



September 2007

FCC: Buyers Must Sign On To Sellers' Tolling Agreements

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Our friends at the FCC have thrown a new twist into the continuing saga of station license renewals, tolling agreements and stations sales.

As we here at *Memo to Clients Central* have previously reported, the FCC has placed holds on a number of license renewals, mainly on the television side – the reason being that complaints (in most cases, complaints involving the broadcast of alleged indecency or VNR's and the like) are pending and the FCC just can't seem to get itself in gear to consider and resolve those complaints. As a result, the subject renewals are languishing in one stack or another at the FCC for years.

Now it is longstanding FCC policy that the Commission will not grant a station sale if a license renewal is pending. So if a licensee stuck in this FCC purgatory happens to want to sell its station, the luckless licensee must first get its renewal granted. Since that would ordinarily require that the Commission address sticky issues like indecency – which the FCC is not currently inclined to do – the licensee finds itself at an impasse.

But wait! The FCC (out of the goodness of its heart) has in recent years been willing to enter into tolling agreements with licensees to “toll” the statute of limitations. The primary benefit the FCC gets out of such agreement is more time to act on pending complaints (usually an additional two-three years). Until recently, once such a tolling agreement was signed by licensee, the renewal application was granted and so was the sale application. Seller and buyer went merrily on their way and all was well in FCC land. While the seller was still under the possible hammer of an FCC fine for the duration of the tolling agreement, at least the station deal could be done and, seriously, what's the likelihood that the Commission is *ever* going to resolve the indecency morass, much less within the two-three years of a tolling deal?

Then, abruptly, without warning, a dark cloud formed over FCC land. The FCC dramatically changed its policy. The FCC now requires that if the seller will no longer be an FCC licensee after the sale, the **buyer** must sign onto the tolling agreement and agree to accept any liability if

the seller is no longer in existence if and when the FCC ever issues a fine (assuming the tolling agreement has not expired). The grant of the sale will also be subject to the condition that the buyer accept liability.

This is a reversal of years of FCC precedent – not to mention common sense and traditional notions of justice – which held that the buyer is not liable for the sins of the seller. There are a number of legal problems with this change in FCC land, problems which fascinate legal scholars. But that does not solve the immediate problem of getting stations sales granted. If the seller's parent will remain and have other subsidiaries that are FCC licensees, the seller's parent can sign onto the tolling agreement and the FCC will grant the sale application without requiring the buyer to accept liability. However, if there is no parent entity and the seller will not continue on as an FCC licensee, the FCC will *not* grant the sale application without the buyer also accepting liability.

What this means going forward is that sellers and buyers will need to bargain for this new potential liability in the sale agreement. For sellers and buyers who have already negotiated and signed sales agreements, this means they may have to go back to the bargaining table to account for this potential new liability. We here at *Memo to Clients Central* will of course inform you of any changes in this new draconian policy.