

**ALERT**

# FCC Revises Proposal for Online Public Files for Television Stations

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The Federal Communications Commission (FCC or Commission) is putting online public files for television stations "on the fast track." On October 27, 2011, the Commission adopted an Order on Reconsideration and Further Notice of Proposed Rulemaking (FNPRM) that vacates the 2007 Enhanced Disclosure Report & Order (including FCC Form 355), and proposes a new requirement that television stations place their public files online. Under the Commission's proposal, most, but not all, of the current information in a station's public file, including the political file, would be accessible to the public in an online file hosted by the FCC. Significantly, the FNPRM proposes additional disclosure requirements regarding main studio location, sponsorship identification, and shared services agreements (SSAs). Whether or not the Commission should adopt a less burdensome standardized reporting form akin to Form 355 and whether or not radio stations similarly will be required to create online public files hosted by the FCC will be considered in separate proceedings.

## Vacating the 2007 Report and Order

As a prelude to the FNPRM's discussion of new disclosure requirements, the Commission unanimously supported vacating all aspects of the 2007 Enhanced Disclosure Report & Order. The rules adopted in 2007 were never implemented because both public interest groups and broadcasters mounted legal challenges, including through petitions for reconsideration, appeals to the D.C. Circuit, and opposition at the Office of Management and Budget under the Paperwork Reduction Act.

## Authors

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Kathleen A. Kirby  
Partner  
202.719.3360  
kkirby@wiley.law  
Ari Meltzer  
Partner  
202.719.7467  
ameltzer@wiley.law

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In deciding to abandon its prior approach, the Commission acknowledged that the 2007 Report & Order was based on a Notice of Inquiry (NOI) that is now more than 10 years old, reasoning that technological and marketplace developments necessitate a "fresh look." Commissioner Michael Copps, the Commission's most vocal proponent of fuller disclosure, expressed disappointment that the FCC is starting over, rather than using the 2007 Report & Order as a launching point to expedite implementation of policy proposals that he says have remained "in limbo" for years.

A significant aspect of the Order on Reconsideration is the death of FCC Form 355, which would have replaced the current quarterly issues/programs lists as a means for reporting on community-oriented programming, among other things. Broadcasters had unanimously decried Form 355 as outrageously burdensome. It appears, however, that the Commission will move forward with the adoption of some vehicle for standardized reporting, as the FCC indicates that it will "promptly" issue an NOI on a new enhanced disclosure form.

### **Implementing Commission-Hosted Online Public Files**

The central focus of the FNPRM is the Commission's proposal to host all public files on the FCC's website. At the Commission's Open Meeting, both Chairman Julius Genachowski and Commissioner Mignon Clyburn invoked the image of an old file cabinet hidden away at a station's main studio to suggest that the existing system is outdated. In contrast, the FNPRM accentuates how making public file information available 24 hours a day, from any location, will encourage a dialogue between consumers and broadcasters, thus adding meaning to the licensing process.

Of course the devil will be in the details of what specific online public file obligations ultimately are adopted. The FNPRM states that the online public file will be less burdensome for broadcasters because the FCC will automatically import documents filed with the agency, which it estimates constitute about one-third of each public file. Commissioner McDowell, however, expressed concerns about the additional demands the proposal will place on broadcasters, particularly with regard to the new requirements to disclose sponsorship identification information and SSAs.

**Logistics.** The FCC's proposal to place public file information online seeks to implement a recommendation from Steve Waldman's Information Needs of Communities Report (INC Report) to move toward online public disclosures. The concept, however, is not new. Under the 2007 Report & Order, which was never implemented, broadcasters would have been required to host their public file on their own station websites or participating state broadcasters association websites. Some of the strongest objections to that proposal involved the costs and burdens involved. By shifting hosting responsibilities to the FCC, the Commission contends that the costs of compliance will be greatly reduced.

Logistically, the FCC's proposal will require that broadcasters upload most of the information that they currently maintain in their public files. The FNPRM does not propose a temporal restriction on this information, meaning that stations whose license renewals remain pending could have to upload more than a decade's worth of public file information before the effective date of the rules. In justifying this requirement, the FNPRM

states that the one-time scanning and uploading of such material would not be unduly burdensome. The trade-off for broadcasters is that they would no longer be required to maintain a physical public file at the station. Broadcasters would, however, be responsible for maintaining an electronic backup of any information that they upload, which would be available to the Commission in the event of data loss.

The FNPRM tentatively concludes that anyone should be able to access a station's online public file, regardless of whether that person resides in the station's geographic coverage area. The Commission argues that this approach is less burdensome than implementing a system to screen non-residents from accessing a station's public file information.

Ultimately, the FCC plans to standardize the format for public file information so that materials can be accessed through a searchable database, in furtherance of another recommendation from the INC Report. Although the FNPRM inquires about the merits of such a proposal, it recommends using documents already in existence while a searchable system is developed.

**Transfer of Existing Public File Components.** As mentioned above, the FCC is proposing to require that broadcasters place most of the information currently kept in the station's public file in the online public file. The only exceptions are letters from the public, contour maps, and the manual "The Public and Broadcasting." In response to the 2007 Report & Order, broadcasters had noted significant privacy concerns associated with online posting of letters and email from the public. The Commission seeks comment on whether to require stations to keep letters from the public in a modified, local public file.

The FNPRM includes extensive discussion about whether to include the political file, issues/program lists, and FCC investigations and complaints in the online public file, ultimately concluding that such information should be included. As to the political file, the Commission considered the practicality of requiring broadcasters to comply with the current requirement to include files "immediately," tentatively concluding that the same standard should apply to online public files. The FNPRM, however, seeks comment on how to make such a requirement "as non-burdensome as possible."

While acknowledging the shortcomings of issues/program lists, the FNPRM proposes that broadcasters upload quarterly reports until the FCC develops a new enhanced disclosure form.

Finally, as to investigations and complaints, the Commission concluded that information currently required to be kept in the public file should be included in the online public file and seeks comment as to whether the FCC also should publish its information about enforcement proceedings in a station's public file. Although the agency did not adopt a tentative conclusion on this point, the FNPRM notes that "this is the sort of information that the public would want to find in reviewing a licensee's public file, and is a natural extension of the requirement to retain FCC correspondence."

**Expanded Public File Components.** Notably, the FNPRM proposes adding three additional disclosure requirements to online public files: main studio information, sponsorship identification and SSAs.

Under the proposed main studio requirement, stations would be required to list the address and telephone number of their main studio in their online public file. Stations with a main studio waiver would be required to list the location of the local file and the required toll free number. The Commission also asks whether the agency should require the posting of an email address that will serve as a station contact for the public file.

The proposed rules would also require television broadcasters to include information contained in on-air sponsorship identification announcements in the online public file. This follows and expands upon a recommendation in the INC Report to disclose online sponsorship of news programs. The FNPRM seeks comment on what additional burden it would impose on broadcasters to place this information online.

Finally, as to SSAs, the FNPRM proposes requiring that stations include copies of "every agreement or contract involving sharing agreements for the station, including local news sharing agreements and shared services agreements" in their online public files. The Commission seeks comment on the burdens of disclosing SSAs and whether to permit broadcasters to redact certain information.

**Announcements.** The now defunct 2007 Report & Order contained a requirement that stations make frequent announcements about the existence, location, and accessibility of the station's public file. The FNPRM concludes that such announcements would be valuable, and suggests that they be made three times a week, with one of the announcements aired between 6 p.m. and midnight. Stations would also be required to post a link to their online public files on the home page of their station websites.

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Comments on the FNPRM will be due 30 days after publication in the Federal Register, with reply comments due 15 days thereafter. We will notify our clients when those dates have been set.

If you would like more information, or if you are interested in filing comments, please contact the Wiley Rein attorney who regularly handles your FCC matters or one of the attorneys listed below. Wiley Rein will consider preparing joint comments depending on client interest.