Fletcher, Heald & Hildreth®

MEMORANDUM TO CLIENTS

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The FCC's Political Broadcasting Rules: Is Your Station in Full Compliance?

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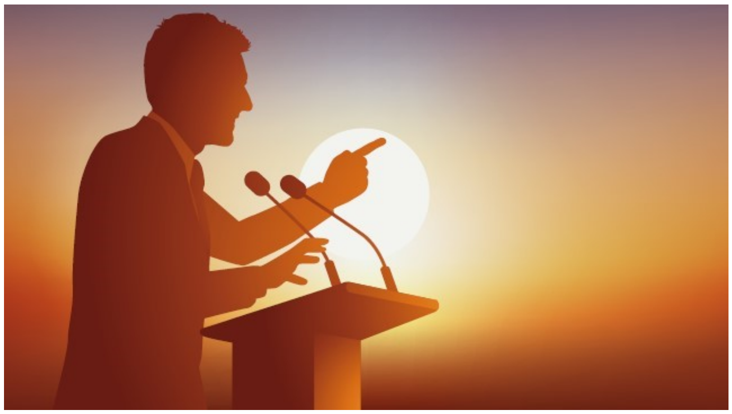
With the primary season in full swing, the 2020 elec tion cycle is certain to be one of the most contentious and hard-fought in recent memory – as well as one of the longest. The Federal Communications Commission ("FCC") is also currently actively engaged in investigating stations' compliance with the political file rules, and has recently provided additional guidance on the documentation required for "issue" ads. Failure to comply with the political file rules can result in significant fines, and possible delays in processing of license renewal applications.



For all stations, ***now*** is the time for broadcasters to review their systems to ensure that they will comply with the FCC political advertising requirements. A little advanced planning can go a long way in making this (seemingly perpetual) election season run smoothly (and, ideally, profitably) for your station.

The FCC's political broadcast rules generally cover: 1) who is entitled access to broadcast advertising time; 2) how much they pay for that time; and 3) disclosure and recordkeeping requirements. We'll look at each of those areas below but we highly encourage stations with questions to contact their communications counsel. The FCC's rules and policies are fairly complicated when it comes to political broadcasting, and the answers to many questions are highly dependent on the specific facts at hand.

Central to understanding and complying with the political rules is the concept of a candidate's "use" of a broadcast station. As we will delve into in greater detail below, the "use" of a broadcast station by a candidate triggers several potential obligations. Therefore, it is important to know as a threshold matter: a) when someone is a candidate and b) when they are considered to have made a "use" of a station.

Who is a "candidate"?

To be considered a candidate a person must:

- have announced his/her intention to run;
- be qualified to hold the office he/she is running for; and
- be qualified to be on the ballot or be eligible to be a write-in candidate.

What is a "use"?

In general, a "use" is any positive appearance of a candidate whose voice or likeness is either identified or is readily identifiable. The appearance in question does ***not*** need to be approved by the candidate or the candidate's committee to be considered a "use" – third-party ads may trigger a "use," as can appearances in entertainment programming. The candidate's appearance on the station must be "positive," so a third party attack ad against a candidate would not be considered a "use" by that candidate. It is worth noting that in this context, "positive" really means something closer to

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"neutral" or "non-negative," so even an appearance in entertainment programming that would generally be considered neutral in regards to the candidate's campaign would be treated as a "use."

Candidate appearances in certain types of programming do not count as "uses." For example, appearances by a candidate on "*bona fide*" news, news interviews, or documentary programs are not considered "uses." Thus, coverage of a "*bona fide*" news event, such as a debate or candidacy announcement, does not constitute a "use" even if the candidate is featured prominently in that coverage.

What candidates are entitled to "reasonable access" and what access is "reasonable"?

The FCC's rules (and the Communications Act) provide that "legally qualified" candidates for ***federal*** offices (*i.e.*, President, Vice President, House of Representatives and Senate) are entitled to "reasonable access" to commercial broadcast stations for the broadcast of advertising. This means that, as a general rule, commercial broadcasters ***must*** make time available to candidates for federal offices. Demands for "reasonable access" can only come from a candidate or his/her authorized campaign committee. Third-party advertisers and "issue advertisers" do ***not*** have reasonable access rights and, as discussed below, neither do candidates for state and local offices.

Although a federal candidate's reasonable access rights ensure access to a broadcast station's airtime, federal candidates do ***not*** necessarily have the absolute right to demand time during specific programs or day-parts. In addition, stations may choose to exclude political advertising from news programming. But, beyond those limited exceptions, the station must offer federal candidates "reasonable" access to the station's full schedule.

Precisely what degree of "access" is "reasonable" is not always easily determined. Since federal candidates enjoy considerable discretion to tailor their campaigns as they see fit, stations should avoid setting flat limits on the total amount or types/classes of time available to federal candidates. Questions about what is "reasonable" in any given circumstance may need to be referred to legal counsel. In any event, given the clear requirement that federal candidates be afforded "reasonable access," stations should do some advanced planning about the amount of time likely to be required to reasonably accommodate political advertising. (For such planning, it is obviously wise to consider the number of candidates competing for the various federal offices, since a "use" by one candidate can trigger "equal time" claims by others running for the same office.)

In contrast to federal candidates, candidates for state and local office (*e.g.*, mayor, county council, school board, etc.) are not entitled to "reasonable access." Thus, a station can choose not to sell any time to any candidate for a particular state or local office. BUT if the station does sell time to one candidate for a particular non-federal office, other candidates for that office will be entitled to insist on "equal opportunities" (see below). If a large number of candidates are vying for one particular non-federal office, selling time to one candidate for that office could result in multiple demands for "equal time" from that candidate's competitors, which could in turn seriously reduce the station's commercial inventory. That being a possibility, stations should consider, in advance, the non-federal political races for which advertising time will be made available. Once that determination has been made, any restrictions should be included in the station's disclosure statements (see below) – and consistently applied.

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What are "equal opportunities"?

All candidates for the same office must be treated in an equal manner. This rule – known as the "equal opportunities" or "equal time" rule – applies to ***both*** federal ***and*** non-federal (*i.e.*, state and local) candidates; it is ***not*** restricted to a limited period of time before the election. The rule is triggered by a "use" of a station by a legally qualified candidate. Once a legally qualified candidate for a given office makes a "use" of a station, all other legally qualified candidates for the same office are entitled to the opportunity to make equal use of the station. That is, the station must make the same amount and kind of time available at the same cost. During primary season, it is important to note that "opposing candidates" entitled to equal time are only those running in the same primary. A candidate in a Republican primary, for example, cannot make an equal time demand based on a "use" by a candidate for the Democratic primary.

In order to take advantage of this rule, a candidate seeking equal time must request it within seven days of the opposing candidate's triggering "use" of the station. A station is not obligated to notify opposing candidates when a "use" is made but, as described below, it must document all uses in its political files, which are now part of the station's online public inspection file. If a station does not post such documentation to its public files promptly (*i.e.*, within one business day), the seven-day deadline for equal time claims may be extended.

The equal opportunities rule can become a serious issue when on-air talent wishes to run for office. All of that person's appearances on the station after becoming "legally qualified" count as free uses of the station. Similarly, if an actor or other entertainment personality becomes a legally qualified candidate, the broadcast of movies, TV shows or other material in which the actor/personality is identifiable would also count as free uses. Such uses would obligate the station to give equal amounts of free time to all opposing candidates.

Equal time claims can also become a serious issue in the final days before an election, when some stations may need to monitor their available commercial inventory closely to ensure that they can accommodate equal time demands from candidates.

What is "lowest unit charge" and when does that apply?

Perhaps the most troublesome question for many stations is the question of the rate that may be charged for political advertising. All legally qualified candidates for any political office – state, local or federal – are entitled to the "lowest unit charge" (LUC) (or "lowest unit rate") during the 45 days before a primary election and the 60 days prior to a general election. (The 45/60 day periods are often referred to as "LUC windows.") For the November 4, 2020 general election, the window will open on September 3.

In general, the LUC is the lowest rate charged to any other advertiser for the same class and amount of time for the same time period, including all discounts and bonus spots. As a practical matter, political candidates are to be treated as the "most favored" advertiser during the LUC windows. This favorable treatment is available only to candidates or their authorized campaign committees for "uses" by the candidate; it is ***not*** available to any third-party advertisers, including political action committees, citizen groups and the like. As explained below, federal candidates also must make an affirmative certification that their advertisements meet certain criteria (and the advertisements must, in fact, meet those criteria) to qualify for the LUC.

Determining the exact amount of the LUC for any particular candidate order can be tricky. It depends on what the candidate is buying (*e.g.*, ROS vs. fixed position, preemptible vs. non-preemptible, etc.). A station must also take into account other factors that affect advertising rates charged to its non-political customers, such as day-part, discounts given for large purchases, the value of "bonus spots," etc. Most stations will have more than one LUC depending on the various classes of time sold on the station during the LUC window.

Because the calculation of the LUC can be complex, stations should begin considering the issue well in advance of the LUC window, and should consult with legal counsel as necessary.

What are "Disclosure Statements" and are stations required to have them?

A disclosure statement is a written summary of the station's advertising rates and policies. Ordinarily, it should describe the classes of time available to advertisers, the LUC for each class, any make-good policies, and policies on the preemption of ads, as well as any other sales practices or information that would be relevant to advertisers. The station should provide the disclosure statement to any candidate, agency, or group requesting political time (inside or outside of the LUC window). Of course, disclosure statements should be updated as often as necessary during the election season to ensure accuracy and stations should be sure to comply with any policies set forth in the statements.

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The FCC's rules do ***not*** require that stations prepare written disclosure statements. Nevertheless, disclosure statements provide both station sales staff and prospective advertisers a clear guide to the factors relevant to any advertising purchase; they also tend to limit after-the-fact disputes. In addition, the process of preparing a complete disclosure statement forces the station to consider and resolve, in advance of the election season, several practical questions (*e.g.*, whether to decline to sell time to candidates for certain non-federal offices).

What sponsorship identification requirements apply to political ads?

All political advertising must include some form of sponsorship identification. Specifically, when a political ad is run, there must be a statement that the ad was "paid for" or "sponsored by" the group or person actually purchasing the ad time. If the advertiser provides the station with a pre-produced spot that does not include the required sponsorship ID, the station must add this language on its own accord (if necessary, it can do so over the content of the spot – no free time need be provided, and this type of addition is exempt from the usual non-censorship rules that apply to candidate advertising). For television ads, the statement must be visual, run for at least four seconds, and occupy at least four percent of the screen.

Ads for federal candidates also must meet a variety of additional requirements imposed by the Bipartisan Campaign Reform Act (BCRA). If the ad refers to an opposing candidate, BCRA requires that a statement be spoken by the candidate who is purchasing the time and that the ad identifies the candidate and the office sought. BCRA requires that the candidate state that

a) he or she approves the broadcast, and
b) b) he or she (or his/her campaign committee) paid for the ad. Television ads must also display a clearly identifiable image of the candidate.

BCRA also requires that federal candidates, or their authorized committees, provide a broadcast station with a written certification stating whether or not the advertisement refers to another candidate for the same office. If it does refer to another candidate, the certification must state that the ad will comply with the "stand by your ad" announcement requirements as described above. This certification must be provided to the broadcast station when the time is purchased. If the certification is not provided, the station is not obligated to give the candidate the LUC.

If the ad advocates the election or defeat of a specific candidate and is paid for or sponsored by a third party, the ad must clearly indicate whether it was or was not authorized by a candidate. That is, the sponsor identification statement must include both the "paid for" or "sponsored by" language *and* the "authorized by" or "not authorized by" a particular candidate or campaign committee language. If it is not authorized, there must be an additional audio statement that the name of the entity purchasing the ad "is responsible for the content of this advertising." This is in addition to relevant state law, which may require more.

Can a station revise the content of a political "use"?

When a legally qualified candidate for office makes a "use" of a station, the station is NOT permitted to censor or otherwise alter the candidate's message in any way (other than by adding a missing sponsorship identification). While some political uses may contain content which the station might ordinarily choose not to broadcast, the station cannot alter the use at all. However, the station is protected from any liability that may result from the candidate's message. This "no censorship" provision applies only to candidate advertising and not to third-party advertising. Thus, stations need to take potential liability into account when deciding whether to accept such third-party ads.

What records need to be kept with respect to political advertising?

The FCC's political file rule requires stations to maintain, and allow public inspection of, records of all requests for political time. With the advent of the online public file requirements now applicable to all broadcast stations, these materials will now be available for review by anyone with internet access. Importantly, all requests must not only be uploaded to the online public file, but these uploads must be completed in a timely manner, which the FCC has interpreted to mean within one business day of the time at which the station either accepts or rejects the request.

For requests from legally qualified candidates or their campaign committees, the records placed in the political file must include details of:

- the nature and disposition of all requests;
- the schedule of time provided or purchased;
- the schedule of time at which advertisements actually aired, if different;

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- the classes of time involved;
- the rates charged; and
- contact information of the purchaser.

These same items of information must also be uploaded to the political file for all requests for time by anyone (including non-candidates) who seeks to communicate a message that refers to any "political matter of national importance"

Under guidance released by the FCC in late 2019, political matters of national importance include, but are not limited to, any request referencing 1) a legally qualified candidate for federal office; or 2) any election to federal office; or 3) a national legislative issue of public importance. The FCC has further clarified that a "political matter of national importance" is not necessarily limited to the three specific categories above, but can include any political issue that is "the subject of controversy or discussion at the national level."

For messages that trigger these BCRA requirements, a licensee's public file documentation must include, in addition to the information identified above related to rates, class, and scheduling:

The name of all candidates, offices, and national issues referred to in the message;
For requests made by or on behalf of a candidate for federal office, the name of the candidate, his or her authorized committee, and the treasurer of that committee;
For requests referencing a federal election (but not a specific candidate), the date of the election, the office which it is for, and the type of election (primary, general, etc.) and
For requests made by third parties, a list of all of the chief executive officers or members of the executive committee or board of directors of the entity purchasing the time.

Where a request addresses more than one candidate, office, or issue of public importance, the public file documentation must identify all of the candidates, offices, and/or issues referred to. The FCC has also clarified that if a licensee has a reasonable basis to believe that a third party advertiser has supplied an incomplete list of officers or directors (*e.g.*, the list contains only one name), the licensee must make at least a single inquiry of the purchaser as to the completeness of that list.

For issue ads that do not address issues of national importance, stations must simply document the fact that the ads were aired and maintain a list of the chief executive officers or members of the executive committee or of the board of directors of the entity buying the time. Information about rate, class, and air times is not required.

So, how can you be sure that your station staff is gathering all of the required information? Luckily, the National Association of Broadcasters (NAB) has updated its Political Broadcast Agreement Forms – one for candidate ads, and one for issue ads. NAB members may download the forms for free; non-member stations can order the PB-19 forms via the NAB online store.
Because the political file is often reviewed by parties seeking "equal opportunities," it is important for stations to keep the political file up-to-date at all times. (***Note***: since the political file is available online for inspection by the public, care should be taken to remove or redact any confidential information, such as credit card or check numbers that might otherwise be included in the materials placed in the file.)

As noted above, this is a thumbnail overview of the political broadcasting rules. We also invite readers to review our firm's archived webinar from early September that was presented with the FCC's Bobby Baker on the political broadcasting rules. In the coming weeks and months, stations should review the rules in detail and confirm that their disclosure statements and station policies in place are up-to-date. As election season heats up, station management should ensure that all sales personnel are well-informed about the substantive rules and the recordkeeping obligations related to political broadcasting.

Now that the political primary season has begun, questions and controversies can arise quickly. Those questions and controversies can be complicated and require careful analysis. Don't hesitate to contact your legal counsel.

If Your Program Sounds Like It's Live, but Isn't, You Must Tell the Audience (Or Suffer the Consequence)

In late January, the FCC released a Consent Decree penalizing Salem Media Group to the tune of $50,000 for "violat[ing] the FCC's live broadcast rules by broadcasting prerecorded programming as 'live' without announcing before the broadcast that the programming was prerecorded." In addition, Salem has agreed to a three-year compliance plan to ensure the violation does not occur in the future.

The pertinent rule is Section 73.1208:

> **§73.1208 Broadcast of taped, filmed, or recorded material.**
>
> (a) Any taped, filmed or recorded program material in which time is of special significance, or by which an affirmative attempt is made to create the impression that it is occurring simultaneously with the broadcast, shall be announced at the beginning as taped, filmed or recorded. The language of the announcement shall be clear and in terms commonly understood by the public. For television stations, the announcement may be made visually or aurally.
>
> (b) Taped, filmed, or recorded announcements which are of a commercial, promotional or public service nature need not be identified as taped, filmed or recorded.

To be clear, it is fine for a station to run a repeat of a show that was originally broadcast live or to delay the broadcast of a program recorded live – as long as the station announces at the beginning of the broadcast that it is recorded. For instance, at the beginning of *The Late Show with Stephen Colbert* – which is broadcast at 11:35 PM, but is usually recorded earlier in the evening – an announcer says it is "live on tape."

For rebroadcasts of call-in programs, a common practice is an announcement at the beginning to the effect of: "this program was recorded previously, so we are taking no new calls." Often simply saying "pre-recorded" at the beginning of the show will be sufficient.

If you are unsure of whether your specific program is compliant with the rules, contact your counsel.

Upcoming FCC Broadcast and Telecom Deadlines for March – May

Broadcast Deadlines:

March 9, 2020

All-Digital AM Broadcasting - Comments are due in response to the FCC's *Notice of Proposed Rulemaking* seeking input on a proposal to allow AM broadcasters to broadcast an all-digital signal using the HD Radio in-band on-channel (IBOC) mode known as MA3.

March 30, 2020

Children's Television Programming Reports - For the first time, all commercial television and Class A television stations must file electronically their annual children's television programming reports with the FCC, although the first one will cover only the portion of the year which began with the effective date of the revised rules (September 16 - December 31, 2019). These reports should be automatically included in the OPIF, but we would recommend checking, as the FCC bases its initial judgments of filing compliance on the contents and dates shown in the online public file.

April 1, 2020

License Renewal Pre-Filing Announcements – Radio stations licensed in Michigan and Ohio, as well as TV stations licensed in Maryland, District of Columbia, Virginia, West Virginia, must begin broadcasts of their pre-filing announcements with regard to their applications for renewal of the license. These announcements must be continued on April 16, May 1, and May 16. A certification statement indicating these announcements were made needs to be uploaded into the station's OPIF by May 23, 2020.

License Renewal Applications Due – Applications for renewal of license for radio stations located in Indiana, Kentucky, and Tennessee must be filed in the FCC's License and Management System. These applications must be accompanied by Schedule 396, the Broadcast Equal Employment Opportunity (EEO) Program Report, also filed in Licensing & Management System (LMS), regardless of the number of full-time employees.

Radio Post-Filing Announcements – Radio stations licensed in Indiana, Kentucky, and Tennessee must begin broadcasts of their post-filing announcements with regard to their license renewal applications on April 1. These announcements must continue on April 16, May 1, May 16, June 1, and June 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the online public file within seven days. Likewise, if it has not already been done, a certification of broadcast and text of the pre-filing announcements should be posted at the same time.

EEO Public File Reports – All radio and television station employment units with five or more full-time employees and located in Delaware, Indiana, Kentucky, Pennsylvania, Tennessee, and Texas must place EEO Public File Reports in their OPIFs. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

April 6, 2020

All-Digital AM Broadcasting – Reply Comments are due in response to the FCC's *Notice of Proposed Rulemaking* seeking input on a proposal to allow AM broadcasters to broadcast an all-digital signal using the HD Radio IBOC mode known as MA3.

April 10, 2020

Issues/Programs Lists - For all commercial and noncommercial radio, television, and Class A television stations, a listing of each station's most significant treatment of community issues during the first quarter of 2020 must be placed in the station's OPIF. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program with a brief description of the program.

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Class A Television Stations Continuing Eligibility Documentation – The FCC requires that all Class A Television Stations maintain in their OPIFs documentation sufficient to demonstrate that the station is continuing to meet the eligibility requirements of broadcasting at least 18 hours per day and broadcasting an average of at least three hours per week of locally produced programming. While the FCC has given no guidance as to what this documentation must include or when it must be added to the public file, we believe that a quarterly certification which states that the station continues to broadcast at least 18 hours per day, that it broadcasts on average at least three hours per week of locally produced programming, and lists the titles of such locally produced programs should be sufficient.

Telecom Deadlines**:**

April 1, 2020

Form 499-A – The annual Form 499 filing, Form 499-A, must be filed by telecommunications carriers and interconnected VoIP providers Carriers report their prior year's annual revenues using the form, and the FCC uses that information to reconcile, or true-up, a carrier's Universal Service Fund (USF) contributions over the past year based on the carriers quarterly Form 499-Q revenue projections. Carriers that overpaid their contributions will receive a credit, and Universal Service Administration Company (USAC) will bill carriers that underpaid their USF contributions.
Rate of Return Reporting FCC Form 492 – Local exchange carriers (LECs) groups of affiliated carriers must file FCC Form 492 within three months of the end of each calendar year. Each LEC or group of affiliated carriers may make corrections to the report within 6 months of the due date for the report. Two copies of the report must be filed with the Secretary of the Commission with an additional copy filed with the Wireline Competition Bureau, Industry Analysis, and Technology Division.

Automated Reporting Management Information System (ARMIS) Reporting – Certain incumbent local exchange carriers (ILECs) must file ARMIS reports annually by April 1. The FCC has made significant changes to ARMIS reporting over the years to reduce the reporting burden. That said, carriers subject to the reporting thresholds are still required to report some ARMIS information, including pole attachment reporting. Information subject to ARMIS reporting also may vary depending on whether a carrier is a mid-size or large ILEC or a mandatory price-cap, elective price-cap, or non-price-cap ILEC. If you have any questions about the FCC's changes to ARMIS reporting, you should contact experienced telecommunications counsel.

Section 43.21(c) Letter – Common carriers with operating revenue in excess of the indexed revenue threshold must file a letter with the Chief of the Wireline Competition Bureau showing the carriers operating revenues for the prior year and the value of its total communications plant at the end of the year. The indexed revenue threshold is defined in Section 32.9000 of the FCC's rules. The threshold is an inflation-adjusted amount calculated based on the annual revenue of $100 million in 1992.

Recordkeeping Compliance Certification and Contact Information Registration ("RCCCI") – Each year, equipment manufacturers and service providers (including traditional telephone providers, interconnected VOIP providers, and Advanced Communications Services, such as non-interconnected VoIP, electronic messaging, and interoperable video conferencing providers) must certify compliance with the FCC's recordkeeping rules related to accessibility of their service by individuals with disabilities. Section 14.31(a) of the FCC's rules requires equipment manufacturers and service providers to maintain certain records related to making telecommunications services accessible to individuals with disabilities. The RCCCI certification requires manufacturers and service providers to certify that they have procedures in place to meet those recordkeeping requirements. The certification is filed online and must be signed by an officer of each company under penalty of perjury.

May 1, 2020

Quarterly Telecommunications Reporting Worksheet (FCC Form 499-Q) – FCC rules require telecommunications carriers and interconnected VoIP providers to file quarterly revenue statements reporting historical revenue for the prior quarter and projecting revenue for the next quarter. The projected revenue is used to calculate contributions to the USF for high cost, rural, insular and tribal areas as well as to support telecommunications services for schools, libraries, and rural health care providers. USF assessments are billed monthly.

Geographic Rate Averaging Certification – Non-dominant interstate interexchange providers operating on a detariffed must certify that their service complies with the provider's geographic rate average and rate integration obligations. The

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certification is due annually by May 1 and must be signed by an officer of the company under oath. Certifications should be sent to the FCC's Office of the Secretary, directed to the attention of:

Office of the Secretary
Attn: Chief, Pricing Policy Division
Room 5-A225
445 12th Street, S.W.
Washington, DC 20554

Numbering Resource Utilization Forecast (NRUF) (FCC Form 502) – Twice a year, service providers with numbers from the North American Numbering Plan Administrator (NANPA), a Pooling Administrator, or another telecommunications carrier must file a numbering resource utilization forecast. Subscriber toll-free numbers are not included in the report. Interconnected VoIP providers are subject to the reporting requirement along with other service providers who receive NANPA numbers, such as wireless carriers, paging companies, ILECs, and CLECs.

FHH - On the Job, On the Go

On March 11, **Frank Montero** will participate in the New Jersey Broadcasters Association Board of Directors meeting in Atlantic City, NJ.

On March 20, **Frank Montero** and **Dan Kirkpatrick** will teach a Broadcast Leadership Training (BLT) class on broadcast station purchasing at the NAB headquarters in Washington, DC.

From March 20 - 22, **Peter Tannenwald** will attend the annual Alumni Symposium held by Cornell Media Guild, Inc., licensee of WVBR-FM, in Ithaca, NY.

From March 25 – 26, **Frank Montero** will attend the Hispanic Radio Conference in Miami, FL, where he will moderate a panel on Federal laws and regulations impacting broadcasters, entitled, "Washington Update".

From March 27 – 28, **Frank Montero** will attend the George Washington University Law School Alumni Board meeting in Washington, DC.

From March 30 - April 1, **Tony Lee** will attend the CCA Mobile Carriers Show in Dallas, TX.

On April 4, **Matt McCormick** will attend the West Virginia Broadcasters Association Spring Meeting and Broadcasting Awards in Morgantown, WV.