



Broadcast Newsletter

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2 MONTHS AND COUNTING ON DIGITAL TRANSITION; DEVELOPMENTS CONTINUE

The nation's transition to digital-only television service is now approximately just two months away. All full-power television stations licensed by the FCC must cease analog broadcasts no later than midnight on February 17, 2009, and thereafter may air only digital signals. Stations that have not yet completed digital construction are in the final phases of doing so.

Current FCC regulatory policies continue to give broadcasters some flexibility in the timing of their individual station transitions. Now that we are within 90 days of the transition, stations wishing to cease analog broadcasting earlier than February 17, 2009 may do so by simply filing an electronic notice with the FCC advising of the scheduled termination date and explaining why the early analog termination is necessary. No further FCC approval is required. The notice must be filed at least 30 days in advance of the planned analog cessation. In addition, stations must air specific viewer notifications on the 30 days preceding the analog termination in order to inform viewers of the coming change. Stations making an early analog termination must also notify applicable cable operators carrying the station's signal of the planned cessation at least 30 days in advance to ensure uninterrupted cable carriage.

In other developments, the U.S. House and Senate have each passed bills approving a voluntary temporary operation of analog facilities for a 30-day period after February 17, 2009 to allow stations to air analog emergency messages and digital television transition announcements. This legislation is designed to help inform those viewers who fail to adequately obtain equipment or converter boxes how they can continue to receive local television signals. Under the legislation, TV stations would have the ability to voluntarily continue analog broadcasts for only these limited purposes. There are no provisions in either the House or Senate's version of the bill that would allow stations to avoid transitioning to digital on February 17, 2009, or to air programming beyond emergency information or digital television education during the period allowed for continued analog operations. As of the date of this newsletter, the only action necessary to implement this legislation is a signature by President Bush.

Finally, in an action previously scheduled for a vote at the Commission meeting scheduled for December 18, 2008, the FCC is expected to adopt a notice of proposed rulemaking to authorize the issuance of digital television translator licenses to existing full-power stations in an effort to assist stations with delivering sufficient digital signals throughout their coverage areas. With the December 18th meeting cancelled, the Commissioners are still circulating this item and may yet approve it before the end of December. As a proposed rulemaking, it would take several months before final rules would be adopted. In the interim, full-power stations are free to use existing translator stations in order to fill in their coverage areas, or can take advantage of the new distributed transmission system procedures that were adopted by the Commission in November 2008.

DTV STATIONS MAY HAVE TO ESTABLISH OR FUND CALL CENTERS

In a widely reported meeting involving President-Elect Obama's transition team and broadcast, cable and consumer electronics industry representatives in early-December 2008, Obama transition team officials reportedly expressed concern over the ability of the country to handle what is anticipated to be a large number of complaints or questions after analog television ceases on February 17, 2009. One possibility proposed by transition team officials would be for broadcasters, cable operators and consumer electronics manufacturers to establish or help fund call centers in order to address public concerns. While no specific details were available of the proposal, the logic behind the idea is based upon the value of the free spectrum that television broadcasters are receiving in their digital channels, as well as the billions of dollars being made by the consumer electronics industry from the sale of DTV products.

The FCC has already set-up and funded a call center related to the digital television transition. That call center was tested in September when the Wilmington, NC market made an early transition to digital television.

At this point, it remains possible that stations may have to devote monetary or staffing resources to provide a local outlet for viewers to call with complaints and questions related to the digital transition. While there is very little time to implement such a requirement, the introduction of call center requirements would be consistent with a flurry of last-minute regulations and requirements related to the digital transition that began last year with the DTV education initiative. This newsletter will report on any developments in this regard. Stations should also consult their counsel for any new requirements.

FCC ANNOUNCES COMMENT DEADLINES FOR RULEMAKING ON DISTURBANCE OF AM BROADCAST STATION ANTENNA PATTERN

The FCC has established January 12, 2009 as the comment date, and February 11, 2009 as the reply comment date for its proposed modification of rules related to construction activities near AM station towers. The proposed rule modifications were first announced as part of a September 2008 Report and Order adopting new rules for the measurement of AM station signal strength.

Current rules require certain preventative measures to be taken and testing conducted by wireless licensees if construction of wireless facilities is taking place within fixed distances from AM station transmitting locations. Existing rules also apply to modification of towers, in addition to new tower construction near AM stations.

The FCC is considering various proposals, including one that would define the types of tower modifications that might affect AM stations, and would exclude routine cases where antennas are simply added to existing towers. In addition, the Commission is considering proposals to allow moment-method modeling as the principal means of determining whether a nearby tower affects and AM pattern. Traditional partial proof measurements would provide an alternative procedure to determine potential interference. Another proposal being considered is the elimination of shorter towers from consideration, with critical tower heights defined in terms of the AM wavelength. Finally, the Commission is also considering adopting a single combined rule on AM antenna disturbance procedures/requirements that is easier to administer and follow.

The Commission seeks comment on several issues in the context of this rulemaking, including whether the Commission may apply the proposed rules to owners of tower structures that are not required to register their towers because of height. In addition, the Commission seeks comments on the wisdom of excluding shorter towers from consideration, and the types of structures, such as buildings, that should be categorically excluded from the proposed rules. The Commission has tentatively concluded that towers not subject to FAA or tower registration requirements should not be categorically excluded from its rules.

Finally, the FCC seeks comment on the notification procedures to AM stations regarding planned nearby structure construction that would fall within the scope of the proposed new rules. The Commission seeks specific comments on the minimum notice that should be provided before construction of a new structure commences, and whether notification to the permittees of unconstructed AM stations is necessary.

We encourage AM stations to file comments in this proceeding. Comments may be filed electronically. Should you require assistance, we are available to assist as required.

COMMISSION DECLINES TO MODIFY RULE PROHIBITING CONSIDERATION OF NCE APPLICATIONS FOR COMMERCIAL CHANNEL USE

In an Order first adopted in September 2008, but not released until earlier this month, the FCC has denied various petitions for reconsideration of an earlier Order governing certain comparative standards for non-commercial educational applicants seeking to use commercial, or non-reserved, spectrum. Those petitions should to change the qualification and processing criteria adopted by the FCC governing NCE applicants' ability to apply for new commercial stations.

Under current requirements, applicants for NCE stations are permitted to apply to receive new service on commercial, non-reserved channels. However, in the event that such an application conflicts with or becomes mutually exclusive with an application of a commercial entity for such spectrum, the NCE application will be automatically dismissed and no longer considered unless a settlement is reached. The primary reason for this rule is that the Commission has no mechanism in place to decide who should receive commercial radio spectrum when one applicant applies based upon the NCE point system, and other applicant(s) apply based upon a highest bidder mechanism. Various court decisions, regulations and statutory provisions mandate that applications for commercial spectrum be awarded through a system of competitive bidding. In its ruling, the FCC refused to change these procedures.

When the FCC opens a filing window for commercial stations, applicants filing expressions of interest in those channels must

specify whether they intend to operate the station on a non-commercial basis. Non-profit entities are free to specify such operation, but in doing so, they risk being dismissed in the event that competing expressions of interest for the same channel are filed by commercial entities. The only exception to that is if the non-profit entity can reach a settlement with the other applicants during a specified settlement period that the Commission may set forth. To avoid the dismissal scenario, non-profit entities are free to specify that they will not seek to operate a new station on a non-commercial basis. By doing so, however, such applicants must participate in the competitive bidding process just as a commercial applicant would.

At one time, the Commission had considered the possibility of simply prohibiting non-commercial entities from participating at all as potential applicants for commercial spectrum. The logic of that approach, which was not adopted, was that commercial applicants were prohibited from filing on non-commercial, or reserve spectrum.

In lieu of that approach, the Commission reaffirmed its current policy of permitting non-commercial applicants for new commercial radio stations, subject to their dismissal if, after settlement opportunities, the non-commercial applicant remains along with at least one other commercial applicant.

CAN A DTV STATION PERMANENTLY ASSIGN ONLY A PORTION OF ITS FCC DIGITAL TELEVISION LICENSE ANOTHER ENTITY?

In the past few weeks, applicants before the FCC have proposed assigning some of their licensed digital channel capacity to a third party, essentially splitting a DTV station license between two parties. The FCC has never before considered such a proposal, and the

applications are therefore being carefully monitored by the broadcast industry.

In the proposed application, ION Media Networks seeks to transfer a portion of its digital television license in the form a discreet portion of the spectrum to Urban Television, LLP, which is primarily owned by Robert Johnson, the former owner of Black Entertainment Television. The proposal would carve out and license to Urban Television one channel of the entire 6MHz digital capacity currently licensed to several ION Media stations. The FCC has actually accepted the applications for filing (an administrative step) and issued a Public Notice giving parties 30 days to file comments on the proposal.

There is some precedent for two licensees to share a single channel. This can and often does occur with non-commercial broadcasters who share a single radio or TV channel. In those situations, however, the licensees split the on-air time available on a single channel, with one licensed to use the entire channel for a portion of the day or week, and the other licensed to use the channel on the other portions of the day or week. The FCC has not, however, previously allowed the sale and assignment of a portion of a channel to a third party, although the possibility was proposed in previous digital rulemaking proceedings as a way to potentially increase diversity of ownership.

The potential problem with splitting a digital television channel is cable or satellite carriage. Presently, DTV licenses are only entitled to cable or satellite carriage of their main video channel. Other streams of digital broadcasting are not entitled to mandatory carriage. For that reason, in the proposed license assignment, Urban Television is requesting that the FCC determine that the channel licensed to it be separately entitled to mandatory carriage on cable and satellite systems. While it is possible that the FCC may recognize the

regulatory ability for Urban to negotiate carriage through retransmission consent, it is unlikely that the FCC would grant mandatory carriage rights to the channel. Nevertheless, under the umbrella of “diversity”, the Commission may allow some limited carriage right. The viability of that determination may turn on the views of the new FCC administration.

DATES TO REMEMBER

January 1, 2009

TV, Class A TV, and LPTV/TV Translator Stations That Elected Mandatory Carriage in Fall of 2008 for 2009-2011 Carriage Cycle: Confirm that all cable and satellite systems sent a mandatory carriage election are actually carrying the station. If not, consult counsel.

TV Stations Intending to Claim an Exemption from Closed Captioning based on 2008 Revenue: Verify with accounting department that 2008 revenue did not exceed exemption levels. If not, consult counsel for new captioning obligations.

January 10, 2009

TV, Class A TV, AM & FM Stations (Commercial and NCE): Complete fourth quarter 2008 quarterly issues/program lists and place in your public inspection file.

TV & Class A TV Stations (Commercial Only): Complete and electronically file FCC Form 398 Children’s Television Programming Report and place copy in public file. Also, compile and place in public file records relating to station’s compliance with children’s programming commercial limits.

TV Stations (Commercial and NCE): Complete and file FCC Form 388 DTV Consumer Education Quarterly Activity Report for fourth quarter of 2008, and place in station public file and on station website, if it has one.

February 2, 2009

TV & Class A TV Stations in New Jersey and New York: If employee threshold is met, complete annual EEO public file report, place in your public inspection file and post on website, if station has one. In addition, unless exempt or Class A, complete and e-file biennial

ownership report on form 323 or 323-E, and place copy in station public file.

TV Stations in Kansas, Nebraska and Oklahoma: If employee threshold is met, complete annual EEO public file report, place in your public file and post on station website, if station has one.

TV & Class A TV Stations in Arkansas, Louisiana and Mississippi: If employee threshold is met, complete and e-file mid-term FCC Form 397 EEO Report, and complete annual EEO public file report and place in your public inspection file and on website if station has one. In addition, unless exempt or Class A, complete and e-file biennial ownership report on form 323 or 323-E, and place copy in station public file.

AM & FM Stations in Arkansas, Louisiana, Mississippi, New Jersey and New York: If employee threshold is met, complete annual EEO public file report, place in your public inspection file and post on station website, if station has one.

AM & FM Stations in Oklahoma, Nebraska and Kansas: If employee threshold is met, complete and electronically file your mid-term EEO review report via Form 397, and complete annual EEO public file report, file in public file and post on station website, if station has one. In addition, unless exempt, complete and electronically file your biennial ownership report via Form 323 or 323-E and place copy in public file.

February 17, 2009 (midnight)

All Full Power TV Broadcast Stations: Cease all analog transmissions, and continue broadcasting in digital-only; file digital license-to-cover application for post-transition digital facilities if not previously done, unless station has obtained an extension of post-transition digital permit. Continue airing DTV Consumer Education announcements on remaining digital channel through March 31, 2009.

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Actual resolution of legal issues depends upon many factors, including variations of facts and applicable Federal laws. This publication is not intended to provide legal advice on specific subjects, rather, it seeks to provide insight into legal developments and issues that we feel could be useful to our clients and friends.

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