

BloostonLaw

Private Users Update

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New Rules for License Renewals and Construction Requirements Became Effective September 28, 2020

The FCC's long-adopted rules which define (a) the expanded requirements for renewal of wireless licenses and (b) when a station is deemed to have "permanently discontinued" operation became immediately effective on September 28, 2020, upon the FCC's announcement in the Federal Register that it had received approval from the Office of Management and Budget (OMB) for the information collection required under the new rules. These rules were originally adopted in August 2017, but were delayed due to delays in obtaining OMB approval.

Discontinuance of Operation

The FCC's rules concerning permanent discontinuances of operation remain largely unchanged for private internal radio operations. For site-based licenses (which are the vast majority of the licenses held by our clients), a licensed facility will be deemed to have permanently discontinued operation if it has not operated a transmitter for a period of 365 consecutive days. For those of our clients who operate under geographic area licenses, the time period is 180 days. It is important to note that the operation of a "Channel Keeper" (a device which transmits test signals, tones, color bars or some combination) does not constitute station operation and will therefore not stop a discontinuance of operation clock.

For those of our clients who provide commercial (i.e., for profit) service, such as SMR or private carrier paging, the standard is more stringent. In order to be considered operational, you must be providing commercial service to at least one unaffiliated subscriber. Thus, the FCC could conclude that your commercial station had permanently discontinued operation if you had no customers, even though the station was fully operational and you were ready, willing and able to provide service if requested.

License Renewal

As described in previous PU Updates, the FCC has adopted a license renewal standard which is designed to ensure standardized review of license renewal applications. In particular, the FCC has created different safe harbors for site-based and geographic area licensees which will require certifications regarding license operations over the prior license term:

Site Based

- Licensee must certify that it is continuing to operate consistent with its most recently filed construction notification (or most recent license authorization if a construction notification was not filed); and

- Licensee must certify that no permanent discontinuance of service occurred during the license term

Geographic Area (Private Systems)

- For a licensee in its initial term with an interim performance requirement, the applicant must certify as follows:
 - o It has met its interim construction performance requirement and that over the portion of the license term following the interim construction performance requirement, it continued to use its facilities to further its private internal communications needs or public safety needs; and
 - o It has met its final construction performance requirement and continues to use its facilities to provide the minimum level of operation required by its final construction performance requirement through the end of the license term.
- For a licensee in any subsequent license term, the licensee must certify as follows:
 - o It continues to use its facilities to further its private business or public safety needs at or above the level required to meet its final construction performance requirement, and
 - o No permanent discontinuance of operation occurred during the license term.

Regulatory Compliance Certification

In addition to certifications concerning the physical operation of the license to be renewed, the FCC is also requiring each license renewal applicant to certify that it has “**substantially**” complied with all applicable FCC rules, policies and the Communications Act of 1934, as amended.

What Happens if I Cannot Make a Certification?

The FCC will require a demonstration if a licensee cannot make an appropriate safe-harbor showing or the regulatory compliance showing. Any client who is unable to make the appropriate showing should contact our office as soon as possible so that we can work with you to develop the necessary information. In this regard, the FCC’s staff has informally indicated that special showings should be the exception to the rule and that most license renewal applications should be covered by safe-harbor certifications.

Keep Your Licenses Up-to-Date

It will be important to advise us of any license modifications, so that you can make accurate certifications at the time of license renewal.

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FCC Adopts Final Steps for All-Electronic Wireless Filings; Sets Six Month Transition Deadline

On September 18, the FCC issued a *Report and Order* taking the final steps to transition to an electronic-only submission of all filings in the Universal Licensing System (“ULS”) and related systems (e.g., Antenna Structure Registration System (“ASR”), Tower Construction Notification System (“TCNS”) and Electronic Section 106 (“E-106”) System. **Once this *Report and Order* is published in the Federal Register, the FCC**

will no longer print and mail paper authorizations, reminder letters and other important correspondence to licensees and applicants, making it critical that our clients carefully maintain their contact information (including email addresses) in the FCC's ULS database. If the FCC sends correspondence about e.g., a proposed modification or termination of your license, and it goes to an expired email address of someone no longer with the company, you may suffer a loss of your license rights. Our clients may also want to establish a separate email address such as "FCCcompliance@acmewireless.com" to use as the contact email they provide to the FCC, which email will go to multiple persons at the company, so that it is less likely an important communication from the FCC will be missed because the recipient is retired, terminated, on vacation or suffering computer problems.

Specifically, in the *Order* the FCC (i) removes the remaining exemptions to mandatory electronic filing in ULS and required electronic filing in the ASR System; (ii) requires electronic filing of pleadings related to Wireless Radio Services licenses and applications in these systems and require electronic service where service of such pleadings is required; (iii) requires that all applicants, licensees, and registrants in the Wireless Radio Services include at least one valid e-mail address on the relevant FCC Forms; and (iv) shifts from U.S. Postal Service to electronic delivery of correspondence generated from these systems to applicants, licensees, and registrants in the Wireless Radio Services.

Absent a waiver, any manually filed applications for wireless services submitted after the transition deadline will be dismissed without prejudice, and any service not effectuated electronically will be deemed ineffective.

The FCC adopted the all-electronic requirement over the objection of BloostonLaw and others, who had pointed out that failure to send a paper copy will mean that important communications may be missed. Even if steps are taken to address retirements, firings, etc. as described above, licensees may miss FCC communications due to, e.g., denial of service attacks over which they have no control. The transition to all-electronic filing will be required six months after Federal Register publication.

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House of Representatives Passes Legislation to Repeal T-Band Spectrum Auction

After almost two years of languishing in the House of Representatives, the House passed the Don't Break Up the T-Band Act of 2020 (H.R. 451) by a vote of 410-5. This legislation, introduced by Rep. Eliot Engle (D-NY), would eliminate the upcoming auction of the T-Band (470-512 MHz), which is currently used by both public safety and industrial land-mobile licensees in order to meet critical internal communications needs. In addition to a repeal of the T-Band auction mandate, the proposed legislation has been amended to include language that would prevent state and local governments from diverting 911 fees collected on land-line telephone bills and wireless bills for other purposes that are not related to the provision of 911 services. This is especially significant during tough economic times – such as that caused by the COVID-19 pandemic – since many state and local governments had been known to use these funds to cover short-falls during such times.

This vote is significant due to its whole-hearted support on both sides of the aisle. The legislation has now been passed on to the Senate and referred to the Committee on Commerce, Science and Transportation for action. While the Senate has not provided a timeline to consider this legislation, we are hopeful that there will be sufficient support for this legislation to pass before this session of Congress adjourns. In this regard, there is significant support for a repeal of the T-Band auction requirement – first established in the Middle Class Tax Relief and Job Creation Act of 2012 – at the FCC, the Government Accounting Office (GAO) and among public safety and industrial business users.

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NSMA Seeks Reconsideration of RF Radiation Rules

The National Spectrum Managers Association (“NSMA”) is requesting reconsideration of several elements of the FCC’s December 4, 2019 *Resolution of Notice of Inquiry, Second Report and Order, Notice of Proposed Rulemaking, and Memorandum Opinion and Order* in ET Docket Nos.03-137, 13-84 and 19-226 (the “MO&O”), in which it decided to retain its current RF exposure limits but modify how compliance is accessed. **Replies to the Oppositions to the Petitions for Reconsideration are due no later than October 9, 2020.**

NSMA has asserted that there are three areas in the FCC’s MO&O that require attention:

- The two-year timetable for implementation of site-by-site RF exposure evaluations is not realistic or practical.
 - o NMSA notes that most non-broadcast facilities and sites were previously classified as “categorically exempt” from the requirement to complete an RF radiation analysis. Under the new requirements, a licensee would be required to evaluate its effective radiated power (ERP) and determine a worst-case distance between the center of the antenna and a possible person. This evaluation would require a determination of the precise specifications and characteristics of the licensee’s transmitters, as well as nearby transmitters operated by other licensees for which the required information may not be available. This evaluation will most likely require site visits as well as significant financial outlays and the hiring of personnel. To provide context to the timeline, NMSA has estimated that there are at least 100,000 microwave transmitters that would be affected, and that it would take anywhere from 2 hours to two days per site to perform the necessary evaluations. Further compounding the issue is the fact that this evaluation would also be occurring during the 5-G rollout.
 - o NMSA notes that the FCC’s current RF radiation hazard rules have been in place for decades and that these rules will continue to protect the public from the harmful effects of RF radiation during a transition period. NMSA suggests that there is “no pressing urgency” to complete this evaluation within the two-year period specified in the rules and therefore urges the FCC to “spread the burden over a long period by . . . requiring the evaluation to be accomplished by the later of two years from the effective date of the new rules or a licensee’s license renewal date.”
- The RF exposure evaluations require the aggregation of radiation from multiple highly directional antennas that are not designed or operated to radiate in the same direction.
 - o NMSA points out that the FCC’s new rules appear to require evaluations of all transmitters at a particular location without regard to whether or not the signal is directionalized or omni-directional. In this regard, NMSA notes that the calculation would require including the combined ERP calculation transmissions from different fixed wireless antennas whose highly focused beams would virtually never converge on the same spot or person. As a result, NMSA contends that simply adding the energy of all antennas to the overall energy levels of other sources transmitting from that location would create an inaccurate profile for

any actual hazard. As a result, NMSA urges the commission to exclude multiple fixed point-to-point transmitters/different antennas at a given location from the summation of energy calculation described in new Rule Section 1.1131(b)(3)(ii)(B).

- While the rules in the *MO&O* point to the OET Bulletin 65 and OET Knowledge Base (KDB) for guidance on the FCC's policies and procedures in connection with the evaluation of potential radiation risks, the *MO&O* would allow alternative showings to be used without reference to the KDB "if they can be shown to be valid."
 - o NMSA notes that the text of the *MO&A* permits licensees to rely on sources other than OET Bulletin 65 and the KDB for methodologies that predict hazardous radiation. However, Rule Section 1.1310(d)(4) seems to require reliance on Bulletin 65 and the KDB and not permit reliance on other valid evaluation methods not discussed in those sources. NMSA requests that the FCC amend this rule to affirmatively state that other methodologies are permitted – consistent with its statement in the *MO&O* if that is in fact what the FCC intended – so that there is no question in the future. Additionally, NMSA also urges the FCC to publish any methodology that has received FCC or peer review that is sufficient to substantiate the reliability of the methodology, and that it will be deemed to be acceptable.

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President Trump Announces Plan to Nominate Nathan Simington as FCC Commissioner

On September 15, the White House announced that President Trump intends to nominate Nathan A. Simington to be a member of the FCC. Mr. Simington would replace Commissioner O’Rielly, whose nomination for another new 5-year term was withdrawn by President Trump on August 3rd following a hold being placed on the nomination by the chairman of the Senate Armed Services Committee Sen. Jim Inhofe (R-Okla.).

Mr. Simington is currently a Senior Advisor in the National Telecommunications and Information Administration (NTIA) specializing in network and telecommunications policy. There, he works on 5G security and secure supply chains, the American Broadband Initiative, and is NTIA’s representative to the Government Advisory Committee of the Internet Corporation for Assigned Names and Numbers. Prior to his appointment at NTIA, Mr. Simington was Senior Counsel to Brightstar Corporation.

According to a report in Reuters, Simington helped draft the President’s May executive order requiring the NTIA to petition the FCC to impose new regulations on social media moderation practices after Twitter Inc warned readers to fact-check his posts about unsubstantiated allegations of fraud in mail-in voting.

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FCC Announces Temporary Filing Freeze on Certain Part 90 Applications for 4940-4990 MHz Band

The FCC has issued a *Public Notice* announcing a temporary freeze, effective September 8, 2020, on the acceptance and processing of certain applications related to Part 90 services in the 4.9 GHz band (4940-4990 MHz). The freeze is designed to preserve the status quo while the FCC revisits the existing eligibility and other restrictions on this spectrum, which is currently allocated for public safety use. Pursuant to this freeze,

applications for new or modified operations in the 4.9 GHz band will not be accepted and pending applications will not be processed unless they meet limited exceptions. Applicants may submit requests for waiver of this freeze on a case-by-case basis. BloostonLaw is experienced in obtaining such waivers and is available to assist in their preparation and filing.

The freeze imposed by this *Public Notice* applies only to applications pertaining to licenses in the Private Mobile Radio Service, specifically those for the Public Safety 4940-4990 MHz Band (radio service code PA). Until further notice, the FCC will not accept: (1) an application for a new license authorizing operations of any kind (geographic area or permanent fixed site operations) in the 4.9 GHz band; or (2) an application to modify an existing license authorizing operations in the 4.9 GHz band, except as provided for below. Any such applications that are filed on or after the date of this Public Notice will be dismissed without prejudice. Currently pending applications that would be barred under this freeze will not be processed and will be dismissed without prejudice. Notwithstanding the implementation of this freeze, a geographic area licensee may continue to deploy mobile units, base stations, and temporary fixed stations within its license area, as such actions do not require the filing of an application with the FCC.

This freeze does not apply to applications that would not destabilize the licensing landscape, including: (1) applications to renew existing licenses without modification; (2) applications that seek to modify existing licenses by deleting frequencies or fixed sites; (3) applications that seek to modify existing licenses by changing technical parameters in a manner that does not expand the station's spectral or geographic coverage, such as decreases in bandwidth, power level, or antenna height; (4) applications to assign or transfer licenses; (5) notices of construction for permanent fixed site licenses or consummation of assignments or transfers; (6) requests for extensions of time to construct or consummate previously granted assignment or transfer applications; (7) applications to cancel licenses; (8) applications for special temporary authority for short-term operations; and (9) applications from geographic area licensees that require individual licensing under rule section 90.1207(b).

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