



Broadcast Newsletter

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TV SPECTRUM AUCTION UPDATE

The FCC voted 3-2 at its May meeting to adopt a Report & Order related to the TV incentive auction. Other than broad generalizations that are available from an FCC public notice, and the tidbits that could be gathered from the online video of the meeting and dissenting commissioner statements, details of the decision are not known because the FCC has still not released the order it adopted.

While it is not uncommon for the FCC to delay issuing the actual text of the orders they adopt at meetings, the “lag” time in doing so has been reduced to 2-4 days in recent years. As of this writing, it has been 12 days since the incentive auction meeting and vote.

The one thing we were concerned about – issuance of a “half” order of sorts without complete decisions on issues affecting broadcasters – apparently occurred. So how the repacking of TV spectrum will work, interference will be calculated, and reimbursement of costs will be determined have all been delegated to the Media Bureau and were not decided by the Commission. This “punt the hard stuff down the road” approach is precisely the type of inaction that leaves broadcasters in a quandary, not knowing whether they should look into participating, and not having a clue as to the vitality or viability of their current broadcast business model in a post-auction world.

NAB has made clear that the FCC’s decision makes the incentive auction involuntary for broadcasters, violating the Congressional requirement that the auction must be voluntary. In our humble estimation, it would appear that the FCC’s Report & Order – whenever it is finally issued – will result in years of litigation. But that doesn’t mean that the FCC won’t proceed with the auction anyway, as they have conducted auctions despite pending litigation in the past. The only difference here is Congress’ clear directive that the FCC has one opportunity to get this right. So if the issues raised in the litigation are those that might jeopardize the success of the auction, the FCC might be convinced to wait for the litigation outcome before conducting the auction.

TV POLITICAL FILES NOW DRAWING COMPLAINTS, SCRUTINY, WARNINGS

Most broadcast stations don't budget for legal fights over their public files, but TV stations might want to think twice on that front, especially when it comes to the political file.

First, a history lesson. When the FCC adopted its online public file rules, it made clear that it was not going to use them as a means to snoop on broadcasters to check for compliance with the public file rules. While that has not been overtly done, non-profit public interest organizations have surfaced to fill that role, and instead of just reporting on what they see in TV station online public files, they have taken to filing complaints with the FCC.

Take for example, the Sunlight Foundation, a non-profit whose website states that "we believe that information is power or, to put it more finely, disproportionate access to information is power. Indeed, we are committed to improving access to government information by making it available online, indeed redefining "public" information as meaning "online." Well, it would be one thing if they stopped at simply making information accessible, but apparently, they are in the complaint business as well. And that means they can cost you money.

The Sunlight Foundation, along with the Campaign Legal Center, recently filed FCC complaints against 11 different TV stations, pointing out omissions from TV station online political files (things like a name missing on a piece of paper). Now we'll be the first to tell you that complaints aren't that common at the FCC, but they do occur.

What is uncommon here is what happened afterward – a premature judgment in the form of a "statement" from the FCC Chairman *before* the complaints were decided. In our view, the FCC Chairman's statement, issued just after the Media Bureau sent inquiries to the involved stations – *and before any adjudication of the complaints* – smacks of anti-broadcaster bias. The Chairman's statement reads "I hope this serves as a reminder to all stations of their obligation to maintain political

files in accordance with statutory provisions and our rules."

Now wait one darned minute here. If the Media Bureau has only just asked for information in order to make a determination about rules that have previously rarely been interpreted by the FCC, how is it that "this" serves as a reminder to stations to follow the political file rules? No decision has been issued. Heck, we don't even have all the facts. For all we know, some of the items complained about are *de minimis*, or inaccurate. The stations haven't even responded yet, for crying out loud. Doesn't that matter? Apparently not.

Maybe the Chairman was referring to the complaints themselves when he asserted that "this" serves as a reminder. But could it really be true that the mere filing of a complaint is a compliance reminder? What ever happened to letting the process follow the FCC's procedural rules and giving these stations a chance to respond before firing a warning shot at all broadcasters?

Ok, our rant is complete. To all online TV political file holders – scrutiny doesn't always come from the FCC. Watch for newly minted "public interest" organizations whose digging has the power to raise the ire of government officials toward you so quickly that your eyebrows won't soon return to their normal resting place.

For those TV stations who must begin populating their online political files this July 1st for the first time, a healthy review of your internal procedures and the FCC's political file rules may be a good place to start.

LIKE MOLASSES FOR AM REVITALIZATION

It has been sixty-plus days and counting since the comment period closed on the FCC's AM Revitalization Proceeding, but the FCC has not made any decisions or provided any immediate relief for AM broadcasters.

Commissioner Pai, a proponent of AM reform, did make a few comments recently, announcing that the FCC will begin holding meetings with station owners, engineers and listeners to discuss the

many proposals made in the proceeding. Meetings are good, but action is better. Pai estimates that AM stations will see some form of relief by Halloween. In our view, that's a scary long time to wait. Hopefully, the treats will be worthwhile, and the tricks non-existent.

OLD FM TRANSLATOR WINDOW FINALLY ENDING

As many know, the last part of a filing window for new and major change applications in the radio services is the actual auction where the highest qualified bidder wins. Along the way, the FCC considers expressions of interest, identifies applicants, requires the filing of full applications, identifies singletons, identifies mutually exclusive applicants, allows one or more settlement periods, and along the way, grants permits where it can. When they've exhausted all other means of granting permits, those remaining applicants that are mutually exclusive proceed to auction. Some windows go quickly. Others take longer.

FM Translator Window #83 took a long, long while. It opened in 2003, and the actual auction was just scheduled. Along the way, the FCC changed the FM translator rules a few times and made room for LPFM. It also revised its own rules and ended up dismissing many of the originally filed 13,000+ applications filed in the window.

From that original glut of applications, one would expect several mutually exclusive applicants to remain at the end and proceed to auction. We were therefore surprised that in the end, a mere four mutually exclusive groups remained for auction, each with two applicants, for a total of 8 remaining applications. Two are in Alaska, one in Arizona, and one in Utah.

It would appear that the next FM translator filing window will be for AM stations only; probably in 2015. We sincerely hope that window takes much less than 11 years to process.

LPFM APPLICATION CRACKDOWN

The FCC's late 2013 low power FM filing window produced many applicants, but a few have run into a bit of a problem with the FCC. It seems that a

few entities provided some information on their Form 318 applications that made the FCC a bit suspicious. On its own, the Audio Division analyzed information from several applications and identified several discrepancies and commonalities.

In one case, the FCC determined via electronic searches that the address for an applicant was publicly listed as belonging to a school. The applicant used that same address for a main studio and for several board members. The Audio Division staff made calls to the actual address occupants gleaned from public information, and determined that the occupant was the only entity at the address and had no relationship to the LPFM applicant or board members that were using that address.

Another application listed the address, phone number and proposed main studio location as that of a full power noncommercial FM station, which the staff matched to its existing records for that station.

All of this led the staff to issue a letter of inquiry, which noted that the FCC was investigating potential statutory and rule violations and related instances of potential misrepresentation and/or lack of candor in connection with the filed applications. Responses to the LOI made clear that the information originally supplied was incorrect.

The FCC chose to dismiss all of the applications on other grounds (i.e., changes of control or lack of reasonable site assurance), but began its analysis with the statement that it had not determined whether any of the applicants had engaged in misrepresentation or lack of candor. Clearly, however, the FCC could have done so and had serious concerns as to whether the applicants were abusing the FCC's processes. In these situations, the staff has the ability to refer such matters – even after dismissal – for further adjudication. It is not clear whether they did so in this instance.

This decision illustrates the FCC's ability, in today's electronic age, to ferret out and identify application inconsistencies or commonalities, using both its own database and simple white pages searches. In the past, such application irregularities were normally only brought to light by opposing

applicants. Now, the FCC can and will do so on its own.

ZAPPLE DOCTRINE DEATH

In the context of a petition to deny a broadcast station renewal application, the FCC has taken the opportunity to “kill” the Zapple Doctrine, a holdover policy having its roots in the now repealed Fairness Doctrine.

The Zapple Doctrine originated in 1970 when the FCC responded to Nicholas Zapple’s request for an interpretation of whether stations had to provide equal time to *supporters* of a political candidate. In response, the FCC confirmed that a political candidate’s supporters were entitled to equal time on broadcast stations, relying upon the then-in-effect Fairness Doctrine as the basis for its decision. Unlike the other Fairness Doctrine-based personal attack and political editorial rules, which were adopted by rulemaking and codified, the Zapple Doctrine was never codified as a rule.

In the renewal application petition to deny, the petitioner alleged that the station had refused to provide equal time to the supporters of a Democratic candidate for governor of Wisconsin so that they could respond to statements made on the station by the Republican candidate. The FCC rejected that argument, noting the FCC’s 1987 abrogation of the Fairness Doctrine, the 1989 D.C. Circuit affirmation of that decision, and the FCC’s 2011 action deleting Fairness Doctrine rules that were still on the books. The FCC succinctly stated that the Zapple Doctrine was defunct because the Fairness Doctrine on which it was based no longer had legal effect, and noted that the FCC could repeal it without a rulemaking proceeding because it had never been a rule.

This action means that on-air opinion statements about a candidate, when made by non-candidates, can no longer be countered by supporters of the opposing candidate demanding an equal opportunity to respond. Broadcasters should note that a qualified candidate’s appearance on a station *does* create equal opportunities – but for the candidate’s opponents, not the opponent’s supporters.

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For more info, contact Joe Chautin, Mark Balkin, or Elise Stubbe.

Phone 985.629.0777

Fax 985.629.0778

www.hardycarey.com

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.

DATES TO REMEMBER

June 1 & 16, 2014: TV, Class A & LPTV Stations in Texas: air your POST-filing announcements

AM & FM Stations in Delaware & Pennsylvania: air your POST-filing announcements.

June 1, 2014: TV, Class A & LPTV Stations in Arizona, Idaho, Nevada, New Mexico, Utah & Wyoming: file your renewal application electronically via Form 303-S. Also file EEO Form 396 with, if applicable, two most recent EEO public file reports. Post current EEO public file report to online public file and post copy on station website, if applicable. **NCE Stations Only:** also file biennial ownership report via Form 323-E.

AM & FM Stations in Arizona, DC, Idaho, Maryland, Nevada, New Mexico, Utah, Virginia, West Virginia & Wyoming: if full-time employee threshold is met, complete EEO public file report and place same in public file as well as post on station website.

TV & Class A Stations in Michigan & Ohio: if full time employee threshold is met, complete EEO public file report and post same to online public file as well as on station website.

AM & FM Stations in Michigan & Ohio: if full-time employee threshold is met, complete EEO public file report and place same in public file as well as post on station website. **NCE Stations Only:** also file biennial ownership report via Form 323-E.

TV & Class A Stations in DC, Maryland, Virginia & West Virginia: if full time employee threshold is met, complete EEO public file report and post same to online public file as well as on station website. **NCE Stations Only:** also file biennial ownership report via Form 323-E.

June 1 & 16 and July 1 & 16: TV, Class A & LPTV Stations in California: air your PRE-filing announcements.

June 23, 2014: TV, Class A & LPTV Stations in Texas: complete and post to your public file documents relating to pre- and post-filing broadcast renewal announcements.

AM & FM Stations in Delaware & Pennsylvania: complete and post to your public file documents relating to pre- and post-filing broadcast renewal announcements.

June 30, 2014: rules related to quality of captioning using Electronic Newsroom Techniques take effect.

July 1, 2014: all television and Class A stations must begin to upload political files to online public inspection file.

July 10, 2014: TV, Class A, AM & FM Stations (Commercial and NCE): complete 2nd quarter 2014 issues/program lists and place in your public file (online for TV & Class A and paper for radio).

TV & Class A Stations (commercial only): complete and electronically file FCC Form 398 Children's TV Programming Report for 2nd Quarter 2014. The report should automatically link to your online public file. Also compile and post to online public file records relating to station's compliance with children's TV programming commercial limits.

Class A Stations Only: complete and post to online public file records relating to station's continuing Class A eligibility.

 Hardy, Carey, Chautin & Balkin, LLP
ATTORNEYS AT LAW
1080 West Causeway Approach
Mandeville, Louisiana 70471-3036