



# Broadcast Newsletter

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## **RADIO ONLINE PUBLIC FILE: NOW A RULEMAKING**

Yes, you read correctly. The FCC has formally proposed rule changes that would impose a requirement on radio stations to migrate their public files to an FCC-hosted site. While the FCC has indicated that it will proceed slowly, and phase-in the requirement for some stations with small staffs, it appears that the radio online public file train has left the station. The FCC did leave the door open a crack for possibly exempting non-commercial stations from the requirement altogether, but that decision is far from made at this point. Comment deadlines have not yet been set, but will likely fall in the first few months of 2015.

## **FCC LEVIES FINES FOR EEO VIOLATIONS**

It has been awhile, but the FCC has just issued a few fines against broadcasters for failing to follow the EEO broad outreach regulations when recruiting for a job vacancy. Each case involved EEO reviews in connection with renewal applications filed in 2011 in some of the first states to begin the radio renewal cycle. So these two decisions may be the first of several more to come.

The decisions do not reveal anything new in how the FCC interprets its EEO regulations, but they provide good reminders. Like most FCC EEO fines, the offenders are large, multi-station owners and the station employment unit consisted of several stations. The station owners were therefore required to carry out the full complement of broad outreach to satisfy the requirements, including the need to conduct broad outreach for each full-time vacancy.

In one of the cases, the station owner used internet and word-of-mouth to fill the vacancy. The FCC fined them for doing so, repeating its prior holding that "relying solely on job postings on its website, on the licensee's own private contacts, such as word-of-mouth referrals, and or walk-in applicants, does not constitute recruitment as contemplated

Under the Commission's Rules, which require public outreach." To avoid running afoul of this policy, placing an ad in a non-Internet publication can be the answer.

Perhaps the worst part of an FCC EEO enforcement action is the now almost standard imposition of reporting obligations that extend not only to the present owner of the station, but also to any future owner. That can hurt your station value (not to mention the need to be hyper-vigilant during the reporting period to avoid a new error).

In addition to reviewing EEO compliance at license renewal, the FCC also does so via random audits of at least 5% of broadcast stations every year.

### **CONTEST RULE CHANGE COMMENT DEADLINES SET**

Last month, we noted that the FCC had decided to update its contest rules to allow broadcast stations to post rules online in order to satisfy disclosure requirements. The rule deadlines for comments in that proceeding have now been set. Comments are due no later than February 17, 2015, with reply comments due March 19, 2015. Comments can be filed electronically via the FCC electronic comment filing system.

### **INCENTIVE AUCTION BIDDING PROCEDURES NPRM SHOULD MAKE TV STATIONS WORRY**

If you weren't already concerned about how the FCC was going about implementing Congress' authority to conduct an incentive auction to repurpose TV spectrum for broadband uses, you should be now. The FCC has now issued its next rulemaking to prepare for the auction. This 167 page document sets out proposed bidding procedures that give the closest view of what might really happen in the auction.

Here are a few brief takeaways that explain our concern. Computation of station values is based on a weighted score of a station's population, a direct effort by the FCC to control the price stations might receive for participation. While the document sets opening bid prices for spectrum based on new geographic zones, several of the values seem incongruent with the earlier study the FCC released

a few months ago. Stations repacked after the auction could be scattered throughout the spectrum instead of all being repacked below a certain channel, thus introducing potential interference problems between broadcasters and broadband companies. And according to one analysis, the number of TV stations repacked based on the FCC's plan would cause a significant shortfall in the amount repacked stations would be reimbursed.

Some of this will be sorted out in the pending litigation against the FCC. Some of it will be worked out in the actual rulemaking. But rest assured, TV stations should be paying attention. The two Republican Commissioners certainly were, and they objected to and voted against the FCC's bidding procedures NPRM.

### **COMMISSIONER O'REILLY CONFIRMED TO NEW TERM**

The US Senate has confirmed President Obama's nomination of FCC Republican Commissioner Michael O'Reilly to a new full, five-year term. Commissioner O'Reilly had been serving out the remainder of Robert McDowell's term since November 2013.

### **TOWER OWNERS TAKE NOTE**

The Wireless Bureau has issued an advisory to all owners of lighted towers. The advisory notes that the Federal Aviation Administration has developed plans to streamline its processes related to Notices to Airmen (NOTAMs), which identify towers with extinguished or faulty lighting.

If you own a lighted tower, then you already know under the FCC's rules you are generally required to notify the FAA within 30 minutes of discovering a lighting outage or malfunction (depending on the light), and then take steps to correct the outage. According to the advisory, the planned change will allow tower owners to self-select the amount of time their NOTAMs remain active. So instead of an automatic 15-day NOTAM when a tower owner reports a light outage, and the follow-on burden of re-reporting and extending the NOTAM, owners will have an ability to access the NOTAM submission system and self-select the amount of time they will need to repair a light. This improvement is

expected to be effective in mid-January 2015. The FCC warns against excessive times for repair, so beware.

## **YOU CAN'T ALWAYS GET WHAT YOU'VE HAD**

Odd title, but true in this case. Sometimes, what the FCC staff has done for you or others many times before suddenly comes to a screeching halt, and there is no explanation. And sometimes, that occurrence is odd enough to prompt a legal challenge (when there is time and money for that).

Let's explain. We were not surprised by a recent FCC decision refusing to apply the *Mattoon* Waiver to a proposed major change move of an FM translator *for use with an FM station* (the waiver was specifically designed for AM stations). But what caught our eye was how the full Commission dealt with the Audio Division's prior processing of several applications granting the very waiver the Division had denied to the challenging applicant.

The applicant had appealed the Audio Division's refusal to grant the requested waiver, citing to the several cases where such waivers had previously and regularly been granted. But the full Commission was not persuaded by those prior actions, noting that in 2013, the Media Bureau had directed the Audio Division to cease granting such waivers because *Mattoon* Waivers were only to be granted in connection with an FM translator's use with an AM station. And although those earlier grants were final and could not be rescinded, the Commission noted that it was nevertheless well established that erroneous staff actions do not bind the Commission.

We are not unfamiliar with that technical legal position, or its close cousin--that informal staff pronouncements are not to be relied upon. But staff actions in other applications are often cited to us as support that a planned application will be granted. As this decision teaches, there is always an asterisk to be placed next to such "precedent." So, the next time you want to file an application based upon waivers that the staff appears to be granting (and we certainly don't discourage those), do so with the full knowledge that the staff and the

Commissioners can simply call the earlier ones erroneous, and refuse yours.

Regulatory agencies. Sigh.

## **CLOSED CAPTIONING RULE CHANGES COMING MARCH 16<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. Yes, you guessed it. This article tells you that the effective dates are right around the corner. But the good news is that instead of becoming effective in January, the effective date is now March 16, 2015.

There are two portions of the new rule that kick in on that date. The first one requires stations to begin to "maintain records" of their efforts to monitor the station's closed captioning and captioning equipment. 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.

The second new rule kicking in on March 16, 2015 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.

If this all seems wildly complicated and over-regulated, you would be correct. But there is a small glimmer of hope. The FCC just issued a notice of proposed rulemaking seeking input on captioning obligations for programmers. Among other things, the FCC seeks input on whether some of these obligations should be shifted to the programmer itself. The deadline for comments has not yet been set.

## **THOSE LOCAL NEWSPAPER NOTICES DO MATTER**

They seem arcane, bothersome and an unnecessary expense. But as a recent FCC decision instructs, required local newspaper notices in connection with certain FCC applications can be critical to the application’s status. The local notice rule is very specific, so pay close attention when reading it or when you get that email from your attorney instructing how it is to be done.

In the recently decided case, a winning bidder for an FM license faced a petition to deny from a competitor, who alleged that the local newspaper notice had not been completed. The FCC had initially determined in a letter decision that the applicant had supplied proof of the required notification. The petitioner claimed the FCC was wrong, first because the proof of notice was for the initial application and not an amendment, and that the applicant knew of and had failed to correct its lack of local notice.

In ruling on the petition, the FCC agreed, finding that the applicant had not published the local notice of the original application in the correct newspaper, had not done a required local notice on the amended application, and that once it did so, was untimely. On the incorrect newspaper reasoning, the FCC pointed out that because there was no

daily newspaper published in the community of license, the applicant had to provide local notice in the weekly newspaper published there, as opposed to the daily newspaper published in a nearby community. Confused? That’s not uncommon. The local notice rule uses a graduated approach depending on whether a newspaper is daily or weekly, and based on where it is published. The number and timing of that local notice can change depending on what kind of newspaper, if any, is published in a community.

Here’s the worst part. Normally, a defective local notice is considered remedied by the FCC, even if done later than required. But here, the FCC had already granted the amended application. So it had to rescind that action, and return the application to pending status while the applicant published the proper legal notice. And that requirement means that the application becomes subject to new objections from local citizens.

## **IS YOUR TV STATION BEING CARRIED?**

We’ve all seen the discount double check commercials featuring Aaron Rodgers. They comically encourage insurance customers to double check their insurance rates to be sure they’re getting the best deal.

We have another real life application of the double-check mentality – in the context of the FCC’s must-carry rules. A few months ago, qualified TV stations had to make triennial must-carry elections against cable and DBS providers. While DBS providers actually have to respond to those letters and advise stations as to their carriage status, cable operators do not have a similar obligation.

For that reason, in the first few days of January 2015, TV stations should check on their carriage status with every cable operator against whom a carriage election was made. You can do that by checking channel line-ups online, or with your station’s viewers. In most instances, the cable systems get it right, but there are situations where the cable company ignores an election letter.

What should you do if your station is not being carried? Under the FCC’s rules, you must raise the

lack of carriage via a letter to the cable operator noting your valid election and the operator's failure to carry the station. That letter will factor in to the start of a 60-day clock on your deadline to file a complaint against the cable operator with the FCC, so exercise caution or get qualified assistance.

## **COPYRIGHT ROYALTY BOARD URGED TO HIKE AND RE-SET COMMERCIAL STREAMING RATES**

We expanded (or numbed, depending on your perspective) your mind last month about the myriad of proposals for 2016-2020 streaming rates for non-commercial broadcasters and now it is time for the commercial side of the house to get the same treatment. The good news is that there are fewer separate plans. The bad news is that SoundExchange and music streamers have very different ideas about what constitutes a fair price for the right to stream.

Commercial streamers are usually held to a higher rate than their non-commercial counterparts for the simple reason that due to their for-profit nature, they can afford to pay more to stream and simply cover it by increased revenues. Based upon that assumption and thousands of pages of testimony from its experts, SoundExchange is asking the Copyright Royalty Board (CRB) to raise the rates for commercial webcasters from \$.0023 per performance (i.e. per song per listener) to \$.0025 in 2016 up to \$.0029 in 2020.

Lest you should think it to be this straightforward, think again. SoundExchange has also proposed a new method of extracting the most amount of money possible from streamers by urging the CRB to adopt a "greater of" formulation for royalties where by streamers would pay the greater of either the regular rates or 55% of revenue related to streaming. In support of its proposal, SoundExchange essentially argued that the 'greater of' formulations are common in deals negotiated directly between SoundExchange and service providers (i.e. iHeart Media) and since everyone else is doing it, so should the CRB.

Not surprisingly, the remaining music streamers who have not reached separate agreements with SoundExchange argue that a rate re-set is what is

needed most now. They point out that even Pandora, the largest music streaming service in the nation, is not able to be profitable under the current rates that it pays – which are actually half the current CRB rates – and so no one else can be either, particularly under the new proposed rates. Pandora, in fact, is also beating a path away from SoundExchange by negotiating directly with record labels and cutting out SoundExchange's middle-man inflation to get rights to stream new music. It isn't clear if this back maneuvering will convince the CRB that SoundExchange's rates are simply too high for any service to be a successful, profitable business venture.

Pandora proposed rates starting at \$.0010 in 2016 up to \$.0018 in 2020. Pandora also offered to use a 'greater of' formulation, except that it would be the greater of the (lower proposed) performance rate or 25% of revenue. Broadcasters, including iHeartMedia and NAB, argue for a flat \$.0005 per performance rate for all five years. NAB also wants a flat fee royalty of \$500 a year for broadcasters who do not exceed 876,000 aggregate tuning hours per year which is roughly equivalent to 100 average listeners.

The next step in the proceeding is for a trial with witnesses (!) and cross-examination (!) that will likely be as scintillating for the non-copyright aficionado as watching paint dry. After that, it will be up to the CRB to wade through the dissonant positions to settle on a "willing buyer, willing seller" rate for commercial streaming for 2016 – 2020. They will hopefully make a decision by the end of 2015.

## **CURRENT STREAMING ENTITIES MUST FILE WITH SOUNDExchange BY JAN. 31**

If you are currently simulcasting your signal online or just streaming online and your stream contains music, SoundExchange should be hearing from you no later than January 31, 2015. By this date, you must file your annual Statement of Accounts and make the minimum \$500 payment for 2015. If you have elected to participate in one of the different settlement agreements reached in 2009, you must also re-elect for that plan in addition to filing the Statement of Account. If you fail to make an

election (or re-elect), you will be subject to the default CRB rates and you will be required to do monthly reporting showing all songs streamed for that month (also known as “census reporting”). If you have questions about your responsibilities to SoundExchange, please contact your copyright counsel.

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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

**January 1, 2015:** TV stations intending to claim an exemption from Closed Captioning based on 2014 revenue: verify with accounting department that 2014 revenue did not exceed exemption levels. If not, consult counsel for new captioning obligations.

**Full-power and eligible Class A & LPTV stations:** confirm that you are being carried on all cable and satellite providers for which you elected carriage last fall.

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

**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.

**January 10, 2014:** TV, Class A, AM & FM Stations (commercial and noncommercial) complete 4<sup>th</sup> quarter 2014 issues/program reports. TV & Class A Stations post to your online public file. AM & FM Stations place in your public file.

**TV & Class A stations (commercial only):** complete and electronically file FCC Form 398 Children’s TV Programming Report for 4<sup>th</sup> Quarter 2014. Link to your report should be made automatically by FCC to your online public file. Also compile and post to online public file records relating to station’s compliance with children’s programming commercial limits.

**Class A Stations only:** complete and post to your online public file certification of ongoing Class A eligibility.

**January 12, 2015:** comments due on treatment of LPTV and TV translator stations post-incentive auction.

**January 26, 2015:** reply comments due on treatment of LPTV and TV translator stations post-incentive auction.

**January 31, 2015:** minimum fees due to SoundExchange for 2015. Renewal of royalty plan may also be required.

**February 1 & 16, March 1 & March 16:** TV, Class A & LPTV Stations in Delaware and Pennsylvania: begin your PRE-filing announcements.

**February 2, 2015:**

**AM & FM Stations in Arkansas, Louisiana, Mississippi, New Jersey and New York:** 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 Arkansas, Louisiana and Mississippi:** if full-time employee threshold is met, complete EEO public file report and post same in online public file as well as post on station website.

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

**AM & FM Stations in Kansas, Nebraska & Oklahoma:** 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 Kansas, Nebraska & Oklahoma:** if full-time employee threshold is met, complete EEO public file report and post same in online public file as well as post on station website.

**TV, Class A & LPTV Stations in New Jersey and New York:** 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.

**February 17, 2015**: comments due on new proposed contest rules.

**February 23, 2015**: **TV & Class A Stations in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont**: complete and post to your public file documents relating to pre- and post-filing broadcast renewal announcements.

**March 16, 2015**: new closed captioning rules take effect, including maintenance of records of monitoring and maintenance, rules regarding captioning quality and standards and captioning best practices.

**March 19, 2015**: reply comments due on new proposed contest rules.

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