



# Broadcast Newsletter

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## **HCCB LAUNCHES NEW WEBSITE!**

Hardy, Carey, Chautin & Balkin, LLP is pleased to announce the launch of our new website which now includes more detailed information about our services, easy access to resources and other content for clients, our e-newsletter, broadcast blog, and more. Please visit us at [www.hardycarey.com](http://www.hardycarey.com) and see the difference.

## **OH, THAT ONLINE PUBLIC FILE**

In 2011, the FCC carefully stated its position on the new TV online public file, assuring broadcasters that the public file would not become a proxy for running up the FCC’s cash registers by using the online public file to issue fines to stations. Here is their quoted language:

“As with paper public files, the Commission staff would not review the material placed in each station’s online public file for purposes of determining compliance with Commission rules on a routine basis. Thus, the purpose of the online hosting would simply be to provide the public with read access to the material.”

Not so fast. In connection with a TV station’s renewal application, the FCC fined a station \$9,000 for 18 late-filed quarterly children’s television reports, 17 of which the licensee admitted to filing late, but one that the Commission noticed on its own. For that one, the decision plainly reads that, “a Commission review of the Station’s online public file showed that the report for the first quarter of 2013 was also filed late.”

Just between us, we can tell you that the FCC staff has earlier taken the “missing from the online public file” approach with us verbally as we have addressed various license renewal issues with them by telephone. They are now openly acknowledging that they are reviewing the online public file, and will issue fines for violations. That’s a lot different from the days when something placed in the public file late was undetectable absent an investigation. Everyone can at least breathe a sigh of relief that this wasn’t simply a random check of the file and issuance of a fine. It only came up in the context of an admitted violation, which had the FCC on the prowl. Nevertheless, all full power and Class-A television stations should take note at the power (and truth serum) that the online public file provides to the FCC.

## AN EYE OPENER ON SPONSORSHIP IDENTIFICATION

After a lengthy investigation, the FCC and a broadcaster have entered into a consent decree related to violations of the FCC's sponsorship identification rules. Those rules have certainly not been a hotbed of enforcement activity by the FCC in recent years, but this case serves as a good example that a complaint to the FCC – even on its more arcane rules – can ruin your day.

To review, the sponsorship identification rules require broadcasters to identify sponsors on-air whenever any money, service or other valuable consideration is paid or promised to the station for the broadcast of program material. The idea behind the rule is that the listeners and viewers are entitled to know who seeks to persuade them. The rules contain some exemptions, the most familiar of which is that when it is clear from the broadcast material that the mention of the name of the product constitutes a sponsorship identification, then the mere inclusion of the product name is sufficient to identify the sponsor, and no further announcement is needed. Otherwise, the sponsor's corporate or trade name must be included.

Seems simple enough, right? Wrong. In the consent decree case, the FCC received a complaint that the station had aired advertisements sponsored by The Cigarette Outlet, but intentionally omitted the sponsor of the announcements in order to avoid violating the FCC's rule prohibiting the broadcast of cigarette advertisements. During the investigation, the station argued that it was unnecessary to include the advertiser's full name in the announcements because "the identity of each advertisement's sponsor and the fact of sponsorship of its business were obvious" given that the advertisements included the address and phone number of The Cigarette Outlet, as well as directions to its only store. From that twisted explanation, you can glean that the station was mentioning the advertiser's products, but craftily avoiding a mention of the advertiser's name, hoping that in doing so, it was meeting the sponsorship id rule because it was "clear", from the products being mentioned, who the advertiser was. The FCC disagreed without explaining why, and a consent

decree followed. We suspect that the other tobacco products being mentioned didn't make the sponsor's identification clear enough for the FCC, even though the advertiser only had one store.

The scope of the consent decree is extensive. First, the station has to make a \$15,000 "contribution" to the government. Second, the station licensee must take certain actions, including (a) creating operating procedures for broadcasts subject to the sponsorship id rules, (b) developing a compliance checklist for employees to follow, (c) establishing a two-employee cross check process for review of every announcement prior to broadcast, (d) creating a "compliance manual" and a compliance training program for initial and annual employee training, (e) notifying advertisers of the sponsorship identification requirements, (f) establishing a hotline for employees to call to report violations of the compliance plan (g) including a clause in employee contracts related to compliance with sponsorship identification laws, and (h) filing a compliance report with the FCC at least annually. These obligations continue for 36 months.

That's not all. The station licensee also agreed in the consent decree that if it receives a future notice of apparent liability from the FCC alleging violation of the sponsorship identification rules, it will suspend each employee accused of violating the rule, investigate the matter, re-train employees, and take disciplinary action, up to and including termination, if the new incident results in a final ruling from the FCC that a rule violation occurred.

In case you were brushing the sponsorship identification rule aside at the start of this article, we apologize if that last paragraph made you spill your coffee (or choke a little). It certainly got our attention. In summary, it would now seem to be the case that an advertiser with the word "cigarette" in its name presents a sponsorship identification problem for any broadcaster.

## FCC TV SPECTRUM INCENTIVE AUCTIONS: A FEW INSIGHTS

Mark it on your calendar. On July 22, 2013, the FCC made an attempt to be transparent about its plans for an incentive auction, in the form of a blog

entry and public notice. As has been the case from the start, there are many questions posed and no answers being given. However, the FCC did announce a release of more information in the form of a complicated data set and instruction manual on how to access and run software the FCC has written to help figure out how it might be able to repack the TV stations that remain after an auction.

The main purpose of the FCC's announcement was to ask for input on its repacking data and software. TV stations should take note of the following statement – "this information and analysis will permit broadcasters to validate the accuracy of the information regarding their stations or facilities contained in the FCC's databases, to ensure that the staff has correctly identified all relevant constraints on repacking." In other words, stations should double check the FCC *now* to be sure they aren't left by the roadside later. For that, we recommend calling your consulting engineer, who will probably have the data set and a download of the software.

The FCC's blog announcement goes on to indicate that the data/software release "provides an opportunity for broadcasters to evaluate the range of channels to which they *could* be repacked consistent with the requirements of the Spectrum Act and the Commission's rules if they are not a "winning bidder" in the incentive auction. Stations that don't plan to bid in the auction fall into this category. Again, a call to your consulting engineer might be helpful there. Here's a third eye opener. The FCC openly states that "it is important to note that in these analyses, we make certain assumptions based on information in the record so that the released data has meaningful value to the public. Those assumptions do not imply any final Commission determination regarding the information provided today." Sounds like a little "cover" for what has been a pretty tenuous approach to figuring out how to do all of this.

And finally, to put all television broadcasters at ease, the FCC's blog entry closes with a statement that it recognizes "that repacking is complicated, and that it will take time for people to review and understand the materials we are releasing today." But that ease is short-lived, since the FCC then asks for "concrete ideas about how to best develop

the repacking methodology." We read into this last statement that they are still very much trying to figure out if, and how, this whole thing will work.

On a related note, we were able to finally access the June 27<sup>th</sup> Incentive Auction Update presentation made to the FCC Commissioners, and found a few very interesting tidbits in the presentation. First, the FCC has hired a company named "Widely" to review equipment cost and availability, tower crew availability, study internal data on existing equipment, evaluate the reimbursement payment mechanism, and explore the tax treatment of various approaches to reimbursement. No word on when that report will be available, or whether it will be released, but the subject matter sure is interesting.

We did a little digging online about Widely. All of their 8 principals or 19 team members have experience in or come from the wireless and fiber industries. None of their brief biographies mentioned broadcasting expertise or experience. That probably explains why their website announces that they have hired outside consultants to assist them with the FCC study, namely Joe Davis, a 30-year broadcast consulting engineer with Chesapeake RF Consultants, and David Cole, a senior appraiser with experience in broadcast appraisals.

Second, it is clear that the staff and Chairwoman Clyburn continue to meet with and/or contact high level Canadian and Mexican officials to resolve interference issues for stations along the borders. Third, it appears that the FCC will soon embark on a program to develop waivers and special temporary authority procedures to facilitate "pilot projects" including channel sharing pilot projects. That should be interesting. Finally, the plan (for now) remains for the FCC to adopt a Report & Order in 2013 and hold the broadcast incentive auctions in 2014.

A new update is to be presented at the FCC's open meeting in August.

## CHILDREN'S TELEVISION FINES ON THE RISE

TV license renewals are providing a steady stream of "revenue" for the FCC's coffers. Previously, we've reported on a number of Class A television stations being fined for not filing quarterly FCC Form 398 Children's Television Reports. Those stations continue to receive fines, though they have an option to return to low power television status and skip the fine. Now, full power television stations are coming under the microscope too.

Based on the dizzying number of stations being fined, we were curious enough to go back and run the numbers on children's television fines for the month of July, and the grand total is \$202,000. That's in one month, on children's television related fines only. About 25 stations were fined amounts ranging from as low as \$3,000 to as high as \$20,000. In many instances, the FCC is increasing the fine because stations have not voluntarily disclosed their late or non-filings in their renewal application. That should be a lesson to any station owner filing for renewal – if filings have not been made on time, or documents not placed in the public file on time, those circumstances mean that a station cannot check "yes" to the required certification statement on the renewal form. If you do, you open the door to being fined, or worse, to being accused of lacking candor with the Commission.

We cannot see the future, but we feel comfortable making a prediction that the FCC's children's television fines are not over.

## EVEN THE LITTLE LICENSES CAN STING

Many broadcast stations have auxilliary licenses in addition to their main station license, often to assist in transmitting the broadcast signal from the studio to the transmitter site. These "STL" licenses are automatically renewed with a station's main license, and although the annual regulatory fees associated with these licenses are very low (\$10), the fines for operating a studio-to-transmitter link without a correct license, or a license at all, are not low. The FCC treats a non-licensed operation the same as any other, and recently did so for a station in Montana that admitted that it did not have a license

authorizing operation of its STL. That resulted in a \$10,000 fine. For any mathematicians out there, that fine is one thousand times the amount of the annual regulatory fee.

We suspect that the station being fined here did something that we've seen multiple times. They bought the STL equipment from a company that promised to install the equipment, and either (i) never mentioned the requirement for FCC licensing, or (ii) mentioned it as included in the price, but then never filed for it. Of course, there is option three, where the company tells the station owner about the licensing requirement, but it is unclear as to who must take care of that, and it slips through the cracks.

Now is a good time to make sure your STL operation is licensed, and to confirm that the licensed parameters are consistent with your STL operation. If either is not the case, actions toward compliance should be taken immediately.

## BROADCAST STATION TRENDS

Following are the trend lines for the past three months for the broadcast stations, according to the FCC's published broadcast station totals from March 31, 2013 and June 30, 2013 tracking the number of licensed stations.

On the radio side, two AM stations have gone dark, three more commercial FM stations are on the air, and 40 more non-commercial FM stations are on the air. In addition, there are nine fewer FM translators operating. Low Power FM stations dropped by five.

On the television side of things, there are 15 fewer Class A UHF stations, and six fewer Class A VHF stations. Full power television stations, commercial and non-commercial, remain static, with an increase of one UHF commercial TV station during the quarter. UHF TV translators increased by six, but VHF TV translators dropped by seven. UHF LPTV stations increased by five, but VHF LPTV stations dropped by three.



A quick look back to the end of 2011 shows that all of the above trend lines hold true for at least the last 18 months.

## INDECENCY REPLY COMMENTS DEADLINE EXTENDED

At the request of College Broadcasters, Inc., the FCC has agreed to extend by 15 days the deadline to file reply comments in its proceeding addressing how it should enforce or change its indecency policies. Reply comments can now be filed through August 2, 2013.

## REGULATORY FEES PAYMENT COMING UP

We'll have more precise details in next month's newsletter, but annual regulatory fees for commercial broadcasters will be due sometime during the first half of September. Sometime during August, the FCC will take several actions on the regulatory fee front, including adopting a Report & Order on the fees, populating its Fee Finder website with the amounts due for each commercial station, and setting up the online link to enable payment.

## DATES TO REMEMBER

**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.

**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 1 & 16 and September 1 & 16: TV, Class A & LPTV Stations in Iowa & Missouri:** air your PRE-filing announcements

**AM & FM Stations in Alaska, American Samoa, Guam, Hawaii, Oregon & Washington:** air your PRE-filing announcements.

**August 2, 2013:** reply comments due on FCC's new proposed indecency standard

**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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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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