



Virginia Association of Broadcasters Legal Review



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December 30, 2015

Legal Memorandum

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FCC Announces Windows for AM Stations to File to Move FM Translators Up to 250 Miles; Web-Based Tools Launched to Assist AM Stations Identify FM Translators

I. Introduction

In late October, the FCC adopted a [First Report and Order](#) (the “Order”), Further Notice of Proposed Rule Making (“Further Notice”) and Notice of Inquiry (“NOI”) in its two-year-old AM Revitalization proceeding. The news is—by and large—favorable for AM radio operators, but the existence of the Further Notice and NOI means that the FCC’s work is not finished, and all issues are not resolved. Of course, only time will tell whether and to what extent the new rules—some of which represent a roll-back of prior rules that had unintended, unfavorable consequences for AM service—will “revitalize” AM service.

We previously distributed a memorandum discussing the AM Revitalization proceeding, including new opportunities for AM stations to use FM translators, modifications to the daytime and nighttime community coverage standards for existing stations, elimination of the so-called

“Ratchet Rule,” and facilitation of implementation of MDCL technology. This memorandum focuses exclusively on FM translator opportunities for AM stations.

II. New FM Translator Opportunities for AM Stations

The “big ticket” item from the AM Revitalization proceeding is a series of opportunities for AM stations to supplement and enhance their AM band operations with FM translator operations. In fact, immediately following the release of the AM Revitalization Order, the FCC issued a [Public Notice](#) regarding the “nuts and bolts” of a series of FM translator filing “windows” for AM stations, and last week, on December 23, 2015, the FCC issued a [second Public Notice](#) (which is attached to this memorandum for your review) announcing the specific dates for the filing windows. Things are going to move quickly, filing windows are going to open as soon as January 29, 2016, and AM stations need to be ready.

AM Stations May Move an FM Translator up to 250 Miles. In a nutshell, the FCC has adopted a policy that will allow AM stations to acquire and move existing FM translators (licensed or unbuilt construction permits) **up to 250 miles** and to specify **any rule-compliant non-reserved band FM channel**. The 250-mile distance is measured from the existing translator transmitter site to the proposed transmitter site (i.e., the distance is *not* measured from the translator transmitter site to the AM station’s transmitter site). This new policy is a limited waiver of the rule that generally limits relocations to areas where the new FM translator contour would overlap with its old contour, and to first, second, or third adjacent channels. Under the new limited waiver, the move must still satisfy the AM/FM translator “fill-in” service restrictions. That is, the FM translator’s proposed 60 dBu contour must be contained within the AM station’s 2 mV/m daytime contour and may not extend more than 25 miles from the AM station’s transmitter site. FM translators relocated pursuant to this limited waiver will be required to rebroadcast the AM primary station for a period of **at least four years**.

As discussed immediately below, the FCC will open two filing windows for this purpose in 2016.

250-Mile Filing Windows in 2016. According to the Public Notice issued on December 23, 2015, the filing windows to move an FM translator up to 250 miles are as follows:

First Window:	January 29, 2016 – July 28, 2016 (11:59 pm ET)
Second Window:	July 29, 2016 – October 31, 2016 (5:59 pm ET)

The First Window will be for Class C and Class D AM stations, and the Second Window will be for all AM stations that did not file during the First Window—in other words, Class C and D stations may file either during the First Window or during the Second Window but cannot file during both windows, while Class A and B stations may file only during the Second Window. As set forth above, the First Window will last for six months, and the Second Window will last for three months and will open immediately after the close of the First Window. In these windows, each eligible AM station will be limited to relocating **one** (and only one) non-reserved band FM translator station. The windows will be first-come/first-served, which means that early applications may impact later application opportunities, and it also means that if two applications

are filed for the same channel on the same day, they will be considered mutually exclusive by the FCC. In a case of mutual exclusivity, the applicants will have an opportunity to resolve the situation through settlement or technical amendment, including an amendment to move to a different non-reserved band channel.

Nonetheless, broadcasters who wish to file an application during one of these windows will need to be very careful and diligent in making their filings; the December 23 Public Notice discusses whether a station may re-file its application if the first application is dismissed or rejected (or if an application to acquire the translator fails to obtain a grant) and concludes, in no uncertain terms: **“Only one application may be filed by/on behalf of each AM station in either of the windows; applicants will not be given an opportunity to re-file under any circumstance.”** Thus, while certain amendments will be allowed, a dismissal and re-filing of an application will not be permitted.

How Can AM Stations Find an FM Translator to Move? To take advantage of these window opportunities, you will first need to identify an existing FM translator (license or construction permit) within 250 miles that can be moved to a location that satisfies the “fill-in” service restrictions for your AM station, and arrange for either the purchase or lease of the translator.

According to the FCC’s December 23 Public Notice, the FCC has developed tools to assist AM stations to locate eligible translator stations and identify rule-compliant FM translator channels. As stated in the Public Notice:

The translator search tool allows an AM licensee to input preferred relocation sites at or near its AM transmitter site. The tool then identifies all translator stations authorized at locations up to 250 miles away. The second tool, the translator channel finder, identifies channels that are tentatively available for use by FM translators at any location. Detailed information about the tools is available at www.fcc.gov/media/radio/am-revitalization. Please note that the translator tools are intended solely to assist applicants in tentatively identifying translators and channels. An applicant should consider using a consulting engineer or an otherwise qualified party to determine the technical acceptability of its application.

In its AM Revitalization Order, the FCC noted that over the past year the vast majority of FM translators have sold for under \$100,000, and a substantial majority of those for less than \$50,000. Since the release of the Order, however, we have observed the price of FM translators begin ticking upwards.

Waiver Requests for FM Translator Permits Expiring in 2016. In its Order, the FCC observed that there are currently a significant number of existing FM translator construction permits from Auction 83 that are scheduled to expire in 2016, which could affect the viability of such permits for purposes of these 250-mile move windows. Thus, the FCC has noted that it will view favorably most requests to waive these translator construction deadlines provided that the

AM station licensee proposing to use the FM translator “commit[s] to prompt FM translator station construction and initiation of broadcast operations.” It is highly recommended that an AM station interested in an FM translator construction permit that will expire in 2016 consult with legal counsel.

FM Translator Auction Windows Opening in 2017. In 2017, the FCC will open two additional filing windows, for those AM licensees and permittees that do not file an application during the 2016 250-mile move windows. The 2017 windows will be FM translator application “auction” windows, with the first being made available only to Class C and Class D AM stations that did not participate in the 2016 windows. The second 2017 auction window will be open to all AM station licensees and permittees that have not participated in any of the prior three windows.

The windows opening in 2017 will be for AM permittees and licensees to propose a brand-new FM translator, which must comply with the FCC’s AM/FM translator “fill-in” service restrictions, and any FM translator acquired during the 2017 auction windows will be permanently linked to the associated AM station. Applicants that propose mutually exclusive facilities during these auction windows will have an opportunity to resolve the mutual exclusivity through settlements or technical resolutions before progressing to an auction for remaining mutually exclusive proposals.

AM Stations Interested in FM Translators Should Begin Work Immediately. Given the fact that the First Window opens at the end of January, and given that the FCC will process applications on a first-come/first-served basis, any AM station interested in obtaining and/or moving an FM translator should get to work right away.

Copyright Royalty Board Sets New Webcast Royalty Rates

Radio broadcasters who stream their programming over the Internet will be bringing in the New Year with much cheer. The [Copyright Royalty Board](#) (“CRB”)—which is the entity that regulates music licensing rates for streaming—has established new blanket music licensing rates for broadcast and non-interactive pureplay webcasters. Effective January 1, 2016, the broadcaster rate will be approximately one-third lower than the current rate.

In mid-December, the CRB released its [determination](#) which set a reduced royalty rate for commercial non-subscription services such as broadcast radio stations that stream programming on the Internet. There are no carve-outs or exceptions for the rates in the CRB determination for “small” broadcasters or webcasters, and the rates include the making of an ephemeral copy of the song necessary for the streaming process. The rate for 2015 was 25 cents per 100 performances (i.e., \$0.0025 per performance) but for 2016 the rate has been reset to 17 cents per 100 performances (i.e., \$0.0017 per performance). A “performance” is the delivery of one song to one listener device. The rates for noncommercial webcasters will continue to be \$500 per year for each channel or station. If the noncommercial webcaster’s service exceeds 159,140 ATH in a month on a channel or station (159,140 ATH represents approximately 5,305 listeners each listening for 1 hour every day for one month), the noncommercial webcaster will be subject to a rate of 17 cents per 100 performances (i.e., \$0.0017 per performance). The initial \$500 is a

nonrefundable fee which remains on the noncommercial webcaster's account as a credit toward any additional royalty fees that it incurs during the same year (with a maximum royalty fee of \$50,000). For the years 2017 through 2020 all rates will be adjusted in accordance with the Consumer Price Index. All fees referenced above are payable by the streaming broadcaster or webcaster for each individual channel and each individual station operated by the broadcaster or webcaster.

At the same time as making the downward rate adjustment, the CRB eliminated the payment of rates as expressed as a percentage of revenue, perhaps because such a rate structure impinged upon the entry of a highly profitable business into the streaming space. As in past years, all streaming royalties must be paid to [SoundExchange](#) (the performing rights organization which collects payments on behalf of record labels and holders of copyrights in sound recordings).

This latest CRB [determination](#) is important to radio stations that already stream programming over the Internet or that are considering streaming or have found prior rates to be too high to consider streaming. In its push to sway the CRB to lower webcast royalty rates, the NAB posited that many local radio stations attempting to enter the streaming business find the high royalty rates to be prohibitive to a streaming business model. NAB proposed that lower rates would allow more broadcasters to invest in streaming services, which would benefit consumers. Although the NAB had proposed a lower rate of 5 cents per 100 performances, NAB has generally indicated that it is pleased by the rate reduction.

TV JSAs May Be Grandfathered Another 10 Years: Congress Passes Spending Bill with JSA Rider

As we have discussed previously, the FCC in 2014 voted to make TV station Joint Sales Agreements ("JSAs") that allow for the sale of 15% or more of the advertising time on a competing local station attributable to the TV station as an ownership interest under the Commission's media ownership rules. (JSAs are financial arrangements between local TV broadcasters where one station sells advertising time for another. These agreements have become increasingly popular in recent years among broadcasters in small and medium-sized markets across the country, and the financial savings have helped to expand the diversity, localism, and competition of programming.) The new rule adopted in March 2014 would require the broadcasters to unwind the agreements in markets where the effect of the JSA would be to violate the ownership rules because duopolies (or triopolies) are not allowed.

Broadcasters with JSAs in existence at the time the 2014 rule was adopted were given until June 2016 to unwind them, a period which was extended by six months by Congress as part of the STELA reauthorization legislation. Since that time, multiple proposals to further extend the deadline for unwinding pre-March 2014 TV JSAs have been offered in Congress; fortunately, on December 18, 2015, one such proposal—appended as a rider to the 2016 Appropriations Bill—passed both houses of Congress. The rider would grandfather for 10 years TV JSAs that were entered into prior to March 2014.

D.C. Federal Court Explains that Internet Video Streaming Services Don't Qualify for a Compulsory Copyright License

In November 2015, a D.C. federal court ruled that Internet video streaming service FilmOn X could not invoke the compulsory copyright license available to cable systems under Section 111 of the Copyright Act. Section 111 allows cable systems to distribute broadcasters' copyrighted content without negotiating individual copyright licenses with every network and local station. Following the U.S. Supreme Court's 2014 *Aereo* decision, which described FilmOn X competitor Aereo as "for all practical purposes a traditional cable system," online video distributors or "OVDs" have claimed that they should be entitled to the Section 111 license just as traditional cable systems are.

In July 2015, a federal district court in California tentatively agreed with the OVD position, ruling that FilmOn X is potentially entitled to the compulsory license following the *Aereo* decision. The California court reasoned that the language of Section 111 doesn't distinguish between traditional cable services and OVDs. Broadcasters have appealed that decision to the Ninth Circuit.

Last month, however, the D.C. federal court reached the opposite conclusion. At the time, the court released a two-page order ruling that FilmOn X infringed broadcasters' exclusive rights under the Copyright Act and that the streaming service is not entitled to the Section 111 license. The court kept the opinion explaining its analysis under seal to allow the parties to redact confidential material. The 48-page opinion, released in early December, explains the court's reasoning.

According to the opinion, FilmOn X is not entitled to the Section 111 copyright license because it uses the Internet, rather than a "physical" system of cables or wires like a traditional cable company, to transmit programming to subscribers. The Supreme Court's statement that now-defunct competitor Aereo was, "for all practical purposes," indistinguishable from a traditional cable system referred only to Aereo's liability for "performing" broadcasters' copyrighted works but did not mean that Internet retransmission services are "cable systems" for *all* purposes under the Copyright Act, including the compulsory license.

Section 111 articulates specific requirements for "cable systems," including a "physical facility" that both receives *and* retransmits programming to subscribers by means of wires, cables, microwave, or similar channels. Retransmitting programming via the Internet, the district court concluded, is not covered by the language of Section 111, because the Internet is a global network of interconnected computers that "exists in cyberspace," not a physical facility located in a particular state consisting of wires and cables that deliver programming directly to subscribers.

To the extent any ambiguity remained, the federal court deferred to the longstanding conclusion of the Copyright Office, the federal agency responsible for overseeing the Section 111 licensing scheme, that Internet-based retransmitters are not cable systems entitled to the compulsory license. Although Congress has long been aware of the Copyright Office's position, it has not enacted a separate statutory license for Internet-based retransmission of television programming.

Finally, the D.C. court refused FilmOn X’s request to stay its ruling until the FCC decides whether OVDs should be classified as “multichannel video programming distributors” or “MVPDs” alongside traditional pay-TV service providers—a decision that could subject OVDs to the must-carry and retransmission consent rules. Even a Commission ruling that Internet-based retransmission services qualify as MVPDs would not compel the Copyright Office to reach the same conclusion for purposes of the Section 111 license.

Having found that the Section 111 license is unavailable to FilmOn X, the district court ruled in broadcasters’ favor on their copyright infringement claims based on the unauthorized retransmission of their programming to FilmOn X’s subscribers. The court applied its ruling to both the “near-simultaneous” and time-delayed features of the FilmOn X service.

As we noted when the D.C. court issued its November 12 order, if the contrary rulings from the district courts in D.C. and California result in similarly conflicting decisions from the federal courts of appeals in the D.C. Circuit and Ninth Circuit, that could set the stage for the U.S. Supreme Court to clarify the effect of its *Aereo* ruling on the scope of the statutory copyright license.

Again, the D.C. court’s decision surely will not be the final word on this important subject. We will continue to keep you apprised of significant developments.

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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DA 1491
Released: December 23, 2015

**MEDIA BUREAU ANNOUNCES FILING DATES AND PROCEDURES
FOR AM STATION FILING WINDOW FOR FM TRANSLATOR MODIFICATIONS
AND
AVAILABILITY OF FM TRANSLATOR TECHNICAL TOOLS**

**First Window to Be Held January 29 – July 28, 2016;
Second Window to Be Held July 29, 2016 – October 31, 2016**

As directed by the Commission,¹ this Public Notice (Notice) announces the filing dates for the translator modification application filing windows for AM stations. In the *AMR Order*, the Commission directed the Media Bureau (Bureau) to open two FM translator modification application windows for AM stations to modify and/or relocate FM translator stations (Modification Windows).² The first window will open on January 29, 2016, and close at 11:59 pm EDT on July 28, 2016 (First Modification Window). The second window (Second Modification Window) will open on July 29, 2016, and close at 5:59 pm EDT on October 31, 2016.

Scope. The Modification Windows will provide AM licensees or permittees³ seeking to rebroadcast on an FM translator an opportunity to acquire and relocate one authorized non-reserved band (channels 221-300) FM translator station up to 250 miles. Modification applications for translators currently authorized to operate in the reserved band (channels 201-220) will not be accepted.

Participation. The First Modification Window is available for proposals by Class C and D AM licensees seeking to modify and/or relocate FM translator stations within the non-reserved FM band. The Second Modification Window is available for proposals by AM licensees of any class seeking to modify and/or relocate FM translator stations within the non-reserved FM band. Only one application may be filed by/on behalf of each AM station, *i.e.*, an AM station may be listed as the primary station on only one application filed in one (but not both) of the Modification Windows. To participate in either of the Modification Windows, applicants will be required to electronically file FCC Form 349 as “minor modification” applications.⁴ To distinguish Modification Window applications from typical minor modification applications, Modification Window applicants must indicate in Exhibit 1 that the proposal is

¹ See *Revitalization of the AM Service*, First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, FCC 15-142, para 13 (rel. October 23, 2015) (*AMR Order*).

² *Id.*

³ Unless otherwise specified in this Notice, “licensee” includes both licensees and permittees, “license” includes both license and construction permit authorizations, and “station” includes both licensed and permitted facilities.

⁴ Applicants do not need to seek a waiver of 47 C.F.R. § 74.1233(a)(1) to file Form 349 as a minor modification application. See *AMR Order* at ¶ 15.

a “250-mile window application.” In addition, a Modification Window applicant that is not currently the licensee of the AM station must affirmatively state that it has entered into a rebroadcast agreement with the primary station licensee.

We will dismiss as premature any application proposing a major site change before the Modification Windows open. We will also dismiss any application filed during the First Modification Window proposing to rebroadcast a Class A or Class B AM station. Furthermore, we will dismiss any Modification Window application that proposes to rebroadcast an AM station that has already been listed in a prior Modification Window application as the primary station. Finally, we will dismiss any Modification Window application that seeks to modify an FM translator station currently authorized in the reserved band.

Identifying Eligible Translator Stations and Available Frequencies. Applicants may use two newly created tools to locate eligible translator stations and identify rule-compliant FM translator channels. These internet-based tools are available on the FCC web site at: www.fcc.gov/media/radio/am-revitalization. The translator search tool allows an AM licensee to input preferred relocation sites at or near its AM transmitter site. The tool then identifies all translator stations authorized at locations up to 250 miles away. The second tool, the translator channel finder, identifies channels that are tentatively available for use by FM translators at any location. Detailed information about the tools is available at the website specified above. Please note that the translator tools are intended solely to assist applicants in tentatively identifying translators and channels. An applicant should consider using a consulting engineer or an otherwise qualified party to determine the technical acceptability of its application.

Eligibility, Application Processing, and FAQs. Applicants should refer to the Bureau’s October 26, 2015, Public Notice for additional information regarding eligibility requirements, application processing standards, construction recruitments, and operational requirements.⁵ In addition, in response to the October Public Notice, staff received additional questions regarding the Modification Windows. Below are answers to some frequently asked questions that may help applicants with the filing process.

Q: Is an AM station that already owns or leases one or more translators eligible to file an application in a Modification Window?

A: Yes. AM stations that currently rebroadcast on one or more FM translators are permitted to participate in one of the Modification Windows.

Q: The Modification Windows allow AM licensees to relocate one non-reserved band FM translator station up to 250 miles. How is the 250-mile limit measured?

A: The 250-mile limit will be measured from the existing translator transmitter site to the proposed translator site; the 250-mile limit is not measured from the translator site to the AM station’s transmitter site.

Q: Can an AM Station relocate a translator during the Modification Windows to any channel or must the translator stay on the original or adjacent channel?

⁵ Media Bureau Initiates AM Revitalization Outreach Efforts; Modification Window Procedures and Requirements Announced, Public Notice, DA 15-1215 (Oct. 26, 2015) (October Public Notice), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1215A1.pdf.

A: The FM translator modification application may specify any non-reserved band FM channel (221-300). However, the proposed facilities must comply with the Commission's translators technical rules, 47 C.F.R. §§ 74.1201 - 74.1290.

Q: Can a translator, once obtained and relocated, be changed to rebroadcast another AM or FM station?

A: Not for the first four years of operation. Any FM translator station modified and/or relocated under the Modification Windows must rebroadcast the specified primary AM station for at least four years, not counting any periods of silence by the primary station.

Q: Can an AM station file an application in one of the Modification Windows while the AM station itself has a modification application pending, and subsequently use the translator at the AM station's future site?

A: The proposed FM translator facilities must satisfy the "fill-in" restrictions applicable to AM/FM translator rebroadcasting. The AM station may rely on either its licensed or permitted facilities to satisfy these restrictions. However, a relocated FM translator may be modified subsequently to use an AM station's future authorized transmitter site.

Q: If a reserved-band translator has an application pending to move to the non-reserved band, can it participate in the Modification Windows?

A: Only translators authorized to operate in the non-reserved band as of the date of modification application filing are eligible for the modification windows. New unbuilt translator stations are eligible for the Modification Windows, *i.e.*, eligibility is not limited to translator stations that are licensed and operating.

Q: What if two or more applicants file for the same channel on the same day?

A: Pursuant to 47 C.F.R. §74.1233, applications filed for the same channel on the same day are considered mutually exclusive.

Q: How will the Bureau resolve applications that are mutually exclusive?

A: Pursuant to 47 C.F.R. §74.1233(d)(1), mutually exclusive applications must be resolved through settlement or technical amendments.

Q: Can a mutually exclusive applicant file an amendment to move to a different non-reserved band channel to resolve a conflict with a mutually exclusive proposal?

A: Yes. Amendments to move to any rule-compliant channel will be accepted.

Q: If an AM station files a modification application and the transaction to acquire the proposed FM translator fails for any reason, can the AM station dismiss the original application and re-file a second modification application specifying a different translator station, provided the modification window has not closed? Similarly, if the staff dismisses or rejects an application for any reason, can the AM station re-file its application?

A: No. Only one application may be filed by/on behalf of each AM station in either of the Modification Windows; applicants will not be given an opportunity to re-file under any circumstance.

Q: In the AMR Order, the Commission has proposed that an AM station may use a FM cross-service fill-in translator where the FM translator's coverage contour is contained within the greater of the 2 mV/m daytime contour of the AM station or a 25-mile radius centered at the AM transmitter site. May applicants rely on the proposed "fill-in" rule change in selecting an FM transmitter site?

A: No. As stated in the October Public Notice, to participate in the Modification Windows, the FM translator station's proposed 60 dBu contour must be contained within the AM station's 2 mV/m daytime contour **and** may not extend more than 25 miles from the AM transmitter site.

Q. In the AMR Order, the Commission modified the minimum efficiency rules and redefined Class D stations as those operating with a nighttime RMS less than 107.5 mV/m at 1 kilometer. Based on the change, are existing Class D stations, which did not meet the former minimum of 141.0 mV/m/km, but which exceed the new minimum of 107.5 mV/m at 1 kilometer, automatically reclassified as Class B stations?

A: No. The newly adopted rules will not be applied retroactively to existing stations. Thus, an AM station currently classified as a Class D station, including those that operate with a nighttime RMS exceeding 107.5 mV/m at 1 kilometer, may file an application in the First Modification Window. A station seeking re-classification as a Class B station must file a minor change application demonstrating compliance with all applicable rules.

For additional information, contact:

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