

Text of Online Public File Order Released - Details of What the FCC is Considering, and Suggestion that Radio May Be Next

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The full text of the FCC's Order overturning its 2007 decision on **online public inspection files for TV broadcasters** and the adoption of the **Form 355 "enhanced disclosure form"** has now been released. This order, adopted at the FCC's open meeting this week (held on October 27, 2011, which we wrote about [here](#)), also contains a Further Notice of Proposed Rulemaking again suggesting an online public file, but this time it would be one hosted by the FCC. In reading the full text, more details of the FCC's proposal become clear. As set forth below, the Order suggests everything from a **future application of these rules to radio** once the bugs have been worked out, to an examination of **whether a station needs to save Facebook posts and other social media comments in the same way that it preserves letters from the public and emails about station operations**, to a proposal for stations to document in their files information about all **"pay for play" sponsorships**. Comments on these proposals, and the others summarized below, which include a request for detailed information about the costs of compliance with the proposals, are due 30 days from when the order is published in the Federal Register, with Reply Comments due only 15 days thereafter. The FCC, after sitting on these obligations for almost 5 years, now seems to be ready to move quickly.

In reaching its decision, the order first discusses some proposals that it was rejecting - some for the time being. For radio broadcasters, the most important of the rejected thoughts was the extension of this rule to radio. The Commission noted that there were proposals pending and ripe for action as part of the Localism proceeding (which we summarized [here](#)), to extend the online public file obligations to radio. In this week's order, the FCC decided that it was not yet ready to apply these rules to radio. The Commission noted that there might need to be differences in the rules for radio (implying that, at least partially, there might be resource issues making it difficult for radio broadcasters to comply with these rules), and also finding that it would be better to see how an online file works for TV before extending the rule to radio. But, from the statements made in the Order, there is no question but that, at some point in the future, some form of the obligations that are proposed for TV will also be proposed for radio broadcasters.

Also, it is important to note that the FCC's Localism proceeding is not dead yet. While this week's Order stems from the FCC's Future of Media Report (renamed the **Report on the Information Needs of Communities**), and that report recommended that the Localism proceeding be terminated, this Order did not do that. The Commission notes its plans to start a new proceeding designed to force broadcasters to complete a more comprehensive report on their public interest programming. That proceeding may be where the looming Localism proposals are finally dealt with. Statements at the meeting and passages in the Order make clear that the examination of the public interest obligations for broadcasters will begin with a Notice of Inquiry, which is a most preliminary stage of an FCC proceeding (which would be followed by a Notice of Proposed Rulemaking after the inquiry comments are reviewed) and then an Order. So final resolution of these issues seem to be far down the road. If that is the case, will the Localism proposals stay on the table until the Order in this new proceeding is adopted? It is certainly unclear from the Commission's statements thus far.

Other proposals rejected by the FCC include one asking that access to the file be limited to local residents of a station's service area. The reason for the rejection of this proposal seems to be based on the proposed adoption of the online file (that there would be no more burden on the station to make it available to all once it is online; that local residents could access the file when traveling; and that restricting the file to locals would create more, not less work) rather than on any philosophical reason that the file should be available to everyone. There also seems to be no discussion whatsoever about the possibility of abolishing the public file, as some broadcasters suggested when the rule was up for review as part of the normal review of FCC rules under provisions of the Paperwork Reduction Act.

Another suggestion that the Commission considered and rejected was one that asked whether any new proposal should be phased in - with only new information placed online, and old information retained in paper form. The FCC tentatively rejects that approach, finding that it would be too burdensome for the public to be forced to look in two places for information about station operations. The Commission also suggests that the burden to move those portions of the public file not already online to an electronic form should not be too great.

Other specifics of the FCC's proposal include the following:

- While the FCC proposes to store the online file on its servers, and to use its site and bandwidth to make the information available to the public, the Commission also proposes that broadcasters keep an **electronic back-up file** in case there should be issues with the FCC's servers or other systems.
- The **political file is proposed to be moved online**. The Commission asks about the burden that would impose, as materials are supposed to be placed in the file "immediately" in most circumstances. The Commission suggests that this should not be a burden as most political orders are taken electronically. But it does not explain the connection with that fact and the ease of an electronic file. In most cases, there is more to maintaining a file than simply placing an order into that file, and there is no indication that orders are in the same electronic format as will be the FCC's online file. The FCC asks if it should provide forms that would make that process easier (though one wonders whether the FCC could come up with forms that are equally usable by all stations that each may have unique selling practices). The Commission itself acknowledges that there is more to the issue, as it asks how an online political file can be organized so as to make it useful. Should it be broken down by election, or in some other way?
- While, for privacy reasons, the FCC suggests that **letters and emails from the public not be displayed on the online file**, it asks a number of other questions about letters from the public:
 - Should all such correspondence continue to be maintained in a physical file, open for inspection, at the station?
 - Should broadcasters be required to report online about the number of letters received from the public, or to summarize their contents in the online file?
 - Are there other ways of making such documents available?
 - Should **Facebook posts and other social media communications be made available to the public in some organized fashion as part of the public file obligation?**

- Are **contour maps** generated by the FCC's own website sufficient for the online public file?
- The **Public and Broadcasting Handbook** is proposed to be eliminated from the public file obligation, as that handbook would simply be available on the FCC's website where all the files are stored
- The FCC proposes to maintain the obligation for TV stations to complete **quarterly programs issues lists** until any new form, more completely disclosing information about a broadcaster's public interest programming, is adopted.
- The FCC asks if, in the online file, it should post all **orders dealing with sanctions imposed on a station for any rule violations**, including forfeiture orders (i.e. fines), notices of violation, notices of apparent liability and other citations for violations. Even though some of these documents are only preliminary findings of violations, which can be rebutted by a licensee, the FCC tentatively concludes that these documents would be important to the public to assess the performance of a broadcaster.
- The FCC proposes some new obligations for the public file, including:
 - An obligation to list the **address and telephone number of the main studio** and, for those stations operating pursuant to a studio waiver, a toll free phone number and the location of the local public file (one wonders, though, if the file is electronic, will there be any such location for the local file?)
 - An obligation to disclose in the online public file all **information about "pay for play" sponsorship identifications**. The FCC notes that all that information is now required to be broadcast, but there is no way for the public to review that information after the program with which it is associated is aired. The FCC notes that such information should already be in the file for sponsored political and controversial issue oriented program, but suggests that the public and "watchdog groups" should have a permanent, searchable database in which all such sponsorships are revealed. The Commission notes that such on-air disclosures are, but their nature "fleeting", and that the public should be able to know who is trying to persuade them to buy something. The FCC does not discuss how such disclosures would be made with respect to network or syndicated programming (e.g. if a network game show concludes with the tag "promotional considerations furnished by Hilton Hotels", how is the station supposed to find that information for inclusion in its file? What if the promotional consideration was received by the producers of a movie aired by the station? These questions were asked in the FCC's [open proceeding on sponsorship identification and embedded advertising](#), but these difficult issues are ignored here).
 - Information about **shared services agreements**, including agreements where stations provide administrative support or news programming to another station, are proposed for posting on the new online file. These agreements seem to be a particular target of public interest groups, and were [characterized by Commissioner Copps](#) as an "end run around our media ownership rules" (see our prior coverage, [here](#)).

- Practical questions about **the format in which such documents should be stored** are asked. The FCC is looking for a searchable format that will allow documents to be uploaded to the FCC site in the least burdensome manner possible.
- The FCC asks what notice of the existence of the online file should be required. The Commission had, in 2007, suggested a twice a day announcement on the air about the file's electronic location, but now asks if a few announcements per week would be sufficient. Should specific dayparts be mandated, the Order asks.
- The FCC also proposes that the URL of the Public File be on the homepage of the station's website, where it can be easily found by members of the public.
- The FCC proposes to eliminate the obligation on broadcasters to make the electronic file **accessible to those with disabilities**, as the FCC suggests that the database in which the files will be stored will be designed to be accessible, so that the burden would be on the FCC, not the individual broadcasters.

Obviously, there are many concerns for broadcasters, who already chafe at the burdens of maintaining a public file which is rarely if ever visited by the public. New obligations to take that information, and perhaps compile more, and put it online, adds a new layer of worry to many TV broadcasters, especially smaller ones. The FCC seems cognizant of that possibility, and asks for a full **Cost/Benefit Analysis of the proposed rule**. The FCC wants broadcasters to determine the costs of complying with the various proposed obligations, and those in the public interest community to determine what the value of the benefits would be. The FCC recognizes that the value of the benefits might be difficult to assess, so the Commission asks how the benefits to the public can be maximized while the burdens on the broadcaster are minimized.

There will no doubt be much more debate on these topics in the weeks to come. But the FCC seems to be in a rush to get this proceeding done, as many public interest groups and Commissioner Copps have complained about the lack of action on the 2007 rules and the localism proposals. So start preparing your comments now for filing once the FCC announces the dates for submission of comments. We will certainly have more coverage of this important issue for broadcasters on these pages in coming weeks and months.

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