

## FCC Proposes To Eliminate EEO Mid-Term Report

The FCC has proposed to eliminate the requirement found in Section 73.2080 of its rules for broadcast stations to file the EEO Broadcast Mid-Term Report (Form 397). This proposal was adopted in a *Notice of Proposed Rulemaking* in Docket 18-23. Presently, radio stations with 11 or more full-time staff members and television stations with a full-time staff of five or more are required to submit a Form 397 four months prior to the fourth anniversary of the expiration of the station's last license term – which would be the half-way point in the current term.

The Commission has tentatively concluded that eliminating Form 397 will advance its goal of reducing unnecessary regulatory burdens without undermining its statutorily-required mid-term reviews of broadcaster compliance with the EEO rules. Section 334 of the Communications Act directs the FCC to conduct a mid-term review of television stations' employment practices

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## Rule Books No Longer Required

The FCC has adopted a *Report and Order* in Docket 17-231 eliminating the requirement for the licensees of low power television stations, TV and FM translator stations, and TV and FM booster stations to maintain hard copies of the FCC's rules relevant to their operations. These rules were published in Volumes I and III of Title 47 of the Code of Federal Regulations.

The requirement to have hard copies of these rules on hand was adopted more than 40 years ago with the creation of the TV and FM translator services, long before the Internet made regulations instantly accessible. The Commission concluded that keeping paper copies of rule books was an archaic and obsolete practice, noting that the online version of the rules is updated on a current basis and is often more accurate than the paper version which is updated only once per year.

Although licensees no longer have to keep paper copies of the rules on hand, they remain obligated to be familiar with the regulations that govern their operations.

## Renewal Applications Designated for Hearing

For the second time in recent months, the FCC has issued a *Hearing Designation Order* to examine in the context of a formal hearing whether radio station licenses should be renewed at the conclusion of a license term plagued by prolonged periods of silence. This case concerns the 2011 applications to renew the applications of co-owned WBVA(AM), Bayside, Virginia; and WVAB(AM), Virginia Beach, Virginia.

These stations were purchased by Birach Broadcasting Corporation from a bankruptcy estate in a transaction consummated on April 1, 2008. They diplex their signals from the same antenna system. Just prior to the closing, in mid-March 2008, the tower was vandalized and fell to the ground. The bankruptcy trustee requested special temporary authority ("STA") for the stations to be silent. Thus they were off the air at the time of the closing on the purchase.

In 2013, Birach obtained a construction permit to relocate the antenna system to another site where the stations could be operated at full power. However, the site never received

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# Court Rules TVEyes' Clipping Service Is Not Fair Use

The United States Circuit Court of Appeals for the Second Circuit, sitting in New York, has ruled that the video clipping service offered by TVEyes, Inc. is not a fair use of copyrighted video programming. The case was remanded to the district court to reformulate an injunction that it had imposed against TVEyes' operation premised on its incorrect conclusion that the service was covered by the fair use doctrine.

TVEyes, Inc. is a for-profit company. It offers a service that allows its paying customers to sort through large quantities of television content efficiently to find clips that feature a topic of interest to the customer. To compile the searchable database, TVEyes records essentially all video programming being released on more than 1,400 channels. The closed-captioned text accompanying the video is also recorded and is used to create the text-searchable transcript of the words spoken in each video segment.

A successful search yields one or more video segments that feature the searched term. The customer then can view a clip of the video which begins 14 seconds before the search term was spoken and which can be played for up to 10 minutes beyond the appearance of the search term. A

customer can access an unlimited number of clips (although consecutive segments cannot be accessed). A customer can archive clips on the TVEyes server or on its own computer. Customers can also send clips to other parties, who may not necessarily be customers of TVEyes.

Subscriptions are available only for business and professional purposes. The company does not offer its service to private consumers for personal use. TVEyes asserted that it restricts distribution of content by requiring customers to execute a contract that limits use of the clips to "internal purposes only." The downloading process includes a warning that the material may be used only for "internal review, analysis or research."

The service offered by TVEyes features two elements: the "Search" function, and the "Watch" function. Fox News Network, LLC sued TVEyes in the district court for copyright infringement occurring in the Watch function, allowing users to view up to 10 minutes of content, and to archive it. Fox did not contest the Search function. In its defense, TVEyes argued that the elements of the Watch function constituted a fair use of the content.

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## FCC Proposes To Eliminate EEO Mid-Term Report *continued from page 1*

and to instruct them on how to improve their recruitment practices when necessary. However, the statute does not mandate the use of Form 397 or prohibit the elimination of such a form.

Nearly all the information in Form 397 is also available in stations' public inspection files. In the Form 397, stations must certify whether they have the requisite number of full-time employees to be subject to a mid-term review. Stations with fewer full-time employees are not required to file Form 397, but may do so if they choose. Stations must identify, by name and title, "a particular official with overall responsibility for equal employment opportunity at the station." This information is also to be furnished in completing Form 396, Broadcast Equal Employment Opportunity Program Report, which must be maintained in the station's public file. The Form 396 is filed once every eight years along with the license renewal application. Finally, stations must also submit with the Form 397 copies of their two most recent annual EEO public file reports.

The Commission invites comment on how it could continue to monitor EEO compliance without the Form 397. How would it identify which stations are subject to the mid-term review if the Form 397 is discontinued? Under the present system, stations self-identify by filing the form. The National Association of Broadcasters ("NAB") has offered two possible solutions to this problem. The first would be to require all stations to indicate whether they are subject to the mid-term review on their annual EEO public file report.

The Commission observes that there is no standard format for these reports. Data could not be easily aggregated electronically. Commission staff might have to manually review each station's report to compile the list of stations subject to review. While potentially inconvenient for the FCC, would this approach be cost-effective for stations?

In the alternative, the NAB suggests changing the online public file database so as to require every station to disclose whether it is subject to the mid-term review as a prerequisite to placing its annual EEO public file report in the file. The Commission asks whether this modification to the public file database should include a question about staff size that each station would be required to answer in order to upload its EEO public file report. The Commission notes that any changes to the public file database template would incur information technology resource costs for the Commission and could be burdensome for stations. Would these costs be justified?

The FCC also asks whether it should require stations to designate a point of contact responsible for EEO compliance on a more routine basis if the Form 397 is eliminated. This disclosure is presently part of the Form 396 – which is only filed once every eight years. Should this information be included in the annual EEO public file report, or some other regularly produced document?

Comments will be due 30 days after notice of this proceeding is published in the Federal Register. Reply comments must be filed within 45 days of that publication.

# Five-Station Group Draws \$58K in Fines for Issues/Programs List Failures

The FCC's Media Bureau has issued a *Notice of Apparent Liability for Forfeiture* to each of five radio stations in a cluster along the northeastern coast of South Carolina licensed to Cumulus Licensing, LLC, for violations of the Commission's public inspection file rule, Section 73.3526. Specifically, each station's public file was missing numerous issues/programs lists when inventories of the file contents were made in connection with the 2011 license renewal applications for these stations. The stations are WLFF(FM), Georgetown; WSYN(FM), Surfside Beach; WRWM(AM), Conway; WDAI(FM), Pawleys Island; and WSEA(FM), Atlantic Beach, all South Carolina.

The application for license renewal, FCC Form 303-S, asks the licensee to certify that all of the documentation required by rule Section 73.3526 has been placed in the station's public inspection file at the appropriate times. If the licensee cannot certify to this, it must provide an explanation. The rule requires every station to compile a list of current issues of public importance in the community each calendar quarter and to identify significant programming that it has aired during the quarter to address those issues. As these quarterly issues/programs lists are produced, they are to be maintained in the public file for the entire remainder of the license term.

In preparing the 2011 license renewal applications for each of these stations, the licensee indicated that it could not certify that all documents had been timely placed in the public file. The file for each of these stations was lacking a significant number of the quarterly issues/programs lists from the course of the license term, which stretched back to 2003. Although not identical, the narratives provided to explain the absence of issues/programs lists for each of these five stations were similar to the statement in the WLFF application:

The Licensee is unable to locate the issues/programs lists for 4Q2003, and all of 2004, 2005, 2006 and 2007. Due to numerous personnel changes during the license term, at all levels of management and staff, there is no one employed at the station currently or available to the

Licensee who has knowledge of the reports prepared for these early years of the term. Due to changes in software and computer systems during the same period, the Licensee has been unable to locate any documentation regarding the programming carried during those years that dealt with issues of local concern. Therefore, the Licensee cannot recreate the missing reports for 2003-2007.

Some reports were also missing from the file for all or parts of 2008, 2009 and 2010. These reports have been recreated and the file is complete for 2008 to date with regard to quarterly issues/programs lists.

While the Commission appreciated the licensee's voluntary and candid explanation of the history of the file problem, the agency was not satisfied that this should resolve the matter. It said that "where lapses occur in maintaining the public file, neither the negligent acts or omissions of station employees or agents, nor the subsequent remedial action undertaken by the licensee, excuse or nullify a licensee's rule violation."

The FCC's *Forfeiture Policy Statement* establishes a base forfeiture amount of \$10,000 for violation of Section 73.3526. The Commission can adjust that figure upward or downward as the circumstances of a case may warrant. It decided against adjusting the amount of the fine for WLFF, which had been missing 17 issues/programs lists over the course of the license term. Each of the other four stations was missing more than 20 lists in its public file. In each of those cases, the Commission found justification for adjusting the base fine upward to \$12,000. The total proposed fine is \$58,000.

Despite the rule violations, the Commission found that there were no issues that would preclude grant of the license renewal applications. It said the renewal applications would be granted after the conclusion of these forfeiture proceedings. Cumulus has 30 days from the release of these Notices to request the reduction or cancellation of the proposed forfeitures.

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## FCC Warns Town About Piracy

The FCC's Enforcement Bureau has issued a warning letter to the local municipality of Ward, Colorado, citing the possible operation of an unauthorized FM broadcast station on the premises of the Town Hall. This action is somewhat unusual in that enforcement proceedings involving unlicensed radio stations typically target private individuals.

In January 2018, agents from the FCC's Denver Office investigated the origin of a signal on 90.5 MHz in Ward. With direction-finding equipment, they were able to determine that the signal was emanating from a trailer parked next to the Town Hall, on property owned by the Town. There is no licensed station on that frequency in the area.

In the letter addressed to the Town of Ward, the Enforcement Bureau's Region Three Director "warned that operation of radio transmitting equipment without a valid radio station authorization constitutes a violation of the Federal laws cited above and could subject the operator to severe penalties, ... **UNLICENSED OPERATION OF THIS RADIO STATION MUST BE DISCONTINUED IMMEDIATELY.**"

The Town was given 10 days in which to respond with any evidence it might have of an authorization to operate a station on 90.5 MHz at this site. As of this writing, the Commission's public records do not indicate what response, if any, was received from the Town of Ward.



# DEADLINES TO WATCH



## License Renewal, FCC Reports & Public Inspection Files

April 1, 2018	Deadline to place EEO Public File Report in public inspection file and on station's Internet website for all nonexempt radio and television stations in <b>Delaware, Indiana, Kentucky, Pennsylvania, Tennessee and Texas.</b>
April 2, 2018	Deadline for all broadcast licensees and permittees of stations in <b>Delaware, Indiana, Kentucky, Pennsylvania, Tennessee and Texas</b> to file annual report on all adverse findings and final actions taken by any court or governmental administrative agency involving misconduct of the licensee, permittee, or any person or entity having an attributable interest in the station(s).
April 2, 2018	Deadline to file EEO Broadcast Mid-term Report for all radio stations in employment units with more than 10 full-time employees in <b>Delaware and Pennsylvania</b> ; and all television stations in employment units with five or more full-time employees in <b>Texas.</b>
April 10, 2018	Deadline to place Issues/Programs List for previous quarter in public inspection file for all full service radio and television stations and Class A TV stations.
April 10, 2018	Deadline to file quarterly Children's Television Programming Reports for all commercial full power and Class A television stations.
April 10, 2018	Deadline to file quarterly Transition Progress Report for all television stations subject to modifications in the repack.
April 10, 2018	Deadline for noncommercial stations to file quarterly report re third-party fundraising.

## Deadlines for Comments in FCC and Other Proceedings

DOCKET	COMMENTS	REPLY COMMENTS
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(All proceedings are before the FCC unless otherwise noted.)

Docket 18-4; NPRM Repeal of requirement to file contracts	Mar. 19	Apr. 2
Docket 17-318; NPRM National limits on television station ownership	Mar. 19	Apr. 18
Docket 16-142; FNPRM Next generation broadcast television standard		Mar. 20
Docket 18-66; Public Notice Petition for Declaratory Ruling re foreign ownership interests of Border Media Licenses, LLC	Apr. 5	Apr. 20
Dockets 14-50, 17-289; NPRM Rules and policies to promote new entry and ownership diversity in broadcasting		Apr. 9
U.S. Copyright Office Docket 2005-6; NPRM Copyright royalty reporting practices of cable systems	June 14	Jul. 6
Docket 18-22; NPRM Encouraging new technologies	FR+45	FR+75
Docket 18-23; NPRM Elimination of Mid-Term EEO Report	FR+30	FR+45

*FR+N means the filing deadline is N days after publication notice of the proceeding in the Federal Register.*

## Paperwork Reduction Act Proceedings

The FCC is required under the Paperwork Reduction Act to periodically collect public information on the paperwork burdens imposed by its record-keeping requirements in connection with certain rules, policies, applications and forms. Public comment has been invited about this aspect of the following matters by the filing deadlines indicated.

TOPIC	COMMENT DEADLINE
Commercial Advertisement Loudness Mitigation Act, Sections 73.682(e), 76.607(a)	Mar. 28
Antenna structure registration requirements, Sections 17.4, 17.48, 17.49	Apr. 2
Sponsorship identification, Section 73.1212	Apr. 16
Filing of contracts, Section 73.3613	Apr. 27
Program tests, Section 73.1620	May 1
Next Gen TV/ATSC 3.0 simulcasting rules, Sections 73.3801, 73.6029, 74.782	May 7



# DEADLINES TO WATCH



## Cut-Off Date for AM and FM Applications to Change Community of License

The FCC has accepted for filing the AM and FM applications identified below proposing to change each station's community of license. These applications may also include proposals to modify technical facilities. The deadline for filing comments about any of the applications in the list below is **April 16, 2018**. Informal objections may be filed anytime prior to grant of the application.

PRESENT COMMUNITY	PROPOSED COMMUNITY	STATION	CHANNEL
Apache Junction, AZ	Sun Lakes, AZ	KVVA-FM	296C3 107.1
Willcox, AZ	Catalina, AZ	KAZK	209C2 89.7
Olney Springs, CO	Rye, CO	KRYE	285C3 104.9
Clermont, FL	The Villages, FL	WMYZ	204C2 88.7
Chincoteague, VA	West Pocomoke, MD	WCTG	243A 96.5

## Cut-Off Dates for FM Booster Applications

The FCC has accepted for filing the applications for new FM booster stations as described below. The deadline for filing petitions to deny these applications are indicated. Informal objections may be filed any time prior to grant of the application.

COMMUNITY	PARENT STATION	CHANNEL	MHZ	FILING
Missoula, MT	KDXT	250	97.9	Mar. 16
Missoula, MT	KVGN	257	99.3	Mar. 16
Scio, OR	KPIK-LP	243	96.5	Mar. 16
Arecibo, PR	WZAR	270	101.9	Mar. 16
Caguas, PR	WZAR	270	101.9	Mar. 16
San Juan, PR	WZAR	270	101.9	Mar. 16
St. George, UT	KPLD	286	105.1	Mar. 28
Washougal, WA	KIEV-LP	273	102.5	Mar. 28

**LPTV SPECIAL DISPLACEMENT  
FILING WINDOW  
APRIL 10 – MAY 15, 2018**

**AUCTION NO. 99  
CROSS-SERVICE FM TRANSLATOR  
CONSTRUCTION PERMITS  
BIDDING BEGINS  
MAY 15, 2018**

## Rulemaking to Amend FM Table of Allotments

The FCC is considering an amendment proposed to the FM Table of Allotments to add the following channel. The deadlines for filing comments and reply comments are shown. Items marked with a "T" include a proposal for a tribal priority.

COMMUNITY	CHANNEL	MHZ	COMMENTS	REPLY COMMENTS
Desert Hills, AZ	292A	106.3	Mar. 26	Apr. 10
Connerville, OK(T)	247A	93.7	Apr. 9	Apr. 23

## Lowest Unit Charge Schedule for 2018 Political Campaign Season

During the 45-day period prior to a primary election or party caucus and the 60-day period prior to the general election, commercial broadcast stations are prohibited from charging any legally qualified candidate for elective office (who does not waive his or her rights) more than the station's Lowest Unit Charge ("LUC") for advertising that promotes the candidate's campaign for office. Lowest-unit-charge periods are imminent in the following states.

STATE	ELECTION EVENT	DATE	LUC PERIOD
Alabama	State Primary	June 5	Apr. 21 - June 5
Arkansas	State Primary	May 22	Apr. 7 - May 22
California	State Primary	June 5	Apr. 21 - June 5
Colorado	State Primary	June 26	May 12 - June 26
District of Columbia	State Primary	June 19	May 5 - June 19
Georgia	State Primary	May 22	Apr. 7 - May 22
Idaho	State Primary	May 15	Mar. 31 - May 15
Illinois	State Primary	Mar. 20	Feb. 3 - Mar. 20
Indiana	State Primary	May 8	Mar. 24 - May 8
Iowa	State Primary	June 5	Apr. 21 - June 5
Kentucky	State Primary	May 22	Apr. 7 - May 22
Maine	State Primary	June 12	Apr. 28 - June 12
Maryland	State Primary	June 26	May 12 - June 26
Mississippi	State Primary	June 5	Apr. 21 - June 5
Montana	State Primary	June 5	Apr. 21 - June 5
Nebraska	State Primary	May 15	Mar. 31 - May 15
Nevada	State Primary	June 12	Apr. 28 - June 12
New Jersey	State Primary	June 5	Apr. 21 - June 5
New Mexico	State Primary	June 5	Apr. 21 - June 5
New York	State Primary	June 26	May 12 - June 26
North Carolina	State Primary	May 8	Mar. 24 - May 8
North Dakota	State Primary	June 12	Apr. 28 - June 12
Ohio	State Primary	May 8	Mar. 24 - May 8
Oklahoma	State Primary	June 26	May 12 - June 26
Oregon	State Primary	May 15	Mar. 31 - May 15
Pennsylvania	State Primary	May 15	Mar. 31 - May 15
South Carolina	State Primary	June 12	Apr. 28 - June 12
South Dakota	State Primary	June 5	Apr. 21 - June 5
Utah	State Primary	June 26	May 12 - June 26
Virginia	State Primary	June 12	Apr. 28 - June 12
West Virginia	State Primary	May 8	Mar. 24 - May 8

# Procedures Proposed for New Technologies Petitions

The FCC has released a *Notice of Proposed Rulemaking* in Docket 18-22 to propose guidelines and procedures to implement Section 7 of the Communications Act. Enacted in 1983, Section 7 is intended to foster the expedient development of new technology and states as follows:

(a) It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under the Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

(b) The Commission shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed. If the Commission initiates its own proceeding for a new technology or service, such proceeding shall be completed within 12 months after it is initiated.

The Commission proposes to interpret Section 7 to include petitions for rulemaking or waiver of the agency's rules and to applications for authorization of any type of technology or service within the FCC's statutory purview. A new subpart will be incorporated into Part I of the Commission's rules with specific procedures and timetables for acting on requests for Section 7 consideration. These rules are not intended to replace or substitute for the Commission's existing rules for processing applications and petitions that do not merit treatment under Section 7.

Under the proposed rules, a party seeking Section 7 processing for its petition or application would need to include a specific request for Section 7 consideration in the initial filing. That request must include a detailed description of the new technology or service and how it differs from existing technologies or services. It must also provide both qualitative and quantitative analyses showing how such new technology or service would be in the public interest. The Commission proposes to adopt a series of factors to be used to evaluate whether a petition or application merits Section 7 consideration:

(1) The Section 7 request would be required to include a demonstration that the proposed new technology or service is both technologically feasible and available for commercial use or application rather than being merely theoretical or speculative. This will assist the Commission in determining whether the public benefits to be realized from the proposal can be realized in the near term.

(2) The Section 7 request would need to demonstrate that the proposed technology or service really is "new." If the proposed technology or service has not previously been

authorized by the Commission, the Section 7 request would have to explain how the function and performance of the technology or service differ in essential or fundamental respects from others that the Commission has previously authorized. If the proposed technology or service would make extraordinary or truly significant enhancements to a previously authorized technology or service, the Section 7 request would need to specifically quantify, qualify or otherwise explain in sufficient detail what is so new that it warrants consideration under Section 7.

(3) The Section 7 request would need to show that the proposed new technology or service would be in the public interest. For example, it could promote innovation and investment, provide new competitive choices, provide new technologies that enable accessibility to people with disabilities, or meet public demand for new or significantly improved services in unserved or underserved areas.

The Commission requests public comment on what indicia should be used to evaluate what would constitute "new" technology as distinguished from an existing or evolving technology.

The initial review of the petition or application would be conducted by a team led by the Commission's Office of Engineering and Technology ("OET") and including staff from other bureaus with appropriate subject-matter expertise. If that team finds the petition to include all of the requisite elements, the petition will be accepted for filing. Then the OET-led team will have 90 days in which to determine if the proposal qualifies for Section 7 treatment. If the result of that review is positive, the Commission would be committed to swift action in considering and acting upon the proposal for the new technology or service.

Under Section 7, any person or party (other than the Commission) who opposes a new technology or service has the burden to demonstrate that it is inconsistent with the public interest. Opponents must address the harm to the public interest that might flow from the proposal, and not their own private interests. It would not be sufficient for someone to oppose a proposal merely because it might cause economic harm to his own service or disrupt a particular sector of the economy.

Although Section 7 requires timely action by the Commission within the one-year window, it does not create a presumption in favor of granting any particular petition just because it proposes something new. The agency has plenary authority to dispose of the petition or application as it sees fit, including by initiating its own proceeding to explore matters further.

Public comment on these proposals is solicited. Comments are due within 45 days after publication of notice of this proceeding in the Federal Register. The deadline for reply comments will be 75 days after that publication.

# Renewal Applications Designated Hearing continued from page 1

zoning approval and the antenna structure could not be built there. For the remainder of the license term, ending October 1, 2011, Birach was only able to operate the stations periodically from temporary facilities with very reduced power. When on the air during this period, WBVA operated with an STA for 30 watts. Its normal licensed power is 1,000 watts. WVAB had STAs to operate with six watts. This station's normal licensed power is 5,000 watts. At these reduced power levels, neither station was able to provide the requisite coverage of its community of license.

However, during this license term, the stations were more noteworthy for being off the air than for their brief stints of reduced-power operation. WBVA was silent for 1,225 days (151 days without a silent STA) and operated with the 30-watt STA for 54 days. While a timely-filed license renewal application is pending, a station is authorized to continue operating beyond the normal expiration date for the license. After the end of the normal license term on October 1, 2011, the station continued the same pattern. From that date until the adoption of the *Hearing Designation Order*, WBVA was off the air for 2,186 days (141 unauthorized) and on the air at 30 watts for 66 days.

WVAB was similarly afflicted. During the license term ending October 1, 2011, it was silent for 1,231 days (157 unauthorized), and broadcast with six watts for only 48 days. Since then, it has been silent for 1,943 days (153 unauthorized) and operated for 309 days with six watts.

The Commission explained that the basic duty of broadcast licensees to serve their communities is reflected in the license renewal provisions of Section 309 of the Communications Act. Under the statute, the Commission is to grant license renewal if it finds (a) the station has served the public interest, convenience, and necessity; (b) there have been no serious violations by the licensee of the Communications Act or the FCC's rules; and (c) there have been no other violations by the licensee of the Act or the rules that would constitute a pattern of abuse. If a station fails to meet this standard, the Commission may deny renewal or grant the application on appropriate terms and conditions, perhaps including a short-term renewal. After notice to the licensee and an opportunity for the licensee to appear in a hearing, if the Commission determines that the

licensee has failed to meet the standard and that there are no mitigating circumstances to justify a lesser sanction, the agency must deny the application for license renewal.

The Commission said that the practices followed by WBVA and WVAB in this case cast doubt on whether they met the renewal standard set by Section 309. The agency cited a 2001 ruling in which it had cautioned that "a licensee will face a very heavy burden in demonstrating that it has served the public interest where it has remained silent for most or all of the prior license term." Accordingly, it designated these renewal applications for a hearing to determine whether the stations had met the Section 309 renewal standard during the license term in question.

The issues to be deliberated in this case involve no substantial and material questions of fact. Also, there is likely little need to test the credibility of witnesses during in-person examination. Consequently, the Commission determined that this could be a "paper" hearing, conducted with summary procedures, relying on written exhibits and pleadings without the need for an in-person live proceeding.

The Commission recently designated another license renewal application for a hearing on essentially the same issues with a very similar factual background. However, that case sheds no light on how the agency might rule in this proceeding because the renewal applicant surrendered the license without contest.

In yet another case involving prolonged silence and license renewal, the Commission recently granted the 2012 license renewal application for another station owned by that same licensee, Radioactive, LLC. WIQI(FM), Watseka, Illinois, had been silent for intermittent periods amounting to more than five years during the license term ending in 2012. When the station was on the air, it operated with reduced power. Rather than designating this case for a hearing, the Commission's Media Bureau granted license renewal for an exceptionally short one-year term commencing on the date of the grant. The Bureau said that this "limited renewal period will afford the Commission an opportunity to review the station's compliance with the [Communications] Act and the FCC's rules and to take whatever corrective actions, if any, that may be warranted at that time."

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**AUCTION NO. 83  
FM TRANSLATOR CONSTRUCTION  
PERMITS BIDDING BEGINS  
JUNE 21, 2018**

**FILING WINDOW FOR LONG-FORM  
APPLICATIONS BY SINGLETON FM  
TRANSLATOR APPLICANTS  
AUCTION NO. 99  
MARCH 14 – MARCH 28, 2018**

## Court Rules TVEyes' Clipping Service Is Not Fair Use continued from page 2

The district court generally agreed with TVEyes that the basic element of the Watch function, i.e., watching a 10-minute clip in this context was a fair use. On the other hand, the district court enjoined TVEyes from enabling its customers to search for clips by date and time, to download clips, to email them or to post them on social media. Both parties were dissatisfied with the district court's decision and appealed to the circuit court.

Under the theory that certain uses of copyrighted material may have societal benefits that outweigh the proprietary concerns of the copyright owner, the Copyright Act has established criteria to evaluate whether a use would be "fair" because it could furnish such benefits, even though the copyright owner might not control the use or be compensated for it. The fair use of copyrighted material for purposes such as criticism, comment, news reporting, teaching, scholarship or research is generally not considered to be an infringement. The following factors are to be considered on a case-by-case basis to evaluate whether a use is fair:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The appellate court found that the first factor tilted slightly toward TVEyes, in favor of being a fair use. An important element of this factor is whether the use is

"transformative." The court said that sifting the copyrighted material through the search feature was transformative. However, this was somewhat offset by the fact that TVEyes is a commercial venture, engaged in selling the copyrighted material for profit.

The court said that the second statutory factor played little role in this case.

The third factor weighs heavily against TVEyes. Fox's news programming is redistributed to the TVEyes' customers in 10-minute segments. Given the brevity of the average news segment on a topic, this likely provides the end viewers with all or most of the content that they seek.

The court ruled that the fourth factor decidedly favors Fox in this analysis. The success of TVEyes' business model demonstrated that there is an exploitable market for access to the copyrighted content. TVEyes' service deprives Fox of revenue from this market for which there is evident potential.

Summing up the effect of the four factors, the court determined that the combined weight of the third and fourth factors heavily disfavored TVEyes' fair use defense. It concluded that, "At bottom, TVEyes is unlawfully profiting off the work of others by commercially re-distributing all of that work that a viewer wishes to use, without payment or license."

The appellate court remanded the case to the district court with instructions to revise the injunction so as to prohibit TVEyes from continuing to offer its Watch feature involving Fox's content without Fox's consent.

The decision is *Fox News Network, LLC v. TVEyes, Inc.*, 2018 U.S.App. LEXIS 4786.