Hardy, Carey, Chautin & Balkin, LLP
ATTORNEYS AT LAW

Broadcast Newsletter

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LOW POWER FM FILING WINDOW ANNOUNCED

After more than a decade since the last filing opportunity for new low power FM stations, the FCC has announced a 15-day LPFM filing window for this fall. The window will begin on October 15, 2013 and close at 6 pm EDT on October 29, 2013.

Though LPFM stations must operate non-commercially, applicants will be able to apply for LPFM stations in the entire FM band (channels 201-300). Individuals cannot apply for LPFM licenses. Only nonprofit educational organizations, state or local governments, non-government entities or tribally controlled organizations can participate. However, the number of applications those entities can file is limited. Non-profit educational organizations can only file one application in the window, while Tribal applicants may only file two applications. Governmental entities or non-profit entities proposing to operate public safety or emergency services may file more than one application, but must designate a "priority" application if multiple applications are submitted.

In connection with its LPFM window notice, the FCC simultaneously announced the availability of a revised FCC Form 318 to be used by all applicants. Though applications cannot be filed until the window, applicants can create an account and begin completing the application. No filing fee is required when the application is filed. Completing the application properly is critical. The FCC's notice makes clear that incomplete and patently defective applications will be dismissed without any opportunity to amend. The form is not as simple as it looks, and applicants should be certain they understand the FCC's rules before completing the form.

While filing an application early in the window does not give an applicant any priority (all applications are treated the same, with no preference), the FCC does encourage early filing in the window so that any errors can be fixed during the window. Multiple amendments during the window are.
allowed. Applications filed during the window will not be available to the public until after the close of the filing window, so there is no reason for applicants to try to "hide" their application from others by filing late in the window.

Once all applications are on file, and the FCC reviews them for completeness and dismisses those that are not, it will announce a settlement window and mutually exclusive list of applicants. Those not settling or filing technical amendments to end their mutual exclusivity will be decided on a points system. Applicants must claim points they qualify for in the application, and will get one point each if they meet the following: (a) have an established community presence of at least two years, (b) pledge to originate locally at least eight hours of programming per day, (c) pledge to maintain a publicly accessible main studio that has local program origination capability, (d) certify that it qualifies for a point under both the local program origination and the main studio criteria, (e) certify that neither it nor any party to the application has an attributable interest in another broadcast station, and (f) is a Tribal applicant proposing to locate its transmitting antenna site on that Tribal Applicant's Tribal lands.

The FCC is expecting thousands of new LPFM applications in the window. While applicants are required to protect all FM, FM translator, FM booster and TV Channel 6 authorizations, they only have to protect pending broadcast applications in those services that were filed prior to the June 17, 2013 date of the FCC's LPFM window notice. The FCC has specific, detailed rules for the resolution of LPFM interference to other stations.

Currently, there are approximately 800 licensed LPFM stations in the United States.

WHEN AN EMPLOYEE QUITS AND TAKES ITEMS FROM THE PUBLIC FILE . . .

In most cases when items are missing from a station's public file, the FCC only has sympathy when a natural disaster or some equally momentous circumstance has caused their loss. We've even seen a situation where even the death of a former employee that exclusively prepared public file items did not warrant any leniency from the FCC when items were later found to be missing from the file.

The circumstances of a recent case were apparently enough for the FCC to have some "heart" when a licensee self-reported 20 missing quarterly issues/program lists in its renewal application. The licensee's explanation? The general manager of 32 years had walked out of the station "never to return", took all of the issues/program lists with him, but later offered to "supply them back to the station for $100,000." The station apparently decided not to take up the former GM on his offer. Financially, that decision turned out to be a good one.

The normal fine for missing quarterly issues/programs lists is $10,000, subject to upward adjustment when multiple lists are missing. But based on the "less-than-amicable departure" of the GM and taking into consideration the unique facts, the FCC decided to reduce the proposed forfeiture to $1,000.

When a licensee's employee is the source of an FCC rule violation, the FCC typically fines the licensee anyway because the licensee is ultimately responsible for its employees. Without saying so here, the FCC followed that logic, but made the penalty less.

Stations might consider having some redundancy or protection for the public file, either with back-up scans of materials on paper, or a regular back up of computer files for public file documents that are stored electronically.

FCC OPEN MEETING INCENTIVE AUCTION UPDATE: MORE OF THE SAME

At its June 27th open meeting, the FCC Acting Chair and two sitting Commissioners got an update and progress report on the Incentive Auction rulemaking from the Incentive Auction Task Force. If Commissioner Rosenworcel's issued statement is any measure, there hasn't been much progress.

Rosenworcel said that "we are at the early stages" of conducting the incentive auctions, and flatly declared that "we need to make progress" and "move forward", even without a full complement of commissioners. She called for simplicity, fairness and balance for stakeholders.

For more transparency, Rosenworcel called for public hearings on the auction and details of its design, as well as direct outreach to every broadcaster in the top 30 markets. In addition, she proposed that the band plan debate must end, and called for the band plan to be adopted by the end of the third quarter of 2013. Finally, Rosenworcel suggested an order to decide and remove from the ongoing NPRM those issues that are not in dispute. We think that list would be very short indeed.

It has been over two months since the FCC's comment period ended on the incentive auctions, though they have periodically floated alternatives and other matters for comment. In our view, there remains a significant amount of uncertainty, as opposed to the clarity and transparency the FCC pledged from the beginning. That doesn't bode well for keeping the FCC on track to its goal of a 2014 incentive auction.

As a side note, a copy of the open meeting presentation was not published or available on the FCC's website before or after the presentation. Loving that transparency.

Cable Operator Fined $2.25 Million For Retransmission Consent Violations

The FCC has fined a Houston, Texas-based cable operator $2.25 Million because it retransmitted broadcast television signals without first obtaining the consent of the stations whose signals it was using. The FCC had previously warned the cable operator and also conducted a full investigation of the cable operator after receiving complaints from four TV stations in the market.

The cable operator claimed that it was a "master antenna television" (MATV) delivering signals to building residents through a "master antenna" but the FCC instead found that it was receiving TV signals at an off-site cable headend. It also found the violations to be "very serious" because the unauthorized carriage had continued over a long period of time, even after an FCC warning.

The FCC has been paying more attention to unauthorized retransmission consent issues in the past few years, issuing similar fines against other cable operators as recently as 2012.

FM Auction 94 Permit Filing Window Opens

June 24, 2013 marked the start of a limited filing window for all Auction 94 winning bidders to complete and file applications for construction permits with the FCC. The filing window will close at midnight EDT on July 24, 2013. In addition to providing the technical and legal information in the application, applicants must also supply the FCC with proof for any bidding credit they claimed during the auction. Failing to file the permit application will subject bidders to default payments.

FM Translator Settlement/Tech Amendment Deadline Nears

FM translator applicants that remain in Auction 83 have only a few more weeks to reach settlement agreements with other applicants with whom they are mutually exclusive, or file technical amendments that will eliminate their mutual exclusivity and allow for a grant of their application as a singleton. The deadline for doing so is July 22, 2013. In some cases, LPFM preclusion showings will be necessary based upon the FCC's new processing guidelines.

During the settlement window, the FCC has waived its collusion rules so that applicants are free to discuss settlement solutions with other applicants. But once the settlement window closes, the FCC's collusion rules will go back into effect, barring discussions among applicants that remain.

Comments Wanted: Minority Ownership Report and TV Political Online Public File

The FCC would like to hear from broadcasters on two significant issues.

On the first, the FCC has asked for comments by July 22, 2013 on an ownership study submitted to the FCC by the Minority Media and Telecommunications Council (MMTC) in late May. The MMTC report is titled "The Impact of Cross Media Ownership on Minority/Women Owned

Broadcast Stations." The report concluded that "cross-media interests' impact on minority and women broadcast ownership is not sufficient material to be a material justification for tightening or retaining the rules. MMTC suggested that the FCC seek additional comment from the public on the report as part of the ongoing open proceedings concerning media ownership and diversity.

On the second issue, the FCC is attempting to assess the impact of its new rule requiring television stations to place political file information in their online public file. Those comments are due no later than August 26, 2013. TV broadcasters originally objected to this requirement, and even proposed alternatives, but the FCC adopted the requirement anyway. NAB challenged the new rules in court, but has asked the court to delay ruling until the FCC considers its challenges, and potentially changes the rules.

Several weeks later, TV stations raised liability concerns related to the online political file information when the bank account of an ad agency was unlawfully accessed based upon a copy of a check included in a station's online public file.

Currently, the online posting requirement for political files applies only to about 240 stations affiliated with the top four networks in the top 50 DMAs. All other stations are exempt from posting political file material online until July 1, 2014. The FCC's public notice seeks comment on the impact of the rules before they take effect for other stations next year. In addition, the FCC has asked for comments on a pending petition for reconsideration file by several TV station owners challenging whether the specific spot rate information should be posted online, as opposed to being retained in the hard-copy public file at the station.

The FCC's notice includes some interesting statistics. For example, over 361,000 documents have been uploaded into the online public file, including over 66,000 documents in political files. During the month leading up to the November 6, 2012 general election, stations uploaded nearly 27,000 documents to political files, peaking at 1,582 documents uploaded on November 5. In addition, the public file has attracted over 2.5 million page views on 500,000 unique visits to the site. The busiest day was September 11, 2012, on which the site attracted 5,296 visits.

Comments in these two proceedings can be filed electronically using the FCC's online comment filing system.

LATE-FILED RENEWAL APPLICATIONS ARE COSTLY

The licensee of two stations just learned how costly it can be when license renewal applications are not filed on time, and a station continues to operate. The FCC fined the licensee a total of $26,000 for not making the required filings on time, and for operating without authorization for various periods after missing the deadline.

When it comes time to file your station's renewal application, the expiration date on the station license is not the renewal filing deadline. Instead, the renewal application filing deadline is four months *prior* to the license expiration date, and pre-filing announcement requirements begin six months before the expiration date.

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

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DATES TO REMEMBER

July 1 & 16, 2013: **AM & FM Stations in California**: air your PRE-filing announcements.

TV, Class A & LPTV Stations in Illinois & Wisconsin: air your PRE-filing announcements.

July 1 & 16, and August 1 & 16, 2013: **AM & FM Stations in Arizona, Idaho, Nevada, New Mexico, Utah & Wyoming**: air your POST- filing announcements.

TV, Class A & LPTV Stations in Michigan & Ohio: air your POST-filing announcements.

July 1, 2013: **TV, Class A, AM & FM Stations (commercial & NCE)**: complete 2nd quarter 2013 issues/program lists. AM & FM stations, place in your inspection file. TV & Class A stations, post to your online public file.

TV & Class A Stations (Commercial Only): complete and electronically file FCC Form 398 Children's TV Programming Report for 2nd Quarter 2013. Confirm that the FCC automatically linked same to your online public file. Also, compile and place in public file records relating to station's compliance with children's programming commercial limits. Post same to online public file.

Class A Stations ONLY: compile and post to your online public file records relating to your continuing eligibility for Class A status

July 18, 2013: reply comments due on FCC's new proposed indecency standard

July 22, 2013: Deadline for all FM translator settlement or technical amendments in Auction 83; also, deadline for comments on MMTC minority/women broadcast ownership study

July 24, 2013: Deadline by midnight EDT for Auction 94 winning bidders to file construction permit applications.

August 1, 2013: **AM & FM Stations in California** file your renewal application electronically via Form 303-S. Also file EEO Form 396 with, if applicable, two most recent EEO public file reports. Place current EEO public file report in public file and post copy on station website, if applicable.

NCE Stations Only: also file biennial ownership report via Form 323-E.

TV, Class A & LPTV Stations in Illinois & Wisconsin: 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 North Carolina & South Carolina: if full time employee threshold is met, complete EEO public file report and place same in public file as well as post on website. **NCE STATIONS ONLY**: also file biennial ownership report via Form 323-E.

TV & Class A Stations in North Carolina & South Carolina: if full time employee threshold is met, complete EEO public file report. Post same to online public file and station website.

August 1 & 16, September 1 & 16, October 1 & 16: **All AM & FM Radio Stations in California**: air your POST-filing announcements.

August 23, 2013: AM & FM Stations in Arizona, Idaho, Nevada, New Mexico, Utah & Wyoming: complete and post to your public file documents relating to pre- and post-filing broadcast renewal announcements.

TV, Class A & LPTV Stations in Michigan & Ohio: complete and post to your online public file documents relating to pre- and post-filing broadcast renewal announcements.

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