



The

# Broadcasters' Desktop Resource

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... edited by Barry Mishkind – the Eclectic Engineer

## Focus on Regulation Preparing for FCC License Renewals



**By Brendan Holland**

*[May 2011] On June 1<sup>st</sup> the second group of stations start their “Pre-filing Announcements” for the 2011 License renewal cycle – and the first group is supposed to file their renewal applications on file. Brendan Holland concludes his look at the process with comments and suggestions about the renewal application itself.*

The FCC license renewal application is easily the most important application that licensees will file with the FCC. While the current FCC Form 303-S License Renewal Application is composed primarily of certifications and yes/no questions, stations should not take the form lightly.

The 303-S application requires licensees to certify their compliance with a range of FCC Rules over the course of the prior license term – or in the case of a station that has been acquired during the license term, for that period of time that the current owner has been the licensee of the station.

Accordingly, each question must be considered and answered carefully, lest the applicant stum-

ble into a false certification or make a misrepresentation to the Commission. While failure to comply with one of the many specific requirements may result in a fine – a misrepresentation to the FCC is much more serious – and even can result in the loss of a license.

Thus, the first and foremost suggestion I can urge upon you is to make sure to be honest and accurate with your responses to avoid even the appearance of a misrepresentation or falsehood.

### THE COMMISSION'S MOOD

There are some who have criticized the current renewal process as too lax and have called for changes. For example, in an address last Fall, Commissioner Michael Copps called for a more rigorous license renewal process for broadcasters.

Copps suggested implementing a “Public Value Test” to assess whether a station has served the Public Interest and, if not – or if the station does not improve during a probationary period –the license then would be revoked.

While Commissioner Copps was speculating on future changes to the license renewal process, his remarks serve to emphasize that broadcasters are the stewards of the public airwaves, and the Commission and the public expect stations to serve the needs and interests of the local community.

With that in mind, let us take a look at some of the more significant issues to consider when completing the Form 303-S, as well as a few changes that have been made to the form.

## **QUALIFIED OWNERSHIP**

In addition to the standard character qualification issues, alien ownership, and Anti-Drug Abuse Act certifications, which are required on a number of FCC applications, the renewal application contains several additional equally weighty certifications.

One such question is a certification that the licensee and each party to the application, i.e., all officers, directors, shareholders with greater than 5% voting interest, members (if the licensee is an Limited Liability Company), or partners (if the licensee is a partnership) have not had any adverse final action taken against it by any court or administrative body in either a civil or criminal proceeding involving any: 1) felony, 2) mass media-related antitrust or unfair competition laws, 3) fraudulent statements to another governmental unit, or 4) discrimination.

Depending on the size of the licensee and the number of principals involved, ascertaining the answer to this question could be simple, or could require a survey of a large number of people. For companies with widely-disbursed ownership, the licensee should survey its attributable owners to make sure that they have not had any such adverse findings.

## **WHICH VIOLATIONS TO REPORT**

Another important question requires the reporting of any FCC Violations during the preceding license term.

By this, the FCC means any violations of Rules or Regulations of the Commission that have resulted in the issuance of an official Notice of Violation, Notice of Apparent Liability for Forfeiture, Forfeiture Order, or similar FCC action finding a specific violation of the FCC's Rules or of the Communications Act. Again, *this question requires the disclosure of any formal FCC action in the preceding term.*

On the other hand – and this is important to understand – the reporting requirement *does not require a confession of any violations the station may have discovered on its own and then corrected.*

## **CERTIFYING THE PUBLIC FILE**

The renewal application requires the licensee to certify the various documentation required by the FCC's Rules *was placed in the station's Public Inspection File at the appropriate times.*

As emphasized previously, in order to make this certification stations need to review their Public Inspection Files in advance. If they find any omissions or errors in the Public Inspection File, they should take steps immediately to correct the problem, and also note the problem and resolution in response to this question on the form.

While the voluntary disclosure of any issues with the Public Inspection File could result in an admonishment or a fine from the Commission, such a result is preferable to making a false certification to the Commission and possibly facing the revocation of the station's license.

## **CERTIFY THAT YOU ARE ON THE AIR**

Next, the renewal application requires the licensee to certify that the station is currently on the air, broadcasting programming intended to be received by the public and that it has not been silent in the preceding license term for any consecutive 12-month period.

Most stations will not have a problem with this certification.

## **THE NON-DISCRIMINATION QUESTION**

For the first time this year, the license renewal application will require a certification that the station is not discriminating in the sale of advertising time.

Specifically, the certification requires an affirmative answer that the licensee's "advertising sales agreements do not discriminate on the basis of race or ethnicity and that all such agreements held by the licensee contain nondiscrimination clauses."

This requirement is one on which the FCC has not provided much official guidance. The Commission has said that station advertising contracts should have certifications that state that advertisers are not making their buying decisions for discriminatory purposes. Given that this is a new – and arguably vague – Policy, stations should consider the issue in advance, preferably in consultation with their legal counsel, to ensure they are able to answer the question properly.

## **CERTIFY THAT YOU ARE REALLY ON THE AIR**

The 303-S contains a new question requiring the licensee to certify that, during the preceding license term, the station was neither silent nor operating on less than the required minimum schedule for any period longer than 30 days.

If the licensee is unable to certify compliance with this standard, then it will need to include an exhibit to specify the "exact dates on which the station was silent or operating for less than its prescribed minimum hours."

While the application continues to contain the certification that the station has not been silent for any consecutive 12-month period mentioned above, the new form will now expand that inquiry to gather information about whether the station has been off the air for any significant period of time during the previous license term.

While it is not clear precisely what the FCC will do with the information, the Commission could potentially find that a station has failed to serve the Public Interest if it has been off the air for a significant period of time, possibly deciding that the station's license should not be renewed or that the licensee should face a forfeiture or sanction.

Stations can often be off the air for periods of time longer than 30 days as the result of equipment failure, facilities modifications, programming changes, station sales, or financial difficulties. Accordingly, licensees should carefully review their stations' operations in the past term and fully describe and disclose any significant outages.

## **RFR CERTIFICATION EASIER**

One last change to the Form 303-S, which could actually make the application a bit easier for licensees, is the elimination of the requirement that full power AM and FM licensees include an exhibit demonstrating compliance with the Radio Frequency (RF) radiation limits.

Previously, radio applicants were required to include an RF exhibit if they were unable to demonstrate compliance with the limitations by using the RF worksheets in the renewal application. If there have been no significant changes at the transmitter site since the grant of the station's last license or renewal, then the revised form will allow applicants to certify that their facilities continue to comply with the Commission's RF limits and does not require any exhibits to support that conclusion.

## **EEO CERTIFICATION**

Simultaneously with the renewal application, stations must also file an FCC Form 396 Broadcast EEO Program Report with the FCC. Please note, all licensees must file an FCC Form 396 – it is required regardless of whether or not the station, or local station employment unit, has five or more full-time employees and thus is subject to the FCC's EEO Rules.

If a station or station employment unit has fewer than five full-time employees, then it will simply certify that it is not subject to the FCC's EEO Rules and report any discrimination complaints (discussed below), but leave the second portion of the Form 396 blank.

The Form 303-S renewal application requires licensees to certify that the FCC Form 396 EEO Program Report has been submitted to the Commission, and also requires that the file number of the FCC Form 396 be cross-referenced on the renewal application.

Practically speaking, this means that applicants will need to press the button and submit the Form 396 EEO Program Report first and, then once the FCC File number is assigned, carry that information over to the Form 303-S.

The renewal application also requires the licensee to certify that the most recent EEO Annual Public File Report has been posted on the station's website, if it has one, as required by the Commission's Rules. As we mentioned last time, the FCC staff will often search the web for a station's website in order to confirm that the Annual Report is properly posted. Accordingly, given that the FCC can easily verify compliance with this rule, stations should be careful to post the Annual Public File Report in advance of the Form 303-S filing in order to avoid making a false certification in the renewal application.

## **EEO COMPLIANCE**

If a station or local station employment unit has five or more full-time employees, then it must complete the entire report, which requires the applicant to certify to the station's ongoing compliance with the FCC's EEO Rules.

The Form 396 will also require applicants to provide copies of the station's two most recent EEO Annual Public File Reports. Ordinarily, these Annual Reports are not submitted to the FCC, but rather are simply placed in the station's public inspection file and posted on the station's website (if it has a website) at both the

mid-term of the renewal period and at the time the station files for its license renewal.

At renewal time, however, the station must provide copies of the two most recent Annual Reports to the FCC. This allows the FCC to review the station's EEO efforts, and to consider the station's compliance – or noncompliance – with the EEO Rules in conjunction with its consideration of the station's request for renewal of license. The station will also need to include a narrative statement about the licensee's EEO efforts in the past two years.

As part of the Form 396, all applicants – both those with fewer than five full-time employees and those with more – will also be required to report whether any pending or resolved discrimination complaints were filed with any body having competent jurisdiction under federal, state, territorial or local law, alleging unlawful discrimination in the employment practices of the station during the preceding license term.

If such complaints are pending, the licensee will be required to provide a brief description of the complaint or complaints, including the persons involved, the date of the filing, the court or agency involved, the file number (if any), and the disposition or current status of the matter.

## **BIENNIAL OWNERSHIP REPORT**

An important area of Public Inspection File compliance is the Biennial Ownership Report. Thus, as with EEO, the renewal application contains a separate question requiring the licensee to certify that it has filed a Biennial Ownership Report on Form 323 (for commercial stations) or Form 323-E (for noncommercial stations) with the Commission.

Previously, all stations, commercial and non-commercial alike, prepared and filed an Ownership Report with the Commission at the same time that it filed the renewal application. With the change to a single consolidated filing date for all commercial stations that is no longer the case for commercial stations. Rather,

commercial broadcast stations must all file a Biennial Ownership Report on Nov. 1, 2011.

With respect to noncommercial broadcast stations, however, those stations will continue to file biennial ownership reports on the anniversary of the license renewal filing date for the station's state and type of service (radio or TV). Thus, all noncommercial broadcast stations will need to prepare and file an Ownership Report on FCC Form 323-E on the same date that they file their FCC Form 396 License Renewal application.

## POST-FILING ANNOUNCEMENTS

Finally, with all of the necessary filings submitted to the Commission and out of the way, all that remains is for stations to air the required Post-Filing Announcements consistent with the Commission's Rules.

Similar to the Pre-Filing Announcements, the Post-Filing Announcements air *after* the filing of the license renewal application to notify listeners of the submission and to encourage them to participate in the FCC's review process. The precise language of the post-filing announcements – which is dictated by the FCC's Rules – can be found [here](#).

The post-filing announcements must air on the 1st and 16th of the three calendar months that follow the filing of the license renewal application. So, for example, with respect to the stations in the first renewal group, Maryland, Virginia, Washington, DC, and West Virginia, these stations will air post-filing announcements on June 1, June 16, July 1, July 16, Aug. 1, and Aug. 16.

For commercial radio stations, at least three of the required pre-filing announcements must air on the station between 7 a.m. and 9 a.m., or 4 p.m. and 6 p.m. local time.

Furthermore, at least one announcement must air between 9 a.m. and noon, at least one between noon and 4 p.m., and at least one

between 7 p.m. and midnight. If the station does not operate between 7 a.m. and 9 a.m. or between 4 p.m. and 6 p.m., then at least three of the required announcements must be made during the first two hours of broadcast operations.

For noncommercial educational stations, the timing of the post-filing announcements is the same as for commercial stations, except such stations need not air the announcements during any month in which the station does not actually broadcast. In such cases, the noncommercial educational station must ensure that the announcements it does air follow the order specified above.

For example, if a noncommercial radio station broadcasts only four post-filing announcements, three must air between 7 a.m. and 9 a.m., or 4 p.m. and 6 p.m., and the fourth must air between 9 a.m. and noon.

## CONCLUSION

Regardless of whether your station is in the first group due to file on June 1, 2011, or is much later in the renewal filing cycle, *now* is the time for stations to make sure that their operations are in good order in all respects.

By starting the review early, stations will have time to correct any issues that might exist, and avoid scrambling to do so when the license renewal is actually due.

In addition, broadcasters should make sure that their stations are serving their local communities.

For most licensees, this goes without saying, but stations should be alert to their listeners and do their best to address any criticisms that coming from the community. At license renewal time, broadcasters want friends who will verify how well the station serves your community and the public interest, not enemies who may be ready to complain to the FCC about the station's performance.

For any further questions relating to the renewal deadlines and FCC Rule compliance, or for assistance completing these important FCC filings, please feel free to send me an email at the address below.

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