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Six Steps for Avoiding Unwanted Delays in Closing a Transaction

By [RBR-TVBR](#) on May, 16 2012 with [Comments 0](#)

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By John M. Pelkey, Garvey Schubert Barer

The FCC assignment application has at long last received final Commission approval. The purchase agreement says that the closing is to occur ten days later. As the appointed closing deadline approaches, however, the parties come to grips with the grim reality that the closing date cannot be met. The transmitter site is found to be harboring PCBs and one of the guy wires is anchored on a neighbor's property. The landlord of the building housing the studios refuses to grant its permission to the Seller's assignment of the lease to the Buyer. The delay caused by these developments threatens to blow up the deal.

What should the parties have done differently to have avoided the delay?

Broadcast transactions are fundamentally different than many other business transactions. In the case of other businesses, the parties can execute the purchase agreement and close immediately. Broadcast transactions, however, are necessarily subject to a gap between the execution of the purchase agreement and the closing because of the need for FCC approval. Because many lenders are hesitant to close until that approval has become final, it is not at all uncommon for a closing to take place several months after the purchase agreement has been signed.

The long gap between execution of the purchase agreement and the closing can lull the parties into a false sense of complacency. They may hold off drafting necessary closing documents until shortly before the scheduled closing. Such procrastination can have the unintended effect of pushing the closing beyond the closing date specified in the contract inasmuch as unexpected hurdles may prevent the parties from being ready to close in a timely manner. Although some of the closing documents can be drafted shortly before closing, there are a number of items that can present long lead times. By getting a head start on these long lead time items, the parties, in general, and the seller, in particular, can help to ensure that the closing occurs promptly.

There are six steps that the parties can take early in the process to help ensure a prompt closing:

1. The seller should keep its lender informed. Many broadcast lenders are large financial institutions that have hoards of lawyers who are paid to make sure that the lender's loan is secured by every asset owned by the seller. Nearly every purchase agreement will include a provision that specifies that the assets are to be assigned to the buyer free and clear of any liens. The buyer will almost assuredly insist that the seller's lender provide a payoff letter that explains that the lender will release all of its liens upon payment of the purchase price by the buyer. It would be a mistake for the seller to assume that its lender will be able to provide such a letter to the buyer if the seller does not notify its lender of the pending sale until a few days before the closing. Most lenders simply are not nimble enough to produce a payoff letter on such short notice. In addition, it is important that the payoff letter be specific and provides copies of the lien releases that will be filed with the appropriate governmental offices once the purchase price has been paid. If the seller waits until the eve of closing to notify the lender of its need for a payoff letter, not only is it unlikely that the lender will be able to respond as quickly as the seller would like, but the chances increase that the list of liens to be released will contain inaccuracies.
2. At least one of the parties must perform a lien search early in the process and then share it with the other parties. The buyer in particular needs assurance that any liens against the assets that it is purchasing will be released as of the closing inasmuch as the seller may go out of business after the sale, thus complicating the process of releasing liens against the seller. Sometimes, the lien search reveals liens held by parties other than the seller's lender. For example, an equipment manufacturer may hold a lien in some of the equipment or a party that has been successful in a lawsuit against the seller may hold a judgment lien. These liens can prove difficult

to clear up. A prudent buyer will not want to close on the transaction until arrangements have been made so that all of these liens are released. In a case involving a seller who has a vast number of liens against its property, the process of obtaining releases can take many weeks or even months. If the buyer waits until shortly before the closing to have a lien search performed, it may find that the seller cannot close on the appointed closing date simply because there is too much work to do to obtain the necessary lien releases. To avoid delays involved in obtaining releases, either or both of the parties must perform a lien search and the parties must closely coordinate with one another to make sure that all liens are released.

3. If a Phase I environmental study has not been performed prior to signing the purchase agreement, make sure that the study is performed as soon after the signing as possible. A Phase I environmental study is used to determine whether the station may have environmental problems that require remediation. It is not an exhaustive study. It is a first cut that relies on an inspection of the site, of historical records regarding the site and on materials concerning adjacent properties to determine whether further analysis is required. On occasion, the Phase I study will suggest that a further study should be performed. Such a recommendation can arise, for example, if the environmental firm performing the study notices discolored vegetation or chemical or petroleum staining at the site. That additional study itself can take several weeks to perform and, in the worst case, can lead to a recommendation that remediation must be performed at the site in order to eliminate an environmental problem. Obviously, if a further study or remediation is required, the closing on the sale of the station may well not be able to occur by the appointed closing date.

4. Start the process of obtaining title insurance as soon as possible after signing. In most cases, obtaining title insurance does not take a long time. On occasion, however, the title insurance company will discover a defect that must be addressed before the title insurance company is willing to issue a policy that will be acceptable to the buyer. Although obtaining title insurance from the carrier that issued the last policy for the property has its advantages, do not automatically assume that a title insurance company will be able to quickly issue a policy even if it issued the previous policy for the property. It is not unknown for a title insurance company to discover a problem that it missed at the time that it issued the previous policy. Although the seller's attorney might be able to use that mistake as a bargaining chip so that the title insurance company can be persuaded to issue a policy despite the defect, the process of resolving the problem frequently can take several weeks – time that could potentially delay the closing.

5. Commission a survey of any real property being sold. A survey will disclose situations in which there is no deeded access to the real property or in which the station's facilities encroach upon someone else's property. For example, a survey sometimes reveals a situation in which the gravel road that has been used for many years to access the station's transmitter site actually traverses property owned by someone else. Similarly, surveys sometimes disclose that a tower's guy wires or even the tower itself is located on the property of an adjoining land owner. Usually, these problems can be remedied. The remedy, however, takes time. By performing the survey as soon as possible after signing the purchase agreement, the seller helps to ensure that the remedy can be effectuated by the appointed closing date.

6. Obtain third party consents. Many routine operating contracts include provisions that prevent the seller from assigning the contract to the buyer without first obtaining the consent of the other party to the contract. Lease agreements, in particular, frequently require that the landlord's consent be obtained before the lease can be assigned. Although many landlords are more than willing to cooperate in providing that consent, it is not unusual for a landlord to use the seller's request for consent as an opportunity to extract concessions. This is particularly true if the seller has been slow in its rental payments or has engaged in unauthorized remodeling of studios. In those cases, some horse trading is likely to occur and, when it does, it decreases the probability that the parties will be able to meet the assigned closing date. Starting discussions with the landlord early on helps to ensure that the horse trading can be concluded early enough so as to not delay the closing.

One particular kind of landlord consent deserves special mention. Most purchase agreements require that the seller provide an estoppel certificate from the seller's landlord. An estoppel certificate is basically an acknowledgement by the landlord that the lease is in full force and effect and has not been amended, that the rent set forth in the lease is the currently-effective rent, that the rent payments are current and that the landlord is unaware of any defaults under the lease. Buyers require landlords to execute such estoppel certificates so as to avoid unpleasant surprises after the closing. The buyer, for example, does not want to learn for the first time after the closing that the seller is six months behind in its rent and that the landlord now expects the buyer to

bring the lease payments current. Some landlords, however, are reluctant to execute estoppel certificates, particularly to the extent that they acknowledge that the seller is not in breach of the lease agreement. Because of this reluctance, it sometimes becomes necessary for the seller and the landlord to engage in some amount of negotiation. Again, any negotiation will eat up valuable time – thus decreasing the possibility that the parties will be able to close promptly.

By paying due attention to those items that require a long lead time, the parties to a transaction can help ensure that the closing takes place on the appointed date.

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About The Author: RBR-TVBR has been reporting on the business of broadcasting for nearly three decades. Beholden to no one, it is independently owned.



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