



**April 2009**

**Six Fix Nixed, Again**  
***Media Bureau puts kibosh on NCE applications  
with Channel 6 contingencies***

*Howard M. Weiss  
weiss@fhhlaw.com  
703-812-0414*

Sometimes it doesn't pay to get creative, especially where the FCC's rules are concerned. This was apparent in an April 1 Public Notice which supposedly "provided guidance" to noncommercial educational (NCE) FM stations with regard to television Channel 6 protection requirements. Significantly, the Notice was issued by the Media Bureau, *not* the Audio Division.

Because NCE FM channels are close neighbors to Channel 6 on the spectrum, NCE FM stations (and related applications) must protect nearby Channel 6 stations. A couple of very narrow exceptions are available, one of which involves submission of an unconditional agreement between the NCE and the Channel 6 station in which the latter "concur[s] with the proposed NCE facilities."

The Channel 6 protection requirement cropped up big time in the run-up to the October, 2007, NCE FM filing window. Channel 6 problems would ordinarily have prevented the filing of many applications. But several NCE applicants came up with a work-around. They noted first that, after the DTV transition (then scheduled for February 17, 2009), a lot of Channel 6 operations would simply disappear, as the stations in question abandon their analog Channel 6 facilities for digital facilities elsewhere on the TV band. The would-be applicants then calculated, correctly, that the NCE FM permits they were filing for wouldn't be granted for at least a year or two – which meant that their three-year construction periods would run well past the DTV transition.

So, they reasoned, if there would be no Channel 6 operation to worry about when construction time actually rolls around, shouldn't they be able to ignore Channel 6 at the application stage?

Thinking along these lines, a number of applicants either sought waivers of the protection rules or entered into, and submitted, contingent agreements with the nearby Channel 6 station. (The contingent agreements reflected the Channel 6 licensee's consent to the filing of the NCE FM application, generally with the proviso that the FM wouldn't crank

up – and thus potentially cause interference – until the TV station had vacated the Channel 6 premises, thereby eliminating the practical possibility of interference entirely.)

As far as we can tell, neither the full Commission nor the Bureau nor the Audio Division had opined as to the acceptability of that approach prior to the October, 2007, window. Since then the Division has indicated in one or two decisions that it was not inclined to accept such applications. (*See* the related article on page 5 of the April, 2008 *Memo to Clients*.) But the Bureau's April 1, 2009 Notice – issued a mere 18 months *after* the applications were filed – conclusively slams the door by barring such creative solutions. The Notice states unequivocally that the Bureau will dismiss any NCE application that conflicts with the interference rules and fails to include either: (a) a showing that no more than 3,000 people would be subject to the predicted interference; or (b) an “unconditional consent letter” from the Channel 6 licensee. To make itself *perfectly clear*, the Notice warns that that consent “cannot contain any contingencies, conditions, qualifications or restrictions.” (We get it; we really do.)

Applications filed in the October, 2007, window are subject to the terms of the Notice, which means that any such application that doesn't satisfy the Notice is toast, since the Bureau emphasized that any attempt to revive the application through an amendment or a petition for reconsideration (even after the Channel 6 station goes away) will be unceremoniously rejected. Further, with regard to currently pending mutually-exclusive NCE applications for new stations, the Bureau notes it will dismiss the applications of NCE FM “tentative selectees” who have attempted the end run described above.

The Notice does magnanimously indicate that, after the June 12 DTV transition, the Bureau will open a filing window for NCE stations to permit them to take advantage of the Channel 6 migration. (The Notice refers only to “stations”, which suggests that the window may be limited to licensees seeking to modify their facilities – that is, the window would appear not to be available for new applications. Time will tell.) But applicants for minor changes who attempt to do so *before* the window opens will in any event be shown the door. And, oh, by the way, the Commission will start a rulemaking to evaluate the “continued viability” of the Channel 6 protection requirements after completion of the digital TV changeover.

The Bureau's position is not inherently irrational. To a significant degree, the Bureau appears to be trying to keep the playing field level by not rewarding creative folks who thought “outside the box” – well, not really outside the box, since the statutorily-mandated transition to DTV has been on the books for years, and the consequences of that transition, including the imminent abandonment of Channel 6 facilities by many stations, have been a well-known matter of regulatory imperative for about as long. Still, the Bureau apparently did not want to disadvantage applicants who elected to play by the

rules as they stood when their applications were filed.

While we appreciate the considerations of fairness and efficient processing that underlie the Bureau's approach, that approach may elevate form over substance in view of the imminent departure of most full-power Channel 6 stations.