



Broadcast Newsletter

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WELL THAT WAS FUN

There is something special about a government shutdown that overlaps filing deadlines for virtually every broadcaster, especially when the one online system needed for those filings is not available (while others are). Yes, we're talking about the period from January 3rd through 26th when, due to the partial government shutdown, the FCC's online public file system was not available.

Unless broadcasters scrambled and uploaded quarterly issues/programs lists and other quarterly submissions before OPIF became unavailable, they were stuck without an ability to complete those uploads by January 10th, the normal deadline. Sure, we know that the deadline was initially suspended until the second day after the FCC returned to normal operations (January 29, 2019), and then [extended](#) by one more day (to January 30, 2019). But the confusion wrought by the OPIF not being available had already begun.

You may have figured out that we're a bit perplexed by the FCC's omission of OPIF as an available system during the shutdown when a number of other FCC databases were available and filings could be made. After all, it is a primary means for the public to reach the broadcasters that serve them, and review how they are being served. Maybe there is some unique issue with the OPIF system that complicates keeping it functional during a shutdown. We're not sure. But if another shutdown does materialize, we once again vote wholeheartedly for the OPIF to remain accessible to the public and broadcasters.

Just to be clear on the deadlines, every broadcast station required to place a quarterly issues/programs list or other quarterly report in their public file should do so no later than January 30, 2019 in order for that action to be considered as timely completed. No matter when you upload items, always double check the publicly available site to be sure your upload is accessible. There's nothing quite like finding out -- three months later when you're uploading something new -- that a prior upload to your station's OPIF was not completed. A three-month late filing is an almost certain financial penalty at license renewal time.

FCC MONTHLY MEETING MOVED TO FEBRUARY 14TH

Because the FCC only has funding under the current continuing resolution through February 15th, it has rescheduled its February 21, 2019 to February 14th to avoid delays that may result from a new government shutdown. Items that were on the January 2019 meeting agenda for consideration have been moved to the February meeting [agenda](#). For broadcasters, the agenda will include consideration of a Report & Order eliminating the Form 397 EEO Mid-Term Report, and a proposed rulemaking to reform the FCC's processes related to awarding noncommercial construction permits.

EEO FORM 397 SLATED FOR ELIMINATION

At its February meeting, the FCC is expected to adopt a Report & Order eliminating the requirement for radio stations with at least 11 full-time employees, and TV stations with 5 or more full-timers, to prepare and file the FCC Form 397 – EEO Mid-Term Report. The logic behind this proposal is that the information submitted in the Form 397 is already available in a station's online public file, and therefore the filing of the form to facilitate the submission of the information or a mid-term EEO compliance review is no longer necessary.

This won't mean that the FCC will stop carrying out its statutory obligation to review station EEO compliance at the mid-point of the license term. They will still do so, but instead of using a form, they'll merely access the station's online public file and review the EEO public file reports there. If the FCC has a question or concern about an EEO public file report, it will make an inquiry of the station then.

The [draft Report & Order](#) released January 3, 2019 does add a wrinkle for radio stations. Under the FCC's current EEO rules, both radio and television stations with five or more full-time employees have to annually prepare and upload an EEO public file report to the station online public file and website. But when it comes to the mid-term review, radio stations must have *at least 11* full-time employees before a review is triggered (for TV stations, only five employees are necessary).

So, by merely looking at a TV station's public file, FCC staff can automatically know if the station is subject to a mid-term review because the TV station will have uploaded the required annual EEO public file report. For radio stations though, an uploaded annual EEO public file report means that the radio station had at least five full-timers, but leaves unknown whether the station has at least 11 full-time employees and is therefore subject to a mid-term review.

To fix this, the draft Report & Order would implement an OPIF feature that asks radio stations – every time they upload an EEO public file report - - to respond yes/no as to whether they have 11 or more full-time employees. That way, the FCC will be able to easily determine which radio stations are subject to a mid-term review. Our only comment here is that we hope this is easier to implement than it was to explain.

The deadline for most stations to file Form 397 in the current renewal cycle has passed, except for TV stations in New York and New Jersey that must file Form 397 by February 1, and TV stations in Delaware and Pennsylvania that must file the form by April 1. After that, the new mid-term "review by public file" procedure would begin in 2023, which would mark the first license term mid-point for radio stations whose licenses are renewed in 2019.

SOUND EXCHANGE PAYMENTS DUE

All commercial and noncommercial broadcast stations that are streaming signals on the web must file an annual minimum fee statement of account form with SoundExchange and pay the \$500 per channel minimum fee no later than January 31, 2019. This year, SoundExchange sent emails to most stations with links and reminders to facilitate the timely statement and fee submissions. But the January 31st deadline applies whether or not a station received such an email.

Noncommercial Educational Webcasters who stream 80,000 or fewer monthly aggregate tuning hours can also pay the \$100 per webcaster proxy fee to be exempt from filing Reports of Use, but

must claim the exemption and pay the \$100 by the January 31, 2019 to qualify.

In case you've forgotten why streaming stations have to take these actions with SoundExchange, it is because they administer the Copyright Act statutory licenses for the public performance of sound recordings via digital audio transmission. By streaming over the internet, new digital copies of the sound recordings being streamed are created, and that's where the statutory license applies.

NCE PERMITTING PROCESS REVIEW AND POSSIBLE CHANGES

At its February meeting, the FCC is slated to consider and vote to adopt a proposed rulemaking to review various aspects of how noncommercial educational permits are awarded. A draft of the rulemaking with all the details can be reviewed [here](#).

For years, the FCC has used a points system to award NCE licenses, including those for low power FM stations. Applicants certify whether they qualify for certain points, and the FCC analyzes all competing applications and determines who has the most points to be awarded a construction permit. They've done this hundreds of times in the past, so there is a healthy amount of precedent on just how the FCC interprets and applies the points system. But some parts of it are unwieldy, such as requiring applicants to amend their bylaws to maintain localism and diversity points, or applying a tie-breaker process that doesn't always produce a clear winner and results in drawn out time-sharing negotiations.

There are other harsh restrictions that result from the process as well, namely holding periods that require permittees to forever maintain certain coverage areas for which they received preferences during the permit awarding process. We've seen permits expire because of lost tower sites or other limitations that prevent construction as planned. The FCC wants to fix that. They also want to redefine "minor change" to include situations where applicant non-profit boards have undergone a gradual change in control while an application is pending.

On the LPFM front, the draft rulemaking item would extend LPFM construction periods from 18 to 36 months and eliminate the current rule prohibiting the sale of unbuilt LPFM construction permits, replacing it with an assignment right after certain holding periods and other criteria.

It has been years since the FCC opened a noncommercial FM filing window, or an LPFM filing window. These proposed rule revisions were not prompted by a party requesting these changes, but instead were apparently issued upon staff recommendations to simplify the process. This may be a preliminary step to adding clarity to the NCE permitting process before new NCE or LPFM filing windows are opened. With any luck, the rulemaking will be completed by summer and new rules will be in effect this fall.

LICENSE RENEWAL REMINDERS

With license renewals starting later this year, two recent FCC fines – one for [\\$495,000](#) and another for [\\$144,344](#) – are timely reminders about how license renewal can go really wrong for some broadcast stations.

Let's start with the smaller one. An LPTV station licensee never filed for a license renewal in 1998, was reminded by the FCC about this oversight in 2004, had its license cancelled in 2005 for not responding, and yet continued to operate the station without a license until FCC field agents visited in 2017 to tell them that they were violating the Communications Act. The end result was cash register windfall for the FCC, who assessed a monetary forfeiture of \$144,344 for operating the station without a license for 18 years. Ouch. Lesson: Don't forget to file your renewal application.

Now for the bigger one, which involved multiple NBC/Telemundo television stations. During the 2004-2007 and 2012-2015 renewal cycles, 23 of their stations failed to air sufficient amounts of children's television core programming and occasionally failed to file the quarterly FCC Form 398 Children's Television Report. Renewals were granted here pursuant to a Consent Decree, but not

without a whopping \$495,000 payment to the US Treasury and a compliance plan that would make your eyes water. Ouch. Lesson: Comply with the children's television rules.

DATES TO REMEMBER

January 30, 2019

Extended deadline for all FCC submissions or filings that were suspended during the partial government shutdown.

January 31, 2019

All stations streaming a signal on the internet must file their statement of use and make a minimum payment of \$500 per channel to Sound Exchange.

February 1, 2019

AM, FM, TV and Class A Stations in Arkansas, Kansas, Louisiana, Mississippi, Nebraska, New Jersey, New York and Oklahoma: if five full-time employee threshold is met, complete EEO public file report and post same in public file as well as on station website. Under FCC EEO rules, a full-time employee is one that works 30 hours per week, on average.

TV & Class A Stations in New Jersey and New York: if five full-time employee threshold is met, prepare **and** electronically file mid-term EEO Form 397 and place copy of filed report in your public inspection file. Reminder – the Form 397 requires that the station's last two EEO public file reports be submitted to the FCC. Under FCC EEO rules, a full-time employee is one that works 30 hours per week, on average.

Post-Auction Phase Two TV and Class A Stations: deadline to file FCC Form 387 10-Week Transition Progress Report in LMS.

April 1, 2019

AM, FM, TV and Class A Stations in Delaware, Indiana, Kentucky, Pennsylvania, Tennessee and Texas: if five full-time employee threshold is met, complete EEO public file report and post same in public file as well as on station website. Under FCC EEO rules, a full-time employee is one that works 30 hours per week, on average.

TV & Class A Stations in Delaware and Pennsylvania: if five full-time employee threshold is

met, prepare **and** electronically file mid-term EEO Form 397 and place copy of filed report in your public inspection file. Reminder – the Form 397 requires that the station's last two EEO public file reports be submitted to the FCC. Under FCC EEO rules, a full-time employee is one that works 30 hours per week, on average.

April 10, 2019

TV, Class A, AM & FM Stations (commercial & noncommercial): complete 1st Quarter 2019 issues/program reports and place in public file.

TV & Class A stations (commercial only) and any LPTV station with must-carry rights: complete and electronically file via LMS the FCC Form 398 Children's TV Programming Report for 1st Quarter 2019, and also compile and post to the public file records relating to the station's compliance with children's programming commercial limits for 1st Quarter 2019.

TV & CLASS A STATIONS CHANGING CHANNELS AS PART OF THE REPACK OR BASED ON VOLUNTARY RECEIPT OF AUCTION FUNDS SHOULD FILE A TRANSITION PROGRESS REPORT IN LMS (UNLESS THE STATION HAS ALREADY TRANSITIONED).

Class A TV Stations Only: complete and post to your online public file a certification of ongoing Class A eligibility.

April 12, 2019

Transition Deadline for Post-Auction Phase Two TV and Class A stations to cease operations on pre-auction channels and commence operations on post-auction channels

April 13, 2019

First day of post-auction new channel testing for Phase Three TV and Class A stations.

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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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