



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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Post-Auction Repack Transition: FCC Extends Filing Deadline for First Priority Window to September 15 (Deadline Was September 8)

The “First Priority Window” for certain full power and Class A television stations to file construction permit applications was opened by the FCC on August 9, and it was originally scheduled to close on September 8. As a result of some problems with the FCC’s LMS (Licensing and Management System) filing platform, the **FCC has extended the deadline to 11:59 pm Eastern Time on Friday September 15.**

The First Priority Window is available only to: (1) 25 repacked stations that were granted a waiver of the July 12, 2017, filing deadline for applications for initial construction permits because the FCC has determined that those 25 stations are “unable to construct” the specified facilities assigned to them; (2) any repacked station, UHF-to-VHF band changing station, or non-repacked station entitled to protection in the repacking process that is predicted to experience a loss of population served in excess of one percent (1%) as a result of the repacking process; and (3) Class A stations that did not receive protection and were displaced in the repacking process.

Stations eligible to file in the First Priority Window may request expanded facilities, or an alternate channel. Applications for expanded facilities are limited to those that qualify as a minor change under the FCC's rules. Applications for alternate channels are "major change" applications and will be subject to the FCC's local public notice requirements and a 30-day period during which petitions to deny can be filed. Band changing stations may not apply for alternate channels outside of their post-auction band. Stations that believe they are eligible to file in the First Priority Window and that want to make a filing should immediately contact their consulting engineer and legal counsel in order to meet the September 15 deadline.

Approximately 14 to 30 days after the First Priority Window closes, the FCC will open the Second Priority Window, which it will announce via release of a public notice.

TV Stations: 2017 Must Carry & Retransmission Consent Elections Must be Made by October 1

It is time again for each full-power commercial television station to make an election for either retransmission consent or must carry status for its primary digital channel. Elections must be made **by October 1, 2017**, for the three (3) year period commencing January 1, 2018, and ending December 31, 2020. Remember that a commercial station's failure to make a retransmission consent election for cable will result in a default to must carry status on the relevant cable system. Conversely, failure to make an election for satellite will result in a default to retransmission consent on the relevant DBS provider. (Thus, commercial stations wishing to elect retransmission consent for satellite providers do not need to send them a notice.) This distinction is critical both for stations that typically rely on must carry and for stations that typically elect retransmission consent.

Noncommercial stations do not have retransmission consent rights, but they, too, must send each of DIRECTV and DISH Network a notice by October 1, 2017, if they want to be carried on the DBS provider's satellite system. In addition, although not required, noncommercial stations may wish to send must carry notices to cable operators in order to specify their channel position, consistent with FCC rules, on an operator's system.

Commercial stations will want to keep the following in mind as they go through this year's retransmission consent/must carry election process for MVPD carriage:

- * Each cable system. Broadcasters electing retransmission consent must make an election for each cable system (including telco, SMATV, MDS, and MMDS systems) on which its station is carried within any portion of the station's DMA or FCC television market.
- * An existing retrans deal does not suffice. Even if a station has an existing retransmission consent agreement with a cable operator extending into the next three-year election cycle, a retransmission consent election form must nevertheless be sent to each cable system.

- * *It's better to be safe than sorry.* Elections are not required for MVPD systems that operate entirely outside of a station's television market. If a broadcaster is uncertain whether a system provides any service within its station's market, however, it's best to err on the side of caution by sending an election notice just in case.
- * *Must Carry stations do not have multicast carriage rights.* Recall that must carry stations do not have multicast carriage rights, but a must carry station can specify a channel location, consistent with FCC rules. This is one of the main reasons why a station electing must carry would send a notice to a cable operator (since otherwise a failure to send any election would default to must carry in the case of cable anyhow). Commercial broadcasters are encouraged to contact their FCC legal counsel if they intend to elect must carry in a particular market or service area.
- * *Certified mail, return receipt requested.* Archaic as the FCC rule may be, elections must still be sent by **Certified U.S. mail, return receipt requested.** Do not forget to do this and to keep copies of your sent letters and receipts!
- * *Send notices now!* If a station has yet to send its notices, it ought to consider doing so as soon as possible; the October 1 deadline will be here sooner than you think. Mailing election notices now may afford stations time to receive the certified mail receipts, or to have an election letter returned as undeliverable so that a station can track down an alternative address.
- * *Put them in the public file.* Copies of all must carry and retransmission consent forms must be maintained in a station's online public file. Stations may also wish to place the returned certified mail receipt in the public file along with its matching election form. A station's election form for the current cycle (i.e., 2015-2017) must stay in the public file until the current cycle ends. Thus, the old (2015-2017) election notices can be removed from the online public file in January 2018.
- * *Search for those addresses!* The most challenging part of the election process can be verifying cable systems' addresses and making sure no system is missed. Here are some suggestions as to where to look to try and find the correct address(es) for a system:
 - The address to which the election was sent in 2014.
 - A notice address provided by the cable operator in a station's current retransmission consent agreement, as may have been amended by any notices of changes of address.
 - Any Nielsen information on cable operators in a station's DMA that a broadcaster may have.
 - The address to which a station's local television competitors sent election notices, either in the current election cycle or for the new election cycle. These can be checked through those stations' online public files.

- Looking up addresses through FCC cable databases. The following databases are not intended for this purpose, but are nevertheless useful for it: <https://apps.fcc.gov/coals/forms/search/cableSearchNf.cfm>.
- * *No inconsistent elections.* Stations cannot make inconsistent elections for cable systems serving the same geographic area. That is, if the service area of a cable system overlaps with the service area of a different cable system, the station must make the same election with respect to both cable systems in that area. Stations do not have to make the same election with respect to satellite carriers.

TV Stations: Remember to Obtain Closed Captioning Certifications from Programming Providers

With the new broadcast season upon us, it is a good time for television stations to take stock of the closed captioning certifications they have received from programming providers. Stations will recall that the FCC's rules relating to written certification of compliance with the closed captioning quality standards have been in effect for more than two years, and they require stations (and other video programming distributors such as MVPDs) to make "best efforts" to obtain a written certification from **all** video programmers from whom they obtain programming regarding compliance with the closed captioning quality standards.

Hold on a Minute; What About the Rules Adopted in February 2016 That Require Program Providers to File Certifications with the FCC? In February 2016, the FCC adopted new rules that will change the closed captioning certification process; once the new rules go into effect, stations will not be required to collect certifications from programming providers, and, instead, programming providers will be required to file certifications electronically with the FCC. However, **the new certification procedures adopted in February 2016 ARE NOT YET IN EFFECT**, and the FCC has not yet constructed its closed captioning certification database. Thus, for the indefinite future, the certification requirements that became effective in March 2015 remain in effect.

How to Obtain a Certification. To achieve compliance with the "best efforts" requirement, stations may retrieve a programmer's closed captioning quality certification from a website or other widely available location. If a station is unable to so locate a programmer's certification, the station is then required to make a written request to the video programmer in order to obtain the certification. If a station cannot locate the certification itself and is unable to obtain the certification after requesting it in writing from the programmer, the station "shall promptly submit a report" to the FCC to identify the programmer that did not make a certification available. Instructions for reporting non-certifying programmers to the FCC were provided in a [May 2015 Public Notice](#). Upon receipt of a report identifying a non-certifying video programmer, the FCC will send an acknowledgement to the station by e-mail and will place the name of the non-certifying programmer in a [publicly available database](#). Reporting any entity to the FCC for any reason is an undertaking that warrants careful consideration. In the realm of closed captioning certifications,

revenue streams and relationships may be at risk because stations are required to obtain certifications from all programmers, including paid programming providers. Stations are encouraged to work closely with rep firms, agencies, and programmers to ensure sufficient certifications are obtained in a timely fashion. Stations would be well-advised to consult with legal counsel before reporting a non-certifying programmer to the FCC.

What if a Station (or Channel) Is Exempt from Closed Captioning Requirements? When a station (or an individual channel, such as a multicast channel) qualifies for exemption from the general closed captioning requirements (e.g., under the \$3 million gross revenue exemption), the station must still request certification from all programmers because such a station is still required to pass-through and air all captions embedded in programming by the program provider.

“All” Video Programmers. Stations must obtain the certifications referenced above from all video programmers. Thus, stations must obtain (or, if unavailable, request) such certifications not only from networks and syndicators but also all paid programming providers, religious programming providers, and any other provider of program material to the station. Note, however, that the FCC specifically stated that MVPDs are not required to request or obtain certifications from television stations.

Are Stations Required to Obtain Certifications from Programmers Every Year? The rules merely require stations to obtain closed captioning certifications from all programming providers. So long as a certification continues to apply to a programming provider’s programming airing on a station, the station does not need to obtain a new certification from the provider. In short, stations are not required to obtain new certifications on an annual basis. However, from time to time stations begin airing (i) programming from a new programming provider, or (ii) programming from an existing provider that isn’t covered by an existing certification—in such situations, stations must obtain a closed captioning certification from the programming provider. This memorandum is really intended to remind stations to obtain certifications in those situations.

Important Reminder for Severe Weather Coverage: Nuts & Bolts of the FCC’s Emergency Access Rules

When television stations cover severe weather events, it is critical that they remember their obligations under the FCC’s “emergency access” rules. The points below do not represent a full exposition of all the regulatory details of the emergency access rules; they are intended to serve merely as reminders. Previous memoranda have discussed the applicable rules in greater detail.

What “Emergency Information” Is Covered By the Emergency Access Rules? The FCC’s emergency access rule identifies “emergency information” as information about a current emergency that is intended to further the protection of life, health, safety, and property, i.e., “critical details” regarding the emergency and how to respond to the emergency. Examples of emergencies include hurricanes, tornadoes, severe thunderstorms, floods, tidal waves, earthquakes, icing conditions, heavy snows, widespread fires, discharge of toxic gases, widespread power failures, industrial explosions, civil disorders, school closings and changes in school bus

schedules resulting from such conditions, and warnings and watches of impending changes in weather.

“Critical details” include, but are not limited to: specific details regarding the areas that are or will be affected by the emergency, **evacuation** orders, detailed descriptions of **areas to be evacuated**, specific **evacuation routes**, approved **shelters** or the way to take shelter in one’s home, instructions on how to secure personal property, road closures, and how to obtain relief assistance.

Safety and health information also constitutes “critical details” of “emergency information”: When covering severe weather events and other emergency conditions, stations often report on numerous details, including road conditions, road closures, evacuations, school closures, electricity outages, etc., that clearly fall within the definition of “emergency information.” Moreover, many of the safety and health tips that stations provide during such coverage also constitutes “emergency information.” The FCC has specifically found the following phrases all to constitute “emergency information”:

- “do not evacuate, it’s too dangerous, stay where you are, hunker down as best you can”
- “take shelter”
- “take cover”
- “go to the basement”
- “cover yourself with blankets”
- “go to an interior room”
- “there’s a mandatory evacuation”
- “breathe through a damp cloth”
- “close windows and doors”

The above list is merely illustrative; other safety and health advice may also constitute “emergency information.”

Emergency information provided via audio must be closed captioned or otherwise presented visually on-screen. The key is that the same emergency information that is being provided in the audio (typically, but not always, the spoken words of on-air talent) must also be provided in a visual format. Some stations use live, real-time closed captioning to meet these requirements. When live, real-time closed captioning is not being provided, stations must rely on other visual aids such as graphics, crawls, tickers, lower-third text, slates, and other visual aids.

Emergency information provided visually during non-newscast programming must be video described on the secondary audio stream. Stations are required to video describe emergency crawls (and other text) that air during non-news programming (the “Audible Crawl Rule”). The Audible Crawl Rule requires television stations that provide emergency information to viewers through visual-only means during *non-newscast* programming to video describe the information concurrently on a secondary audio stream. Although the emergency messages are not required to be translated verbatim, the information presented on the secondary audio stream must accurately and effectively communicate the same critical details that are provided visually in the on-screen crawl. There are no exceptions: all television stations must comply with the Audible Crawl Rule.

The Audible Crawl Rule also requires stations to air an aural tone to alert the audience that emergency information is available on-screen during non-news programming (and the tone must also play on the secondary audio stream).

Emergency Information and Closed Captioning Cannot Block Each Other. Stations must ensure that (a) emergency information does not block any closed captioning, and (b) closed captioning does not block any emergency information provided by means other than closed captioning. Stations should carefully assess the placement of information used during graphics-heavy displays in order to avoid overlap.

There Are No Exceptions to These Emergency Access Rules. All television stations and all programming streams are subject to the emergency access rules discussed above. The unscripted nature of most severe weather coverage (and coverage of other emergency conditions) is no excuse for not providing emergency information visually (via closed captioning or other visual display, as discussed above). And, all the same rules apply to multicast channels just as they do to primary channels: (a) if emergency information is provided via audio on a multicast channel, stations must find some way (closed captioning, crawls, slates, scrolls, or handwriting on a blackboard, whiteboard, or other display) to provide the emergency information visually, and (b) if emergency information is provided via crawl during non-news programming on a multicast channel, the material must be video described on a secondary audio stream.

Live Streaming and Clips of Emergency Coverage on the Web. When a station live-streams emergency coverage on the web, any closed captioning that airs on the broadcast version of the emergency coverage must be available to viewers on the web. If a station posts clips of emergency coverage on the web that first aired on television, the closed captioning from the broadcast must follow the clips to the web.

FEMA Requests that Stations Include ASL Interpreters “In Frame”. On September 5, 2017, FEMA sent a letter to the NAB (and filed a copy with the FCC) requesting NAB’s assistance in communicating to TV stations the importance of including ASL (American Sign Language) interpreters “in frame” during their coverage of live events (such as an emergency management press conference about Hurricane Irma) when an ASL interpreter is being used. In many instances, governors and emergency management personnel have a live ASL interpreter on-site when giving updates and statements about a pending emergency, and many deaf viewers understand ASL better than written English provided via closed captioning. Thus, when covering such events, stations should carefully consider FEMA’s request.

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

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