May 25, 2022

Legal Memorandum

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# **ONE-WEEK COUNTDOWN:**

# June 1, 2022: EEO Public File Reports Due

# for Virginia Radio and Television Stations

By **June 1, 2022**—i.e., only one week from today!—all Virginia radio AND television stations must upload their annual EEO Public File Report (covering the period of June 1, 2021, to May 31, 2022) to their online public inspection file and post it to their website (if they have one). Recall that, for purposes of the FCC’s EEO rules, a “full-time” employee is one who works 30 or more hours per week.

As a reminder, the FCC’s EEO rules require broadcast stations to engage in specific non-vacancy outreach efforts. Every two years, stations that have more than 10 full-time employees and are not located in a “smaller market” must engage in at least four of the initiatives on the FCC’s “menu” of outreach options, and stations that are located in a “smaller market” or have five to ten full-time employees must engage in at least two of the initiatives. Stations with fewer than five full-time employees and religious broadcasters who apply religious qualifications to all employees are not required to engage in any “menu option” activities. For Virginia television stations, the current two-year period in which to complete these EEO “menu options” ends June 1, 2022. (Virginia radio stations are currently in the middle of their two-year period, which will end June 1, 2023.)

As stations prepare their 2021–‘22 EEO Public File Report, they will want to keep in mind the Commission’s EEO recordkeeping requirements. Each year the Commission conducts random audits of radio and television stations for EEO compliance. Stations that pay close attention to the EEO recordkeeping requirements will be in a better position to respond if they find themselves subject to an EEO audit. The FCC sent out its first round of 2022 EEO audit letters in March, and typically sends out a second round of EEO audit letters later in the year.

For specific details regarding the contents of the EEO Public File Report and EEO recordkeeping requirements, especially in light of the circumstances created by the COVID-19 pandemic, stations may wish to contact their communications counsel or call the VAB’s FCC Hotline at (434) 977-3716.

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# International Bureau Releases Updated List of Purportedly Inactive and Non‑Operational C-Band Earth Stations

As reimbursement funds continue to flow to broadcasters with qualifying, incumbent C‑band earth stations (e.g., C-band downlink dishes) affected by the ongoing C-band transition, the FCC’s International Bureau recently released [an updated list of incumbent C-band earth stations](https://www.fcc.gov/document/ib-issues-90-day-earth-station-public-notice) that “may be inactive or otherwise not operational” (the “List”). **Broadcasters with earth stations appearing on the List must take action by August 10, 2022, or risk losing their earth station authorization and incumbent status (including entitlement to reimbursement for any earth stations appearing on the list).** For further information and context, please read on.

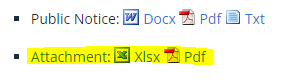
*Background*. You may recall our prior memoranda explaining that various entities—including the C-band “Relocation Coordinator” (i.e., RSM US LLP, or RSM) and third-party contractors such as Wesco or Comsearch—have been conducting outreach to broadcasters regarding various aspects of the C-band transition. As a result of that outreach, the FCC has received reports that certain registered or licensed incumbent earth stations are either inactive, over-registered (e.g., duplicate another registered or licensed earth station), or operate in a different frequency band than the C-band. This has caused the FCC to issue several Public Notices (1) with attached “lists” of allegedly inactive, duplicate, or non-operational incumbent earth stations, and (2) requiring broadcasters who appear on such list(s) to make a filing with the FCC to address the alleged issue with their identified earth station(s).

The latest, May 2022 [Public Notice](https://docs.fcc.gov/public/attachments/DA-22-518A1.pdf) (the “Notice”) and List assert that the earth stations appearing on the List may not be “operational” for one of three reasons: the C-band antennas (e.g., broadcaster downlink dishes) are (1) inactive; (2) over-registered (e.g., 10 antennas are registered, but only 8 antennas are present at the site); or (3) do not receive in the C-band (e.g., when a broadcaster’s downlink dish receives in the Ku‑band, rather than the C-band).

Again, broadcasters appearing on the List must take action by **August 10, 2022**, or risk losing their authorization and incumbent status. Specifically, **the Notice indicates that operators who appear on the List but who do not take necessary action by August 10, 2022, will: (1) have the applicable earth station authorizations automatically terminated by operation of rule; (2) have those authorizations terminated in the International Bureau Filing System; and (3) have their listed earth stations removed from the incumbent earth station list, thus forfeiting interference protection and the possibility of reimbursement for the costs of transitioning those earth stations in the forthcoming C-band transition.**

*How Can I Check the New List?* The new List is currently available as an Attachment—in either Microsoft Excel or PDF format—at the following link:

<https://www.fcc.gov/document/ib-issues-90-day-earth-station-public-notice>



Be aware that the Excel spreadsheet includes **three separate tabs/categories**—we recommend that you review each tab independently to determine whether any of your earth stations appear in any of the spreadsheet’s three categories. The earth stations listed in each of spreadsheet’s three categories are organized in alphabetical order by applicant name. However, we recommend using several different search methods to confirm that none of your earth stations appears on any of the list’s three tabs/categories, such as searching each tab/category not only for your registrant/licensee name (the “ApplicantName” field), but also for your earth station’s call sign (the “Callsign” field) and registration number (the “FileNumber” field).

*What if One or More of My Earth Stations Incorrectly Appears on the New List?* Per the Notice, no later than August 10, 2022, you must submit a filing with required information in the FCC’s IB Docket No. 20-205. Such filing must include at least the following information:

* A statement affirming that your earth station antenna (or antennae) that appears on the List is operational and receiving in the 3.7 GHz band.

*What if One or More of My Earth Stations Appear(s) on the New List, and I Agree that the “Inactive”/“Non-Operational” Classification is Correct?* First, double-check that you agree with the “Inactive”/“Non-Operational” classification. **For the rest of this section of our memo to apply to you, you must be an earth station operator with an earth station that:**

1. appears on one of the tabs in the List; AND
2. either has, in fact, ceased operations; OR was/is incorrectly registered (i.e., there is either no actual dish currently associated with the antenna identified on the List or the dish associated with the antenna identified on the List is already reflected in another registration or license that qualifies as an incumbent C-band earth station); OR incorrectly identifies an antenna as receiving in the C-band when the antenna, in fact, receives in another frequency range (e.g., the Ku- or Ka-band); AND

(c) will continue to be non-operational for more than 90 days.

If you have double-checked, and agree that such extremely limited circumstances apply to you, then the Notice directs you to make a filing in the International Bureau Filing System to correct the information in your registration.

Admittedly, the foregoing is complex. We recommend that you contact communications counsel for assistance in navigating the matters discussed above, should they apply to you.

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# [FCC Seeks Comment on the State of Competition in the Communications Marketplace](#_FCC_Proposes_Additional)

The FCC is requesting broad input from industry stakeholders, the public, and other interested parties about the current state of competition in the communications marketplace. As you may recall, Congress requires the Commission to publish a “Communications Marketplace Report” (the “Report”) in the last quarter of every even-numbered calendar year. The Commission recently issued a [Public Notice](https://docs.fcc.gov/public/attachments/DA-22-535A1.pdf) (the “Notice”) seeking input for use in its 2022 Report.

Comments on the Notice are due July 1, 2022, with reply comments due August 1, 2022.

The list of topics required to be addressed in the Report—and therefore the information solicited by the Notice—is expansive (e.g., wireless, fixed, voice, video, audio, and international broadband services are all implicated). Broadcasters will likely be most interested in the FCC’s requests for comments on competition with respect to video and audio services.

Comments on those subjects may be used by the Commission and/or Congress in making future policy decisions, including in rulemaking proceedings, legislative activity, and the like. For a recent example of just how important these comments can potentially be, one need look no further than the FCC’s last Quadrennial Review proceeding, in which comments submitted for purposes of the last Communications Marketplace Report were incorporated into the record and used by the Commission in determining whether and/or how to deregulate various aspects of its media ownership rules.

*Video Marketplace*. With respect to competition in the video marketplace, the Commission is seeking comment, among other things, on “the issues and trends affecting competition to deliver video programming services,” which includes programming provided by, or generally considered comparable to programming provided by, traditional over-the-air or digital television broadcasting. According to the Notice, the FCC intends to use an analytical framework similar to that used in its 2020 Communications Marketplace Report. That framework operates by delineating three separate categories of entities that deliver video services for purposes of analyzing competition: over-the-air broadcast television stations (OTA), multichannel video programming distributors (MVPDs), and online video distributors (OVDs). Broadcasters may wish to comment on whether those categories are, in fact, appropriate when it comes to how the Commission analyzes the competitive marketplace. Among other issues on which the Notice seeks comment are the following:

* Video service pricing, offerings, and features (e.g., original or exclusive programming, number or frequency of ads shown, and device compatibility);
* Vertical integration of programming ownership and distribution;
* Trends in video subscription and usage patterns, including household subscription to or usage of multiple video services;
* Technological developments (e.g., ATSC 3.0 deployment);
* Status of competition among video providers in multiple tenant environments;
* Recent entry into and exit from the marketplace; and
* Operating and financial statistics including subscriptions, subscription revenue, advertising revenue, retransmission consent fee revenue, and any other sources of revenue.

In addition to the foregoing issues—many of which were also considered in the 2020 Communications Marketplace Report—there are several additions this year that interested parties may wish to touch on in their commentary. Chief among those newly listed issues are:

* Effects of the COVID-19 pandemic on the marketplace for video services;
* Provision of diverse video programming; and
* Provision of video programming accessible to people with disabilities.

In addressing these video-related issues, the Notice solicits comments on competition both *within* a particular entity category (e.g., one MVPD as against other MVPDs) and *across* entity categories (e.g., MVPDs as against OVDs).

*Audio Marketplace*. With respect to competition in the audio marketplace, the Notice seeks comment on “the criteria or metrics that could be used to evaluate the state of competition in the audio programming marketplace, as well as comment and information on industry data, competitive dynamics, and trending factors.” The Notice suggests—and seeks comment on—dividing analysis of the audio marketplace across three groups: (1) terrestrial broadcast radio stations; (2) satellite radio; and (3) online audio providers (e.g., streaming services, music libraries, and podcasts). In addition, the Notice suggests that comments should address “industry data, competitive dynamics, and trending factors,” including (but not limited to) the following issues:

* Industry participants in the provision of audio programming services;
* Trends in service offerings, pricing, and consumer behavior;
* The extent of competition among audio marketplace participants, including intramodal competition (i.e., competition among providers of the same type, such as terrestrial radio broadcast stations as a group) and intermodal competition (i.e., competition among providers of different types, such as terrestrial radio broadcast stations versus satellite radio providers);
* Ratings, subscribership, and revenue information, both for the marketplace as a whole and for individual industry participants;
* Capital investment, innovation, and the deployment of advanced technology;
* Requirements for entry into the marketplace; and
* Recent entry into and exit from the marketplace.

As with the list provided for the video services marketplace, the Commission also requests comment on how COVID-19 has affected the marketplace for audio programming services; the provision of diverse audio programming; and the provision of audio programming accessible to people with disabilities.

Finally, the Commission requests comments addressing the extent to which any laws, regulations, and/or marketplace practices affect competitive expansion for established providers and entry conditions for entrepreneurs, other small businesses, and established providers, both in the video and audio marketplaces.

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# **July 5, 2022:** Deadline for State SECCs to File [State EAS Plans](#_FCC_Proposes_Additional)

By July 5, 2022, each state’s State Emergency Communication Committee (“SECC”) must file its state’s EAS (“Emergency Alert System”) Plan in the FCC’s new “Alert Reporting System.” As broadcasters may recall, among other things each state’s EAS Plan provides the FCC and other EAS stakeholders with core operational characteristics regarding how EAS alerts are disseminated and received within each particular state. Accordingly, it is important for broadcasters to be aware of those aspects of their state’s EAS Plan that affect broadcast operations, such as each broadcaster’s given monitoring assignments—i.e., the particular stations a broadcaster must set its EAS equipment to monitor in the event of an EAS alert disseminated by the legacy, daisy-chain method of EAS alerting.

Although the July 5, 2022, plan filing deadline applies to state SECCs—and not to individual broadcasters—it is nonetheless important for broadcasters to be aware of the deadline because it means that state EAS plans will be undergoing review (and potential revisions) over the coming weeks. That does not necessarily mean than any of your station’s current EAS operations will need to change; however, stations should keep an eye out for communications from their SECC over the coming months in case there are any changes to the current version of a state’s EAS plan. It may also be useful for all stations to use the forthcoming July 5 deadline as an opportunity to (1) check and ensure the operational readiness of their EAS equipment, and (2) confirm that they understand the operational characteristics of their state’s EAS Plan.

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*Tim Nelson, Editor*

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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.

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