



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

June 17, 2016

Legal Memorandum

In this issue, link to information about

Developments: [Special Displacement Window for LPTVs and TV Translators](#)
[Lack of “Core” Children’s Programming Results in Fine](#)
[FCC Rule Violations Result in Shortened License Renewal Term](#)

FCC Clarifies Eligibility Requirement for Post-Auction Special Displacement Window for LPTVs and TV Translators

As has been widely reported, many low power television and TV translator stations (including digital replacement translator stations) (collectively, “LPTV stations”) potentially will be impacted by the broadcast television spectrum Incentive Auction. Unlike eligible full power and Class A television stations, LPTV stations are not protected in or after the auction and may be displaced as a result of the auction and the repacking process following the auction. Ultimately, displaced LPTV stations will need to either find a new channel from the smaller number of channels that will remain available in the broadcast television bands or discontinue operations altogether. After the auction, the FCC will open a special, limited displacement filing window for “operating” LPTV stations to submit displacement applications proposing new channels.

The FCC recently announced that to qualify to file in the special displacement window, a station must be “operating” on the date the FCC releases the *Channel Reassignment Public Notice*, which is to occur at the end of the Incentive Auction (the “Operating Deadline”). To be deemed “operating,” the station must actually be on the air, and the station’s facilities must be licensed or the station must have a license-to-cover application on file with the FCC by the Operating

Deadline. Stations that are not “operating” by this deadline will have to wait until the completion of the special displacement window before being able to propose a new channel.

Because the Operating Deadline is tied to the status of the Incentive Auction, the deadline date cannot be predicted with certainty. It is likely to be at least a few months from now. The reverse auction component of the Incentive Auction started on May 31 and is currently predicted to continue until early July. Following the reverse auction, the FCC will conduct the forward auction component of the Incentive Auction. The Incentive Auction will not be concluded until both the reverse auction and forward auction components are successfully completed. (The status of the Incentive Auction may be monitored using the FCC’s Incentive Auction Public Reporting System available at: <https://auctiondata.fcc.gov/public/projects/1000>.)

The FCC will open the special displacement window after eligible full power and Class A television stations have had an opportunity to file construction permit applications for their post-auction facilities. The FCC will announce the actual dates for the window at a later time. LPTV stations will not be required to actually cease operations on their current channels until well after the auction has concluded.

The FCC has said that prior to opening the displacement window, a Public Notice will be issued, listing potential channel availabilities in areas where LPTV stations have been displaced. However, it is important to note that displaced LPTV stations are not guaranteed that a new channel will be available to them. In addition to displacement applications for existing LPTV stations, the FCC will allow full-power stations that are reassigned to new channels after the auction to apply for new digital-to-digital replacement translators (“DTDRTs”) beginning with the opening of the displacement window. DTDRTs are TV translators that will be licensed to full power stations and used to recover lost digital service areas that result from the auction and repacking process. DTDRTs are similar to currently authorized digital replacement translators (“DRTs”), which are TV translators that are licensed to full power television stations and are used to recover analog coverage areas that were lost in the 2009 DTV transition.

All applications filed during the displacement window will be considered filed on the last day of the window (in other words, there is no greater priority given to stations that file early in the window). Stations that file conflicting applications during the window will have an opportunity to explore engineering solutions or agree on a settlement to resolve the conflict. Should the parties be unable to resolve a conflict, the FCC will grant co-equal priority to applications for new DTDRTs and displaced DRTs. If a conflict remains after applying the selection priority, the FCC will use an auction to resolve the conflict.

As a reminder, LPTV and TV translator stations are not required to transition to digital operations until 51 months after the release of the *Channel Reassignment Public Notice*. This delay will allow LPTV stations to analyze the outcome of the Incentive Auction and determine the best route to convert their analog facilities after the auction. This extended deadline also applies to construction permits for *new* digital LPTV stations. Permittees of new LPTV stations face a greater displacement challenge following the auction because they will not be eligible to file in the special displacement window unless they build and are “operating” by the Operating Deadline.

While an LPTV station must be operating by the Operating Deadline to qualify to file during the special displacement window, it is important to understand that any new construction efforts made before the conclusion of the auction would not be without risk—if a station is displaced by the auction and a new channel is not available, the station will be required to discontinue operations altogether.

No Excuses: Children’s “Core” Television Programming Rules Must Be Followed

Each full power and Class A television station is required to air a minimum of three hours per week of so-called “Core Programming” to meet the educational and informational needs of children. The Commission also requires that each commercial station file a Children’s Television Programming Report on a quarterly basis reflecting the efforts made by the station during the quarter to serve the educational and informational needs of the children. A recent FCC case demonstrates just how serious the FCC is about these requirements. A station recently entered into a settlement with the FCC in which the station agreed to pay a penalty of \$15,000 and adopt an enhanced compliance program for failing to provide the required Core Programming and adhere to other requirements. The facts unfolded after FCC staff reviewed the station’s renewal application and materials in the online public file.

Based on its review, the FCC found that the station failed to:

- broadcast any children’s Core Programming for three consecutive calendar quarters;
- timely upload to the online public file two Children’s Television Programming Reports (the licensee later uploaded the missing reports shortly before the filing of the renewal application);
- timely upload existing copies of children’s commercial time limits certifications to its online public file for four quarters and timely create and upload such certifications for two other quarters (all missing certifications were subsequently uploaded to the online file shortly before the filing of the subject renewal application).

The station’s renewal application acknowledged these deficiencies and attempted to explain the circumstances behind them. The station outlined the many challenges it faced, shortly after the station acquisition, in meeting the Commission’s requirements. Among the reasons given by the station were the following:

- The station argued it was unable to obtain Core Programming from various networks and syndicators because they were contractually precluded from providing programming to the station;

- The cost of securing available children’s programming was prohibitively high for the station; and
- The station faced staffing issues that affected its ability to adequately manage its records and public inspection file.

In addition, the station advised the Commission that during the period following the three quarters in which it aired no Core Programming, it took steps to air a quantity of Core Programming that exceeded the minimum three-hours-per-week threshold.

In the end, the Commission was unconvinced that the station’s explanations were sufficiently mitigating, and the case was ultimately settled with a fine and compliance plan. The two-year compliance plan requires the station to designate a compliance officer to oversee compliance and to conduct training for all staff concerning FCC rules and policies for children’s educational and informational programming. In addition, the compliance plan requires the station to work with legal counsel to ensure that all FCC filing requirements will be timely met. Finally, the station must file annual certifications that the compliance plan’s requirements are being met.

This case serves as an important reminder that the FCC enforces its children’s programming rules with significant penalties. In light of the FCC’s continuing interest in enforcement of these rules and the substantial penalties for violations, stations may wish to review their performance carefully. In addition, stations should take care to ensure that that routine quarterly filings are timely generated and uploaded to the online public file. To the extent that documents have been omitted from the online public file, stations should consult with their legal counsel about how best to address the situation. And, of course, television stations should always provide sufficient children’s Core Programming to meet the requirements of the Commission.

Serious Violations Lead to Short Term License Renewal

A recent FCC case illustrates how seriously the FCC takes its rules. So seriously, in fact, that the FCC not only fined a station but also renewed the station’s license for only half of the normal license term.

The FCC’s rules require broadcast licensees to maintain a public inspection file containing specific types of information related to station operations. Each licensee must certify (in its license renewal application) that the required documentation has been timely placed and maintained in the station’s public inspection file. Among the materials required for inclusion in the public file are the station’s quarterly Issues/Programs Lists, which must be retained in the file until final Commission action on the station’s next license renewal application. In addition, the FCC’s rules require broadcast licensees to file Biennial Ownership Reports and place copies in the public inspection file.

In considering a radio station’s application for renewal, the FCC found several rule violations. First, the licensee certified that all Biennial Ownership Reports had been filed, but the

FCC staff's own review of Commission records revealed that the licensee had failed to file the biennial reports three times during the eight year license term. In light of its discovery, the FCC staff repeatedly requested that the licensee correct the erroneous certification, and the licensee failed to do so. Second, the station disclosed on its application that some Issues/Programs Lists were missing. This disclosure caused the FCC staff to seek additional information about the missing Lists. Despite the FCC Staff's repeated requests for a detailed listing of the missing Issues/Programs Lists, the station did not provide the requested information.

The Commission found that the licensee willfully and repeatedly violated the rules by failing to retain all required documentation in the station's public inspection file and by failing to file multiple Biennial Ownership Reports. Perhaps even more significantly, the Commission also found that, over an 18-month period, the licensee was unresponsive to the FCC staff's repeated communications concerning the public file deficiencies and advising the licensee to correct the erroneous Biennial Ownership Report certification.

As a result, not only did the FCC impose a fine of \$12,000 for the violations, but, in addition, the licensee's renewal application was only granted for **a period of four years** instead of a full term of eight years! The FCC's decision stated that the short-term renewal period would afford the Commission an opportunity to review the station's compliance with the FCC rules and to take any additional corrective actions that may be warranted.

Lessons learned: First, if the FCC contacts you, you need to respond (and contact FCC counsel!) in a timely fashion. Second, the FCC may review your online public file for verification that certifications made in your renewal application are, indeed, accurate. Finally, stations must, at license renewal time, disclose public file deficiencies and remain proactive about correcting or addressing them.

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
J. Benjamin Davis
Julia C. Ambrose
Elizabeth E. Spainhour
Eric M. David
Timothy G. Nelson

This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

© 2016 Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.