



# Broadcast Newsletter

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### **AM REVITALIZATION REPLY COMMENT DEADLINE EXTENDED**

The FCC has granted a 30-day extension of the deadline for reply comments in the AM Revitalization rulemaking proceeding. The new deadline is March 20, 2014. The extension reflects a partial grant of a request made by the Association of Federal Communications Consulting Engineers for a 60-day extension. AFCCE formed a committee to review and prepare responses related to several of the technical rule changes proposed by commenters.

A variety of responses and new proposals have been submitted in the proceeding, and positions vary widely on some substantive issues. For example, some commenters believe that an AM-only FM translator window won't help to revitalize AM, but will only drive listeners to FM. Others want to restrict the FM translator window to AM daytime stations only, or at least give them priority. Many are in favor of applying the so-called *Tell City* waiver to allow greater flexibility in FM translator relocations. Finally, there are numerous proposed suggestions for changes to the AM interference rules, from the simple (i.e., extending daylight hours regardless of interference) to the more complex (formulas for calculating interference).

Comments can be accessed for review in the FCC's online Electronic Comment Filing System (ECFS). Search by Docket Number 13-249.

### **SILENCE AND ITS LURKING PENALTIES**

This renewal cycle, the FCC added a few questions to its renewal application, one of which requires radio stations to certify and explain any period during which a station was silent during the license term. All stations have had to certify that they have not been silent for more than a 12-month consecutive period, and that they are on the air at the time they file the license renewal application. But now radio stations have an additional question about whether they have adhered to a minimum operating schedule, and have to explain any period of silence greater than 30 days.

The origin of these questions is tied to a Communications Act provision that automatically forfeits the license of a station that fails to operate for 12 consecutive months – unless the FCC

grants a waiver, which is rare. In addition, these questions were meant to provide a litmus test for the FCC to use at license renewal time to determine whether to place the license renewal application in a hearing for the station being silent too long.

Why the above summary? Well, the FCC – as we near the end of this 4-year staggered renewal cycle – has decided to stick its regulatory toe in the water and analyze the worthiness of license renewal for a station that was off the air for an extended period of time that was short of the 12- consecutive-month-period. The decision has many lessons.

First, in the context of license renewal, if a broadcast station is silent for more than ½ of its license term, the FCC will designate your license for an evidentiary hearing to determine whether license renewal should be denied. Importantly, “license term” does not have the 8-year default meaning that one would think. Instead, if the licensee at the time of renewal has not held the license for the entire 8-year term, then the “license term” is the shorter period during which the licensee held the license. In the case decided by the FCC, that period was right at four years, and the station narrowly missed being put into a hearing because it had been off the air collectively for nearly two of those four years.

Second, the FCC noted what it called a “practice” of some stations of going silent for nearly a year, and then resuming operation for a short period to “interrupt” the 12-month period that would trigger license cancellation. The FCC decision doesn’t directly address the question of whether the interruption was sufficient to avoid license cancellation (though it does not cancel the license), but it does find that prolonged silent periods nevertheless raise a question as to whether a license should be renewed. The FCC cited to a 2001 decision where it “warned” broadcasters that they will face a “very heavy burden” in demonstrating public interest service when they have been silent for most or all of the prior license term.

Third, the FCC concluded that a short-term license renewal of two years was an appropriate sanction, and that it would grant that renewal upon

conclusion of the associated forfeiture proceeding (\$4,000) for public file violations. The station is not promised a follow-on renewal for the remainder of the normal 8 year license term, but instead a close review of the station’s compliance, and an ability to take whatever corrective actions may be warranted at that time.

Fourth, in a footnote that is a little chilling, the FCC notes that some stations have operated with minimal power instead of remaining completely silent. It then declares that “if the power level is too low to provide the minimum signal level required under the Rules for service to a station’s community of license, this type of operation is the functional equivalent of silence.” We don’t like that statement, though it is instructive for future responses to license renewal silent questions. And for times when a station must seek temporary authority to operate at reduced power, we note that it might be helpful to clarify that your station is still providing coverage to its community of license (if that is the case). If it is not, be forewarned that the FCC might consider that status to be “the functional equivalent of silence,” which would raise a whole host of other prickly questions.

## **ONLINE PUBLIC FILE – ONE YEAR LATER**

Now that we’re just over a year removed from the FCC’s full implementation of the online public inspection file for full-power and Class A television stations, we thought it might be helpful to capture a few kernels of wisdom, along with some cautions and warnings.

First and most important is that the FCC staff can not only determine the date, but also the time of everything you upload into the public file, as well as every form or application a station files with the FCC that automatically finds its way into the public file. That information is a truth serum of sorts, as it provides an easy tool for the FCC staff to “test” your license renewal certification that all items were timely placed in the public file. It is therefore paramount that stations upload the required items on time, or for those automatically uploaded items, that stations make the required FCC filings on time.

Second, excel spreadsheets have presented upload issues. Stations have reported problems when uploading an item to the public file that is or contains an excel spreadsheet, only to revisit the public file days later to discover that the upload never made it. At that point, a corrected upload shows a placement date in the file that exceeds the applicable deadline. If at all possible, try to upload all documents in PDF format, even if you are keeping track in excel. Simply convert the excel spreadsheet to PDF before uploading. If you are unable to do so, then after uploading your excel file, always check back – using the publicly accessible link to the public file, and not your password-access – to be sure the document(s) that were uploaded actually appear in the file.

Third, as noted above, replacing something in the file can lead to an inability to easily prove that a document made it to the public file on time. If something has been uploaded that was incomplete, or there is some other reason a station needs to substitute another document for one already uploaded, it is far better to simply add the additional document to the file, rather than remove the first one and replace it with a new one. By doing so, a station can prove that the original was timely uploaded, and that the date/time of the replacement file does not control the question of timeliness.

Fourth, a note or two about keeping a “lean” online public file. Back in the days when the public file was kept on paper at the station main studio, it was not uncommon (in our experience) for public files to contain much more than was required by the rules. Station personnel were understandably leery of removing anything from the file and just left everything in it.

Well, it was one thing to leave too much in the file when the likelihood of a visitor actually coming to inspect the file was very small. But now that the file is accessible by anyone at all hours of the day or night, and the FCC has an online complaint filing system and a willing cadre of “public interest” groups that have anti-broadcast agendas, the potential exposure is magnified tenfold.

It’s true that the FCC won’t fine a station for having items in the public file that do not belong there. But it’s also true that greater accessibility by the public

to the file increases the likelihood of complainers. Given that, the public file should only contain the documents required by the rules. Stations have two choices for Commission-linked documents – they can either “toggle” them as “on” or “off”, which leaves them in the computer file but limits public accessibility and viewability to only those items that are “on”. For documents that stations upload themselves, the only way to get rid of a document is to put it in the trash, completely removing it from the file. No matter what the document, be careful to avoid removing something that should not be removed.

A “lean” file, containing only what is required, is the best course, especially in the transparent world of online public files.

Finally, here’s something you may not know. Anyone can subscribe to an RSS (Really Simple Syndication) feed specific to your station so that they are notified and can track every time your station uploads or removes anything from the public file. In fact, those RSS feeds can be made specific to a particular folder within a station’s public file. Transparency is one thing, but enabling software that allows tracking by station public file or folder is transparency on steroids. Your need to be on “alert” regarding the public inspection file cannot be emphasized enough. Here’s a thought -- subscribe to your own station’s public file RSS feed so you can track/double-check progress and compliance.

## **INCENTIVE AUCTION WEBINARS COMING UP**

The FCC has now released more details about two TV Incentive Auction webinars to be held on February 21, 2014.

The first webinar is from 10 am – 12 noon EST and will describe the FCC’s computer program and methodology for performing “feasibility checks” during the auction to confirm – before accepting bids on spectrum offered for sale -- that a viable and technically compliant arrangement of remaining TV channels can be assigned in a particular market. The FCC needs a way to do this rapidly during each round of bidding, but to do so, they want to use computer software that will provide rough estimates of repacking scenarios instead of

more precise interference calculations. The webinar will include a moderated question and answer session at the end. To participate in this webinar, you must RSVP to [Cecilia.sulhoff@fcc.gov](mailto:Cecilia.sulhoff@fcc.gov) to receive login information, and specify the “feasibility check webinar.”

The second webinar is from 1-3:30 p.m. EST and will present information on a proposed methodology for predicting potential interference between broadcast television and licensed wireless services, and then answer questions. The FCC has published its proposed methodology and requested comments, which are due February 28, 2014. The public notice acknowledges that the FCC’s record in the incentive auction rulemaking proceeding does not address situations where TV channels will potentially be interleaved with wireless channels in some markets, and therefore does not consider interference that may be caused by TV to wireless operations. To participate in this webinar, you must RSVP to [Cecilia.sulhoff@fcc.gov](mailto:Cecilia.sulhoff@fcc.gov) to receive login information, and specify the “inter-service interference prediction” webinar.

Both webinars have potential far-reaching effects, and we encourage all TV broadcasters to participate.

## **CHANNEL SHARING TEST DESCRIBED AS “GAME CHANGER”**

FCC Chairman Tom Wheeler, in a post on the FCC’s blog, has heralded an FCC-sanctioned test of the FCC’s proposal for channel-sharing by TV stations. Channel-sharing is one way the FCC hopes to incentivize TV stations to turn in licensed spectrum and share another 6 MHz TV channel that will not be auctioned.

Chairman Wheeler toured the facility of KLCS in Los Angeles, one of the two stations involved in the channel-sharing “pilot,” stating in his blog that he had “seen the future, and it’s using 50% less bandwidth to produce a picture with increased quality of up to 300%.” The Chairman’s comments came seven days after the Commission approved an experimental authorization for the stations to channel-share. The other station involved is KJLA.

The experimental authorization specifies that the stations will test the technical feasibility for multiplexing signals, including multiple HD streams, and simultaneous HD and SD streams in a video compression format called H.264. In addition, the test will examine how to modify the PSIP information provided to consumers and test various channel-sharing scenarios at off-peak hours.

The two stations had to represent to the FCC that they will use their portion of the shared channel consistent with FCC rules (one station is noncommercial) during the test. To extend the 6-month experimental authorization, the stations must file a report providing detailed data and responses required for experimental operations. Even if not extended, the FCC requires a filing by July 6, 2014 of a report detailing the research, experimentation and results, showing both positive and negative aspects of the test (we assume it will be publicized by the FCC). If an unusual problem or condition arises during the tests, the stations must inform the FCC at the time they occur. The stations can terminate the experimental tests at any time by notifying the FCC.

## **SPIKE IN TOWER CLIMBER DEATH/INJURY**

Tower owners should take note of a recent letter from the Assistant Secretary for Occupational Safety and Health (OSHA) addressed generally to any “communication tower industry employer.” The letter notes a spike in deaths in the communication tower industry (13 in 2013 and 4 already in 2014), noting that the total of 17 deaths is more than occurred in the previous two years combined. It also states that each one was preventable.

The Secretary’s letter goes on to state that OSHA is aware of a spike in tower work during the past year, and is concerned about future incidents, especially when tower work is done by employees of subcontractors. OSHA has found that a high proportion of tower worker deaths occurred because of lack of fall protection (either not provided, or not used), and it warns employers that they have the responsibility to recognize and prevent workplace hazards. OSHA has the power to and does issue financial penalties for safety



violations, and the Secretary's letter warns of more to come. Most important, it urges the industry to take steps to safeguard employees, from training to the provision of equipment and actions to confirm use of equipment.

Broadcast tower owners or tenants who hire tower climbers should be especially selective with respect to individual and tower climber company safety practices. Tower worker protection information is available at [www.osha-ogv.gov/doc/topics/communicationtower/index.html](http://www.osha-ogv.gov/doc/topics/communicationtower/index.html). Beyond safety steps, be proactive with requirements for and proof of insurance before any tower climbing.

## **DUE TO CDBS LIMITATIONS . . . .**

The broadcast industry has become quite accustomed to the FCC's Consolidated Database System (CDBS) since it was launched several years ago. Under normal circumstances, the system generally performs well. But regular users of the CDBS system, which allows the electronic filing of virtually every regulatory filing required of broadcasters, have experienced and are familiar with certain CDBS quirks, limitations and shortcuts.

Recently, an applicant for a new Low Power FM application experienced a CDBS quirk, but was able to convince the FCC to accept its application filed some two weeks after the filing deadline. The applicant had timely submitted its application during the window, but needed to file an amendment to it before the window expired – an action that is normally allowed in window filing proceedings. But CDBS would not permit the amendment to the already filed application, so the applicant did the next best thing – it deleted the original application, and then created and attempted to file a replacement application before the close of the window. But it was unable to make that filing.

So the applicant did the next, next best thing – it filed its application late, and then asked the Media Bureau for relief. The Bureau was able to confirm that the earlier filed application had indeed been timely filed (since it had been issued a file number), and that “due to CDBS limitations” the timely filed application “could not be routinely amended.” And

so, the Bureau accepted the late-filed application (but not a subsequent amendment to that application).

CDBS is software driven. Sometimes, the FCC makes the system “smart” so that certain actions that would not otherwise be permissible are prevented by the system. That computer coding likely saves the FCC tons of unnecessary work in returning applications or considering petitions for reconsideration when applications are dismissed.

But sometimes, the computer coding isn't complete, and doesn't allow an otherwise permissible action, and that is when things get sticky. Applicants should first refer to the instructions for any filing window for help or an explanation, as the FCC will sometimes provide a unique way to make something happen in CDBS. But if not, the applicant should call the help desk and keep as much documentation as possible to prove the actions it has taken (i.e., converting filings or CDBS receipts to PDF). And when all else fails, asking the Media Bureau for relief can make the difference between having or not having a viable application.

In this day and age of select filing windows, opened only when the FCC decides to do so, efforts to get a late or other defective filing recognized and accepted can make a huge difference. In this case, for example, the likelihood of a future filing window for new LPFM stations is infinitesimally small, so this was the applicant's only real chance of securing a LPFM permit.

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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

**March 1 & 16, 2014:** TV, Class A & LPTV Stations in Texas: air your PRE-filing announcements.

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

**March 1, 2014, March 16, 2014, April 1, 2014 & April 16, 2014:**

**TV, Class A & LPTV Stations in Kansas, Nebraska & Oklahoma:** air your POST-filing announcements.

**AM & FM Stations in New Jersey & New York:** air your POST-filing announcements.

**March 20, 2014:** reply comments on AM revitalization NPRM due.

**April 1, 2014:** TV, Class A & LPTV Stations in Texas: 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 Delaware & Pennsylvania:** 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.

**AM & FM Stations in Indiana, Kentucky & Tennessee:** 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 & LPTV Stations in Delaware, Indiana, Kentucky, Pennsylvania & Tennessee:** if full time employee threshold is met, complete EEO public file report and post same in public file as well as on website.

**AM & FM Stations in Texas:** if full time employee threshold is met, complete EEO public file report and place same in public file as well as post on website.

**April 1 & 16, 2014; May 1 & 16, 2014:** TV, Class A & LPTV Stations in Arizona, Idaho, Nevada, New Mexico, Utah & Wyoming: air your PRE-filing announcements.

**April 1 & 16, 2014; May 1 & 16, 2014; and 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.

**April 10, 2014:** TV, Class A, AM & FM Stations (Commercial and NCE): complete 1<sup>st</sup> quarter 2014 issues/program lists and place in your inspection 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 1<sup>st</sup> 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.

**April 23, 2014:** AM & FM Stations in New York & New Jersey: complete and post to your public file documents relating to pre- and post-filing broadcast renewal announcements.

**TV & Class A Stations in Kansas, Nebraska & Oklahoma:** complete and post to your public file documents relating to pre- and post-filing broadcast renewal announcements.

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