



# Virginia Association of Broadcasters Legal Review



Brooks, Pierce, McLendon, Humphrey &  
Leonard, LLP  
Counsel to VAB • (919) 839-0300

250 West Main Street, Suite  
100  
Charlottesville, VA 22902 • (434)  
977-3716

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## Legal Memorandum

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*Deadlines:*     [January 10: 4Q Form 387 Reports Due for Transitioning TV Stations](#)  
[December 21: Singleton FM Translator Long-Form Applications Due](#)  
[December 31: DMCA Registered Agent Info Must Be Filed Via Web](#)

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### Fourth Quarter “Transition Progress Report” for Post-Auction Transitioning Stations Due **January 10, 2018**

All full power and Class A transitioning stations that are changing channels in the post-auction transition are required to file Transition Progress Reports—FCC Form 2100, Schedule 387 (“Form 387”)—on a quarterly basis, by the tenth day of the month following the end of the calendar quarter; thus, Form 387 is due by **January 10, 2018**. (The first Form 387 filing for such stations was due October 10, 2017.) Transition Progress Reports must provide information regarding steps stations have taken toward construction of their post-auction facilities.

*Finding Form 387 in LMS.* Form 387 must be filed via the FCC’s LMS (Licensing and Management System) filing platform. Navigating to Form 387 in LMS is not particularly intuitive. As such, here are instructions as to how to get to Form 387:

- Log into LMS using the FRN that is associated with the relevant station using this URL: <https://enterpriseefiling.fcc.gov/dataentry/login.html>.

- Click on the “Authorization” tab on the top left corner of the landing page.
- On the next page, click on “License Authorization” of the station for which the schedule is being submitted.
- On the next page, click on “File an Application”.
- From the options presented, click on “Transition Progress Report”.
- Complete the questions and, when ready and authorized, submit the application.

*NAB Encourages Transitioning Stations to Identify and Describe Potential Issues.* Two questions on Form 387 require each filer to indicate whether, as of the date the report is filed, the station expects to procure, install, and schedule all equipment and services necessary in a timely fashion to meet its transition deadline. In the first quarterly filings, the vast majority of stations indicated that they do. NAB is encouraging stations—even if they continue to be on schedule to meet all applicable FCC transition deadlines—to include narrative descriptions of any *potential* issues that could *possibly* arise as their transition unfolds and progresses. For example, if a station is located in an area that is threatened annually by hurricanes, tornadoes, wild fires, or other weather-related circumstances that could, conceivably, affect the timeliness of the station’s post-transition installations, the station may wish to identify such circumstances in its fourth quarter 2017 Form 387 report.

*Form 387 is Due Each Quarter.* As noted above—and much like Children’s Television Programming Reports—Form 387 must be filed electronically by the 10<sup>th</sup> day following the end of each calendar quarter. Transitioning stations will have to file the Form 387 each quarter until the station ceases operation on its pre-auction channel. The Form 387 will also have to be filed at other specific times prior to and following the completion of construction.

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## Singleton FM Translator Long-Form Applications Due **December 21, 2017**

On November 1, the Media Bureau released a [Public Notice](#) (“Public Notice”) announcing the opening of the filing window—from December 1 to December 21, 2017—for long-form FM translator construction permit applications by AM stations who timely filed “Tech Box proposals” that are not mutually exclusive with any other proposals from the [Auction 99](#) July 26 – August 2, 2017, filing window. A [list](#) of those qualified to participate in this upcoming filing window was released with the Public Notice. **Applicants must complete and file these long-form applications no later than December 21.** Filers who are not fee-exempt must also pay the required FCC filing fee and submit payment-related Form 159 for each application.

Applicants are permitted to make minor modifications to the engineering data submitted earlier this year in their Tech Box proposals. Such minor changes include changes to power, height,

directional pattern, and channel. However, applications that include any major change (as defined by the FCC’s rules), or any change that creates a new conflict to any pending Auction 99 Tech Box proposal or to any prior-filed Form 349 application, will be dismissed.

In addition, any singleton long-form applications filed between December 1 and 21 that do not comply with the procedures contained in the Public Notice will be dismissed. The Public Notice states that the application deadline of December 21, 2017, will be strictly enforced. Thus, such applicants should not leave the long-form application to the last minute.

At some point after the December 21 filing deadline, the Media Bureau will release Public Notices in the FCC’s Consolidated Database System (CDBS) entitled “Broadcast Applications.” These Broadcast Applications Public Notices will list applications determined to be “acceptable for filing”—i.e., grantable and not subject to dismissal. Any petition to deny a long-form application must then be filed within 15 days following the release of the relevant public notice. Interested parties will obviously need to monitor these Broadcast Applications Public Notices.

AM stations that filed FM translator proposals in the Auction 99 filing window should review the list of eligible participants and the Public Notice for additional detail on procedures, and plan to complete and file their long-form applications during before December 21.

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## DMCA Registered Agent Filings Due – Via Online Filing System – By **December 31, 2017**

Broadcasters operating websites that wish to avail themselves of certain copyright infringement protection under the DMCA must, among other things, register a “designated agent” with the U.S. Copyright Office. On December 1, 2016, designated agent registration became subject to a mandatory online registration process (replacing the old system through which registrations were submitted on a paper form either in hardcopy, or as a scanned submission of the paper form via email).

If your station previously designated an agent using the “old” paper/email process, and has not yet submitted a new designation using the new online system, then you must do so by no later than **December 31, 2017**. Broadcasters needing to make the required filing can access the Copyright Office’s website [here](#). Note that December 31 is a Sunday, meaning stations should treat Friday, **December 29, 2017**, as the deadline.

Stations may recall that the U.S. Copyright Office created the new online filing system last year for registering websites, apps, and other online platforms for so-called “DMCA safe harbor” protection from copyright infringement liability. If your station’s website or app—like most online platforms—provides links to material on other websites, or if your station’s website or app hosts material submitted by users (“user-generated content” or “UGC”), then you may need to take action.

*DMCA Safe Harbor Protection Generally.* Section 512 of the Digital Millennium Copyright Act (“DMCA”) provides safe harbors from copyright infringement liability for online service providers

(including stations that operate websites and apps) when certain eligibility requirements are satisfied. For example, the safe harbors may protect a station from copyright liability in situations where the station is not aware that a hyperlink on its website is directed to infringing content hosted on another site. For station websites that host UGC, the safe harbors may also protect the station if the broadcaster is not aware that a particular item of such UGC infringes the copyright of another.

*Designated Agent Contact Information.* Among several other requirements and conditions, a station seeking to avail itself of the DMCA safe harbors is required to designate an agent to receive notifications of claimed copyright infringement by making contact information for the agent available to the public on its website and by providing such information to the Copyright Office. A service provider that fails to maintain current and accurate designated agent contact information, both on its website and with the Copyright Office, may lose the safe harbor protections. Historically, agent designations were required to be filed with the Copyright Office on a paper form either in hardcopy, or as a scanned submission of the paper form via email. The new electronic filing system significantly updates this process and replaces the paper-based system.

*Prior Registrants Must Re-Register in Electronic System By December 31, 2017.* Beginning **December 1, 2016**, stations were **required** to use the new online registration system to electronically submit the requisite station and designated agent information to the Copyright Office. **Even if your station previously designed an agent using the “old” paper/email process, you must submit a new designation using the new online system by no later than December 31, 2017.**

*Updates to Designated Agent Information Required.* As under the “old” registration system, stations will be required to keep their designations current and accurate by timely updating information in the online filing system when the information changes.

*Renewal of Registrations Required Every Three Years.* In the new, electronic filing system, agent designations will expire and become invalid three years after registration. Accordingly, you must plan to renew your designations every three years. **If you don’t timely renew the registration, you risk losing the DMCA safe harbor protections.**

*The Filing Fee is \$6.* As under the “old” paper/email system, there will be a fee to file an agent designation with the Copyright Office using the new online system. However, the Copyright Office reduced the fee to a flat fee of \$6 per designation; the fee will apply irrespective of whether the station is registering a new designation, or renewing, amending, or resubmitting a previously registered designation.

*Registration Alone Does Not Guarantee Safe Harbor Protection.* The agent designation filing is only one of many conditions and requirements that a station must satisfy to be entitled to the protection of the DMCA safe harbors. In addition to compliance with the registration requirements, the applicability of the DMCA safe harbors will ultimately depend on the type of material and content provided on your online platforms, your practices and procedures, and other particular circumstances.

*Consult with Legal Counsel!* Because copyright infringement comes with significant liability exposure, stations should contact legal counsel with questions about the DMCA safe harbors or the designated agent electronic registration system.

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## FCC Issues \$20,000 Fine and Imposes Additional Reporting Obligations For EEO Violations

The FCC's random Equal Employment Opportunity ("EEO") audits are not just busy work! They can sometimes lead to fines for broadcasters, and that's exactly what happened recently as the Commission issued a [decision](#) fining a single broadcast employment unit \$20,000 for alleged violations of the Commission's EEO rules. The FCC also imposed additional EEO reporting obligations on the broadcaster for the next three years.

While the decision does not establish any new policies or standards, it serves as an opportunity to review the Commission's EEO rules and the consequences of violations—and illustrate particularly well the parade of violations that can flow from a failure to retain required records.

*Brief Review of EEO Requirements.* The FCC's EEO rules require broadcasters with five or more full-time employees (i.e., employees who regularly work 30 or more hours per week) to:

- Establish an EEO Program to prevent discrimination.
- Engage in widespread recruitment for every full-time job vacancy unless an exigent circumstance exists or a position is filled by the internal promotion of a full-time employee. As previously reported, recently the FCC adopted a new rule that permits stations to rely on Internet-only recruitment so long as full-time vacancies are widely disseminated.
- Assess the effectiveness of their recruitment programs to ensure they are achieving broad outreach and to address any deficiencies.
- Maintain recruitment records that include information about organizations that request vacancy notices, information about the recruitment sources notified about each vacancy, and information about the number of interviewees referred by each recruitment source.
- Compile annual EEO Public File Reports to be placed in the public inspection file every year on the anniversary of the date the station's license renewal application is due to be filed with the FCC.
- Engage in the proper number of outreach initiatives every two years (two or four initiatives depending upon the size of the station and market) and maintain adequate records to substantiate the performance of these initiatives.

*The Recent \$20,000 Fine.* In the most recent case, an employment unit in South Carolina filled 11 full-time vacancies during the applicable two-year period but failed to adequately recruit for six of those vacancies—55% of total full-time hires during the two-year period. According to the decision, recruitment was inadequate for these six vacancies because the unit either failed to report any recruitment sources or relied only on word-of-mouth referrals. The FCC has long taken the position that “private” recruitment sources like word-of-mouth referrals are not enough, by themselves, to satisfy the widespread recruitment requirement. The unit also allegedly failed to notify a recruitment source that had specifically requested vacancy notifications for seven hires—64% of the total full-time hires during the relevant period. Piling on to the alleged violations, the unit apparently lost most of its EEO records after its business manager left the stations. This led to a third finding of a violation for failure to retain records of the number and sources of interviewees for 10 hires (91%). Without these records, the unit could not include multiple pieces of required information in its annual EEO Public File Report—resulting in two additional violations. The Commission found this failure in the record-keeping area evidence of a lack of self-assessment, another separate rule violation (if you’re keeping count that is six total alleged violations). In determining the amount of the fine to be issued, the Commission considered relevant the licensee’s history of alleged EEO violations in two different employment units—upwardly adjusting the proposed fine on that basis. Ultimately, the licensee was fined \$20,000 and ordered to comply with additional reporting obligations for the next three years.

*Lessons to Learn.* There are several broad principles that stations should take away from this case:

- The use of “private” recruitment sources alone, such as word-of-mouth referrals, internal company bulletin boards, and/or walk-ins, is also inadequate to comply with the widespread recruitment requirement for all full-time job vacancies.
- Record-keeping can be the “tail that wags the dog” in EEO enforcement actions. The failure to keep (or to keep and then lose) records of recruitment efforts, including dissemination of full-time vacancies and the number and referral sources for interviewees, constitutes an EEO rule violation in itself and can also lead to a host of other violations. Without adequate records, a station employment cannot complete its EEO Public File Report with all required data or demonstrate its compliance with the widespread recruitment rule.
- The FCC is continuing to enforce the self-assessment provisions of the EEO rules. Stations should make it a special point of emphasis to evaluate and discuss their EEO programs and the successes or failures of particular recruitment sources and techniques and outreach activities. Failure to analyze the number or referral sources of interviewees demonstrates, in the FCC’s eyes, failure to perform adequate EEO program assessment.

If you have not done so within the past year, the start of a new year offers an excellent opportunity to plan a review and evaluation your station’s EEO programs and record-keeping, recruitment practices, and outreach initiatives.

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

*Stephen Hartzell, Editor*

BROOKS, PIERCE, McLENDON,  
HUMPHREY & LEONARD, L.L.P.

Wade H. Hargrove  
Mark J. Prak  
Marcus W. Trathen  
David Kushner  
Coe W. Ramsey  
Charles E. Coble  
Charles F. Marshall  
Stephen Hartzell  
Julia C. Ambrose  
Elizabeth E. Spainhour  
J. Benjamin Davis  
Timothy G. Nelson  
Amanda Whorton

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