

ALERT

FCC (Again) Adopts Online Public File Requirement for Television Stations; Adds Political File Component

May 7, 2012

The Federal Communications Commission (FCC or Commission) is once again mandating that licensed television stations place their public inspection files online. In a Second Report and Order adopted at its April 27, 2012 open meeting, the FCC revised its rules to require that television licensees upload most portions of their public inspection files to a Commission-hosted website. The information below supplements our initial Client Alert discussing the online public file.

Five years ago, the FCC adopted a similar requirement as part of its Enhanced Disclosure Report and Order, but those rules were never implemented, and the Commission vacated them as part of its October 2011 Further Notice of Proposed Rulemaking (FNPRM). Unlike the 2007 rules, which would have had stations place their public files on their own websites, the new rules will establish an FCC website to host online public files. In another controversial departure from the prior rules, the Commission is requiring stations to migrate political files online according to a two-year phase-in schedule that will begin with major network affiliates in the largest television markets.

Online Public File Requirement. Under the new rules, stations will be required to place most components of their existing public inspection files online. Exempt from the online public file requirement are letters and email from the public, which stations should retain in a correspondence file at their main studio. To facilitate public access to these documents, stations must include in their online public files the address of their main studio and contact information for a person

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who can respond to inquiries about the station's public file. Television broadcasters will not be responsible for adding to their online public files documents already available on the FCC's website. Instead, the Commission will automatically import these documents, which include station authorizations, applications and related materials, contour maps, ownership reports, *The Public and Broadcasting* manual and children's television programming reports.

As to Notices of Inquiry and other FCC information requests, the Commission will automatically place these in a station's public file unless otherwise directed by FCC staff. Stations will have to upload any related materials, including their responses. Stations need not, however, upload complaints that do not lead to Commission action; licensees may maintain such complaints and any responses thereto in their local correspondence file.

The Commission made three notable changes to the online public file rules it had proposed in the FNPRM. First, television stations will not be required to include local news sharing agreements and shared services agreements in their online public files (although the FCC cautioned that it will revisit this issue either in this proceeding or in the ownership proceeding). Second, the Commission abandoned plans to require television stations to include information in their online public files about on-air sponsorship identification disclosures. Third, the FCC will assume responsibility for maintaining back up copies of online public file materials, although stations will be required to maintain local paper and/or electronic back-ups of their political files (with the assistance of tools developed by the Commission) so that the information will be available if the online public file becomes unavailable.

The FCC will require television broadcasters to upload new public file documents to the online system as of the effective date of the rules (which is to be determined). For example, an issues/program report that is due to be created and placed in the public file after the effective date of the rules must be uploaded to the online file on that due date. As for materials already contained in the public inspection file, broadcasters will have six months from the date the FCC announces the Office of Management and Budget's (OMB) approval of the rules to upload those materials. We will apprise our clients once those dates have been established. Once uploaded, stations no longer have to maintain these items in a paper file at their main studio.

The Commission has elected not to specify the format in which files must be uploaded "at this time." The FCC noted, however, that if the documents already exist in a searchable format (such as Word documents, spreadsheets, or searchable pdfs), it expects that they will be uploaded in the same format, although stations may remove metadata from those documents. Moreover, the FCC will use optical character recognition (OCR) to add search functionality to documents that are uploaded in a non-searchable format.

To facilitate the organization of the online public files, the Commission will create a folder for each required item. While the FCC's system is not yet available for broadcaster access, the *Second Report and Order* states that television stations will be able to "drag and drop" files into the appropriate folder. The FCC is not requiring that licensees remove each item at the end of its retention period, but it warned stations that their public files "should not become so overgrown with out-of date documents that it is difficult to access relevant materials." In addition, the Commission is requiring stations to remove expired contracts at the time they

upload replacement agreements.

Finally, to promote the existence of online public files, the FCC is requiring that stations include a link to their online public file on the home page of their website along with contact information for a station representative who can assist persons with disabilities with issues regarding the public files.

Stations whose licenses are due to expire in close proximity to the online public file implementation date should pay particular attention to how the rules' timing affects their obligations. Typically, licensees are permitted to "reset" their public files upon the grant of their license renewal, potentially meaning that these stations would not have to upload information from the prior license term. If a station's renewal is delayed, however, it could be required to upload eight years or more of public file documents. Some stations may have to upload documents from the prior license term, only to delete those files a short time later.

Also related to the renewal process, for stations that file their renewal applications post-effective date, the FCC has modified the mandatory pre- and post-filing announcements to reflect the fact that the renewal application will only be available on the Commission's website and not at the station.

Although the online public file requirement only applies to television stations at this time, the Commission may allow radio stations to voluntarily post their public files online as an accommodation to commonly-owned stations.

Online Political File Requirement. The Commission's online political file requirement includes most of the elements proposed in the FNPRM, but with a two-year phase-in period:

- Affiliates of the ABC, CBS, FOX, and NBC networks located in the top-50 markets will be required to upload political file documents beginning 30 days after publication of the OMB's approval of the rules. The FCC estimates that the requirement will cover approximately 200 television stations, or 11% of licensed stations. Any station that believes compliance with the requirement will impose "an unreasonable burden" may apply for a waiver.
- No later than July 1, 2013, the FCC will issue a public notice seeking comment regarding the effects of placing political files online. The Commission will consider at that time whether any changes should be made before it expands the online political file requirement to other stations.
- On July 1, 2014, all remaining television stations will be required to place political file information online.

To facilitate the keeping of an orderly political file, the FCC will create subfolders for candidates and issues. The Commission also will provide stations with the ability to create their own subfolders and subcategories consistent with their own practices.

In a departure from the FNPRM, the Commission limited the online political file requirement to documents created after the applicable effective date—*stations will not be required to retroactively upload political file information*. The FCC reiterated, however, that stations must upload new documents "immediately absent

unusual circumstances" given their time-sensitive nature. The Commission explained that, as with the existing paper files, broadcasters need not place documentation regarding actual air time and preemption in the online file on an immediate basis. Instead, broadcasters may provide information regarding the order "with a notation that the station will, upon request, provide immediate assistance and access to the station logs or other information concerning actual air time."

Responding to comments in the record about the scope of its political file rules, the Commission clarified the two primary components. First, the requirement that stations include "requests for time" in their political file includes only "final orders by candidates for specific schedules of time" and not general requests for rates and availability. Additionally, the "disposition" of such requests includes "the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased." Thus, broadcasters are not required to include negotiations or other communications in their political file, just information about the final order, including any make goods and rebates or credits.

The online political file requirements do not apply to radio broadcasters and multichannel video programming distributors at this time. Rather, the FCC stated that it will evaluate the effects of the online posting requirement for television stations before expanding that requirement to other platforms.

Enhanced Disclosure. The FCC stated that it does not have a specific timetable for adopting revised standardized and enhanced disclosure requirements (to replace the now defunct Form 355). The Commission issued a Notice of Inquiry on that issue in November.

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Before the new rules take effect, the FCC must publish them in the *Federal Register* and then solicit comments regarding the compliance burdens pursuant to the Paperwork Reduction Act. Only after OMB approves the rules will they become binding upon television stations. This process, as well as the potential for litigation, may slow implementation of the rules. We will keep our clients apprised of developments that could affect when television stations must begin the online public file transition.

If you have questions regarding the online public file and online political file requirements, please contact one of the attorneys listed below or the Wiley Rein attorney who regularly handles your FCC matters.