d 1603 (1985).

3 These constraints are set forth in 47 C.F.R. § 73.3522(a)(6).

problem-free but mutually exclusive applications and in processing unrelated problem-free applications.

The Commission believed that the "hard look" approach would thus yield important benefits. First, the reduction of frivolous and speculative applications would enable us to more rapidly process all applications, particularly those tendered by serious candidates who were "ready, willing and able" to rapidly bring service to the public. Second, streamlining our processing procedures would enable us to make more efficient use of our limited staff and other resources in processing large numbers of applications.

To date, the "hard look" processing system has, in large measure, accomplished its originally intended result. Since the institution of the "hard look", the Commission has opened filing windows for a total of 1341 new channels. By January 1, 1990, the staff had processed approximately 5000 construction permit applications filed for these allotments. Significantly, the number of applications for new facilities currently being returned by the staff is approximately 5% of those tendered.

Nevertheless, although the present level of receipt by the Commission of applications for new facilities is estimated to be only 60 per month, approximately 2200 applications remain pending. In a further effort, therefore, to significantly shorten current processing times for the remaining backlog of applications, we are herein announcing four FM processing changes relating to applications for new commercial stations, which the staff is hereby instructed to implement immediately.

1. The first change is procedural and authorizes the staff to issue the required "Notice of Acceptance for Filing" prior to the staff's engineering study of the application. This Notice is mandated by Section 309 of the Communications Act for the purpose of establishing a 30-day period for the filing of petitions to deny. Currently, the Notice is released after the engineering study, and the legal study therefore cannot be completed until the petition to deny pleading cycle has ended. Triggering the statutory petition to deny pleading cycle while applications are still awaiting engineering study will insure that each file is virtually complete before both engineering and legal processing begins. We believe this change will shorten processing time by approximately 45 days per application. We note that if an application placed on public notice as acceptable for filing is subsequently determined to be unacceptable for filing, it may be dismissed as such. See 47 C.F.R. § 73.3566.

The other changes, in three factual settings, authorize the staff to waive the FM "hard look" processing rules which prohibit the filing of amendments curing tenderability or acceptability defects after the applicable amendment of right periods. We believe that "hard look" waivers in the three circumstances described below would, at this time, better serve the public interest. Specifically, these waivers would permit the immediate authorization of new service in situations where the defects in question would otherwise bar settlements or grants for applicants and would, therefore, occasion further procedural or administrative delay. These three changes are as follows:

2. In situations where only one applicant has applied in a filing window, the staff will waive the "hard look" rules to permit one opportunity to correct tenderability defects and one opportunity to correct acceptability defects in response to Commission deficiency letters, providing any such amendments do not conflict with a previously filed acceptable application.⁴
3. As to any applicant who proposes to buy out all other applicants in a mutually exclusive group, including any previously dismissed applicant whose dismissal is not final, the staff will waive the "hard look" rules to permit one opportunity for the surviving applicant to correct all defects in its application, providing such amendment does not conflict with a previously filed acceptable application.
4. As to any applicant previously dismissed for defects whose dismissal is not yet final and who proposes to buy out all remaining applicants in a mutually exclusive group, including any other dismissed applicant whose dismissal is not final, the staff will waive the "hard look" rules in order to permit reinstatement nunc pro tunc with a curative amendment for the limited purpose of settlement approval, providing such amendment cures all defects and does not conflict with a previously filed acceptable application.

We believe that waivers of the "hard look" rules in the above limited circumstances will result in significantly improved speed of service to the public. The "hard look" rules will continue to be applied in all other cases.

NOTE: As is the current practice with regard to all applications for new stations not mutually exclusive with another and for proposed settlements which would result in the immediate authorization of new service, cases

⁴ This policy will also apply to any sole applicant whose application has been dismissed on "hard look" grounds, but whose dismissal, at the time the applicant seeks to amend, is not yet final.

involving the above three types of waivers will be taken out of line and expedited. However, requests for expedition should always be made in writing in order to alert the staff that the case in question falls within one of the above three categories.

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