



# Broadcast Newsletter

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## **INCENTIVE AUCTION DELAYED UNTIL EARLY 2016**

The TV Incentive Auction now won't be happening until early 2016. That's according to an FCC hosted blog that assessed the need for a delay based upon the pending legal challenges to the FCC's Incentive Auction Report & Order.

We're not surprised. The FCC's Incentive Auction has been a moving target thus far. An initial target of 2014 proved hopeful, as the FCC could not even issue its own order in enough time. Then, the order itself made a vague reference, in a footnote, to a mid-2015 estimate for the auction. Outside of official pleadings, Chairman Wheeler threw around a few projections of his own. The latest unofficial "early 2016" target is premised upon a pretty fast decision by the DC Circuit in what can only be described as an extraordinarily complex case. Our opinion? Early 2016 might still be too optimistic.

In other Incentive Auction news, the FCC extended the timeframe for comments on the draft reimbursement form that will be used by broadcasters that decide not to participate in the auction, or whose bids are not accepted. You now have until November 26, 2014 to file comments.

And in a long-promised kick off to the FCC's pitch to incentivize broadcasters to participate in the auction, the FCC's outside investment firm produced a report that – with many caveats and an assumption that the auction will be successful – provided broadcasters with estimates of what their spectrum *might* be worth in the auction. The FCC will reportedly next seek to directly engage with broadcasters to continue the conversation. What an odd situation. The agency that regulates you wants to visit to convince you to get out of the business you're in. Awkward.

## **NEW TOWER RULES NOW EFFECTIVE**

Most of the FCC's new tower regulations adopted in early August 2014 became effective October 24, 2014. A few others require information collection approvals first, so their effectiveness will trickle in over the next few months. Tower owners should fully expect the FCC's Field Office personnel to know and apply the new rules when they make friendly visits to towers.

## AUDIO DIVISION TIGHTENS FM TRANSLATOR *MATTOON* WAIVER CRITERIA

Three years ago, the FCC first began granting waivers for the relocation of certain FM translators so they could be used with AM stations. Called *Mattoon* waivers, the FCC adopted four criteria for granting such FM translator moves, waiving its major change rules to help AM stations.

The first of the four criteria was designed to prevent the applicant from getting a waiver if it had “a history of filing serial minor modification applications.” Prior to the *Mattoon* waiver, it was not uncommon for FM translator stations to move a translator over long distances by filing a series of minor modification applications, constructing and operating the station briefly at each stop along the way, then filing a new minor mod application. The FCC ultimately concluded that practice defeated its minor modification rule, so it blocked so-called “serial hoppers” from getting a *Mattoon* waiver. Serial hopping was largely defined in a substantial case where the FCC punished a multiple hopping FM translator licensee by taking away a few licenses. From that decision, “a history of filing serial minor modification applications” was pretty clearly defined as several moves over an extended period. Or so we thought.

The somewhat open question that bugged many an FM translator licensee or permittee was whether only two moves of a translator would be too many, and disqualify an applicant from qualifying for a *Mattoon* waiver. That honestly didn’t seem likely. Well, we now have the answer to that question from a new FCC decision, but it is not the one many were hoping for.

Let’s review the FCC’s decision and logic. Prior to seeking a *Mattoon* waiver, the applicant in the case before the FCC had filed for, received and built out a minor change application to relocate the translator 8 kilometers from its original location. From that new location, the applicant then sought a *Mattoon* waiver to relocate to within the appropriate contour of an AM station. Seems innocent enough, huh?

Not so fast. The FCC questioned the earlier move, and the applicant claimed it was unrelated to the second move, but gave no other explanation for it. The FCC’s engineers called foul, finding that the previous transmitter location of 8 kilometers “was designed to place the Station so that its 40 dBu contour overlapped the 60 dBu contour of the newly proposed facility in order to satisfy the *Mattoon* criterion of mutual exclusivity. But the Audio Division didn’t stop there. Instead, it characterized the applicant’s actions as an abuse of process, and then found that the applicant could not meet the first *Mattoon* criterion – absence of a history of filing serial minor modification applications. Ouch.

The last time we checked, “serial” means occurring in a series, not simultaneously. Webster doesn’t go so far as to say that two constitutes a series, and from all prior FCC decisions, that certainly wasn’t made clear. Then there is the definition of “history”. Some definitions of “history” make no reference to time at all. Others use the word “systematic”. For the FCC’s take, one might surmise that “history” is anything in the past – anything at all.

But we digress. The easiest conclusion from this decision is that even two translator moves makes an applicant a serial hopper, and ineligible for a *Mattoon* waiver. That might be a good general rule, but the Audio Division did leave a very small crack in the door, suggesting that if there was some other legitimate reason for the long distance move -- such as the unavailability of existing translators in the proposed area -- it might have reached a different conclusion. We can think of perhaps other factors that *might* also fit through that small crack, such as a greater length of time at the first location or interference that forced the first relocation. Maybe.

The FCC’s decision is a hard lesson to learn, and not really fair, since it appears to have completely ignored the public benefit of revitalizing at least one AM station that could have used the translator to provide a usable audible signal for reception to the public. We’ve all learned a “buyer beware” lesson here – acquiring a translator to help your AM station must be done with extraordinary caution and a hyper-analysis of the *Mattoon* criteria as it applies to the FM translator at issue. In any acquisition, prudence counsels to add a closing condition that

the translator move has to be approved before money exchanges hands.

This decision comes on the heels of last month's decision denying a nearly-2-year-old application seeking a waiver of the FCC's major modification rule for an FM translator relocating to within the 0.025 mV/m interference contour of an AM station. The so called "Tell City Waiver" application was summarily dismissed by the FCC, AM revitalization be damned.

Perhaps the Audio Division's denial mindset when it comes to AM stations is tied to a coming liberalization of such rules in the context of the FCC's AM Revitalization NPRM, though we don't have any hints in that direction. A stated goal of Commissioner Pai to have an order in that proceeding by Halloween seems to have evaporated, with no such item even on circulation at the FCC.

We note that when the FCC dismissed the Tell City Waiver application last month, Commissioner Pai issued a statement lamenting the Audio Division's reluctance to provide immediate relief to AM broadcasters. He also called again for the FCC to provide immediate relief and open an FM translator window only for AM stations. The wait continues.

## **SHORT TERM RENEWAL FOR NCE-FM STATION**

It's rare, but every now and again, the FCC grants a renewal, but for less than a normal 8 year term because of some (really) bad regulatory oversights by the broadcaster. And sometimes, they pile on with a monetary forfeiture as well.

The latest station to experience this treatment found out about it a few days ago. The station filed its renewal application about four months too late, and then self-reported that it had not completed or placed in the public inspection file any of the 32 quarterly issues/programs reports during the prior license term. The station tried to dodge by seeking relief under the FCC's new policy giving a one-time break to student-run college radio stations, but the FCC found that a college staff member was in charge so the new policy didn't apply. The end result – a four year license renewal, a \$13,500 fine,

and annual reporting requirements. And then they'll have the pleasure of filing a new license renewal application.

## **CLOSED CAPTIONING RULE CHANGES COMING JANUARY 15<sup>TH</sup>**

This past February, the FCC adopted some new closed captioning requirements for TV stations, but staggered the effective dates of the new rules.

One rule change will become effective January 15, 2015, so long as the FCC has gotten approval for the information collection. This rule requires stations to "maintain records" of their efforts to monitor the station's closed captioning and captioning equipment. This record-keeping rule requires that for a minimum of two years, a TV station must maintain "information about the station's monitoring and maintenance of equipment and signal transmissions to ensure the pass-through and delivery of closed captioning to viewers, and technical equipment are maintained in good working order." The records have to be submitted to the FCC upon request, but do not have to be placed in the public file.

Another of the new rules will automatically kick in on January 15, 2015. This rule requires TV stations to make "best efforts" in obtaining certifications from each programmer on the station about the quality or existence of closed captioning in their programs. The programmer must certify to at least one of three things – (1) that the program satisfies the new caption quality standards set forth in section 79.1(j)(2) of the new captioning rules, or (2) that in the ordinary course of business, the programmer has adopted and follows the best practices set forth in section 79.1(k)(1) of the new captioning rules, or (3) that the programmer is exempt from the captioning rules under one or more exemptions.

Stations can satisfy their "best efforts" obligation by locating a programmer's certification on the programmer's website or other available locations used for the purpose of posting widely available certifications. But if a station can't find the certification, it has to inform the programmer in writing that the programmer must make the

certification widely available within 30 days of receiving the notice. And then, if the programmer does not cooperate, the station has an affirmative obligation to promptly report the programmer to the FCC (the “tattle-tale” component). By following these steps, the station will not be liable for violating the FCC’s captioning quality rules.

Are we having fun yet?

## FIRST PHASE OF NEW FCC APPLICATION SYSTEM LAUNCHED

About a month ago, with little fanfare, the FCC issued a public notice announcing the availability of the first phase of a new broadcaster e-filing system called the Licensing and Management System (LMS). LMS will ultimately replace the current CDBS system used for filing broadcast applications. It has been in the works for years.

For now, the initial launch of LMS will apply only to full power TV stations that seek to file applications for construction permits (formerly Form 301) and applications for a license to cover a construction permit (formerly Form 302-DT). These applications will now be part of a new single form called FCC Form 2100 that will eventually replace all of the existing radio and TV services forms.

Interestingly, making full power TV stations the “guinea pigs” for the new system is mostly a non-starter because of a current freeze on applications that expand existing coverage areas. There will be a few exceptions, but the new system and form will go mostly unused for several months. But TV stations not participating in the incentive auction should take note of the new system and form. Why, you ask? Well, if a station is repacked to a different channel after the auction, it will have the privilege of filing a Form 2100 application to get a permit for its new facilities, and then get another chance to use the form to get licensed after construction.

We’ve played around with the form and LMS, and we surmise that it is designed to be as dummy-proof as possible, though there are some oddly worded questions that are different from the standard application questions broadcasters are accustomed to. In total, the application and

questions feel much more like the Universal Licensing System, though without the odd Java applets and other grey screens.

All other broadcasters should stand by – the FCC will slowly migrate all forms to the new system, announcing them periodically as they collapse old forms into the new one and make the new form available for use.

## LPTV DIGITAL CONSTRUCTION DEADLINES SUSPENDED

Previously, all LPTV stations that had not yet built out digital facilities had until September 1, 2015 to do so. In light of the planned incentive auction, the FCC has decided to suspend that deadline indefinitely.

Before you get that nice warm fuzzy feeling about the FCC’s generosity here, you’ll want to remember that the FCC has chosen not to protect LPTV stations in the upcoming auction. Not only can LPTV stations not participate in the auction, they are not eligible for reimbursement in the event they are displaced during the post-auction repacking of the TV band.

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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.

## DATES TO REMEMBER

**September 5, 2014 – November 4, 2014:** lowest unit charge for federal election in place.

**November 1 & 16, 2014:** TV, Class A & LPTV Stations in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont: air your PRE-filing announcements.

**November 1 & 16, 2014 & December 1 & 16, 2014:** TV, Class A & LPTV Stations in Alaska, American Samoa, Guam, Hawaii, Oregon & Washington: air your post-filing announcements.

**November 4, 2014:** Election day.

**December 1, 2014:** Digital TV, Class A & LPTV Stations: prepare and file Form 317 reporting Ancillary/Supplemental Fees for year ending September 30, 2014.

**December 1, 2014:** AM & FM Stations in Alabama, Connecticut, Georgia, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont: if fulltime 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 Colorado, Minnesota, Montana, North Dakota, and South Dakota:** 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.

**AM & FM Stations in Colorado, Minnesota, Montana, North Dakota, and South Dakota:** 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 Alabama and Georgia:** 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 Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont:** 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.

**December 1 & 16, 2014 and January 1 & 16, 2015:** TV, Class A & LPTV Stations in New York and New Jersey: air your PRE-filing announcements.

**December 1 & 16, 2014; January 1 & 16, 2015 and February 1 & 16, 2015:** TV & Class A Stations in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont: air your POST-filing announcements.

**AM & FM Stations in Florida, Puerto Rico, Virgin Islands, American Samoa, Guam, Hawaii, Oregon and Washington:** 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.

**TV & Class A Stations in Florida, Puerto Rico, Virgin Islands:** 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.

**AM & FM Stations in Iowa & Missouri:** 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 Iowa & Missouri:** 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 & LPTV Stations in Alaska, American Samoa, Guam, Hawaii, Oregon & Washington:**

**December 23, 2014:** TV, Class A & LPTV Stations in Alaska, American Samoa, Guam, Hawaii, Oregon & Washington: complete and post to your public file documents relating to pre- and post-filing broadcast renewal announcements.

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