



### A Statement on COVID-19 from Fletcher, Heald & Hildreth, PLC

As COVID-19 continues to challenge our nation, we at Fletcher, Heald & Hildreth, PLC are taking action to ensure the health and safety of our team and their loved ones. All staff has transitioned to telework and will continue to do so until further notice. FHH attorneys and staff are reachable via email and their office telephone numbers and their contact information can be found on our [site](#). The Federal Communications Commission (FCC) has already made a number of changes to its operating procedures and deadlines, a number of which are more fully explained in this memo. We will continue to further monitor the FCC and will let you know of any further changes as they become available.

We recognize that for our communities, broadcasters and telecommunications services are the first line of defense in keeping families informed and connected to vital resources. That's why we are so proud of the work that we do with you, and why we will continue to counsel you during this crisis and beyond.

Moving forward, we will take caution and abide by [CDC](#) guidelines in advising our staff. In addition, we will continue to update [CommLawBlog](#) with necessary information and status updates. Should you have any specific questions regarding our COVID-19 policies please contact [managingmembers@fhhlaw.com](mailto:managingmembers@fhhlaw.com).

Stay healthy and stay safe.

Your friends at,  
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### Homeland Security Issues Access Letter to Broadcasters and Telecoms

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In early March, in response to the developing COVID-19 pandemic, the Cyber and Infrastructure Security Agency, an agency within the Department of Homeland Security (DHS), issued [multiple letters](#) that will provide the bearer access to:

- restricted areas and times (such as during curfews) if necessary to access communications equipment to ensure continued service; and
- priority access to fuel for generators and debris removal/repair vehicles, should they become necessary to operate communications equipment.

Curfews and "stay-at-home" orders are in place in much of the country and continue to expand; the access letter can be shown to law enforcement to provide passage to access telecommunications and broadcast infrastructure. And, while

we certainly hope the situation does not devolve to a place where we have power outages, telecommunications providers and broadcasters can be assured by the fuel letter they are to be afforded primary access to fuel for generators through the Federal Emergency Management Agency (FEMA) and other federal relief mechanisms.

As a reminder, since 2018, broadcasters also are deemed "first informers" under federal law and are to be afforded access to report on news events regardless of restrictions to the public.

Please be aware that, while many states have adopted laws that mirror the federal laws recognizing telecommunications, broadcast, and tower operations as "essential services" granted priority access, some local laws may be in conflict. Please defer to your local emergency management officials.

In times of crisis such as these, Americans rely even more on our broadcasters and telecommunications providers to provide reliable information and to keep our communities connected. Thank you for all that you do – and stay safe!

## You May Get Some More Robocalls, Thanks to COVID-19

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I hate them, you hate them, we all hate robocalls with a passion (commonly used four-letter descriptions omitted here). But the FCC had good reason to issue a [Declaratory Ruling](#) that under the Telephone Consumer Protection Act (TCPA), the coronavirus pandemic constitutes an “emergency” which invokes a statutory exception permitting certain kinds of robocalls to be made and texts to be sent without the consent of the recipient.

What constitutes an illegal robocall under the TCPA can be a fairly complicated question, which has led to a lot of litigation and requests for waivers. Leaving aside restrictions on calling numbers that have been registered on the Federal Trade Commission’s (FTC) “Do Not Call” list, whether or not a call made without the consent of the recipient is forbidden under the TCPA depends in part on whether it is automatically or manually dialed, whether called numbers are randomly generated or taken from customer lists, whether the called number is a landline or a cellphone, whether the message is recorded or live, and whether the call is made by a for-profit or non-profit entity or a political campaign.

We don’t have to delve into all those nuances here. The important point is that the FCC is trying to remove any regulatory impediment to fighting the coronavirus threat and so has made it clear that unsolicited calls by certain kinds of entities, with content limited to information about the pandemic, are permitted under the TCPA.

To qualify under the FCC ruling, the call must be made directly by, or by a person acting under the specific direction of, a hospital, health-care provider, state or local health official, or some other governmental official. The content of the message must consist solely of information made necessary because of the COVID-19 outbreak, and directly related to the imminent health or safety risk arising out of the outbreak. Examples include calls from hospitals about preventive measures and information about shelter-in-place, quarantines, testing, and school closures. The FCC contrasts these calls with calls that contain advertising or telemarketing of services — e.g., selling or promoting commercial grocery delivery services, health insurance, cleaning services, or home test kits. Those do not constitute calls made for an “emergency purpose.” Similarly, calls made to collect debts, even debts arising from health care treatment, are not made for an “emergency purpose,” because such calls are not time-sensitive, do not “affect the health and safety of consumers,” and are not directly related to an imminent health or safety risk. Thus, these debt collection, advertising, or telemarketing automated calls continue to require the prior express consent of the called party.

So, what about broadcasters and other news organizations making automated calls with information about the pandemic, even on a non-profit basis? What about adding to an otherwise permissible health care message offers to sell home test kits, grocery delivery, health insurance, and cleaning services? No deal — mixed content calls don’t qualify for the exception.

The FCC warns that it will show no mercy to scammers or others who try to take advantage of the pandemic to step up robocalls. The FCC is putting a lot of pressure on telephone companies to implement technology intended to validate calls before they go through, and they don’t intend to slow down their campaign against robocalls. While the agency is subject to Constitutional restrictions against “cruel and unusual punishment,” the Commissioners would probably not lose any sleep over unpleasant fates that might befall robocall abusers who are caught.

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## FCC to Stations: Giving Away Spots Doesn't Necessarily Have to Cost You When Candidates Come to Buy Time

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One of the outcomes of the COVID-19 crisis – according to reports from many radio and television stations – has been a precipitous drop in spot sales and customers canceling existing advertising contracts, leaving lots of airtime to fill. To fill that time, and to help other struggling businesses, some broadcasters have responded by offering advertisers free spot time.

There is a potential problem with doing this. Typically bonus spots have to be counted in calculating the lowest unit charge (LUC) for candidate advertising during the 45 days before a primary election and the 60 days before a general election.

Now the FCC has offered guidance on how to give away spot time without impacting your LUC. In a [Public Notice](#) released March 25, the FCC's Media Bureau instructs that broadcasters may exclude free time they provide to commercial advertisers when calculating their LUC – “provided the free time is not associated with an existing commercial contract for paid time or otherwise considered bonus spots.” To avoid being considered “bonus spots,” the free time can't be tied in any way to an existing spot buy. That does not necessarily mean that the station cannot give free time to a current advertiser; it just means that free time can't be an extension of or otherwise formally associated with (e.g. as part of a make-good for) the current buy.

While the FCC staff has informally indicated that they will try to provide appropriate flexibility to broadcasters, how this policy is to be applied in particular cases may vary based on the specific facts of your case. If you are unsure if the new policy fits what you have in mind, check with your communications attorney.

The FCC notes that because the pandemic is a rapidly evolving situation and market conditions are changing quickly, this guidance applies only to the current period and will not necessarily continue when more ordinary conditions are restored.



## Coronavirus News to Share? FCC Won't Ensnare

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The FCC has issued a [Public Notice](#) assuring radio and TV stations that they may share news content and news-gathering resources on an emergency or *ad hoc* basis during the coronavirus crisis without reducing their arrangements to writing or putting them in their online public inspection file (OPIF) as “shared service” agreements (SSAs), as long as the sharing is temporary and not part of implementing a long-term formal agreement.

Rule Section 73.3526(e)(18) requires stations to put in writing and to post agreements that involve collaboration or the provision of programming, administrative, technical, and/or sales support between stations that are not commonly

controlled. The posting requirement applies only to full power and Class A television stations, not to radio stations.

When it adopted the SSA rule, the FCC excluded “*ad hoc* or ‘on-the-fly’ arrangements during breaking news coverage,” which is “typically precipitated by unforeseen or rapidly developing events.” The exclusion applies as long as those arrangements are not undertaken pursuant to a broader, longer-term, agreement governing news coverage outside of the emergency, even when each station produces its own newscasts. Those broader agreements are considered to be SSAs and do have to be posted in the OPIF.

So, if you are collaborating temporarily with other stations, in or outside of your designated market area (DMA), to facilitate coronavirus coverage, go for it, let your news staff do their thing, and don't worry about paperwork or your OPIF.

## Auction 105 for the 3.5 GHz Band Delayed

In a [Public Notice](#) released March 25, the FCC announced a delay in Auction 105 for the 3.5 GHz band due to COVID-19. Short-form applications will now be due on May 7, 2020 and the auction for priority licenses will take place on July 23, 2020.

Here is the complete list of the revised dates:

- Short-Form Application (FCC Form 175) Filing Window Opens – April 23, 2020, 12:00 p.m. Eastern Time (ET)
- Short-Form Application (FCC Form 175) Filing Window Deadline – May 7, 2020, 6:00 p.m. ET
- Upfront Payments (via wire transfer) – June 19, 2020, 6:00 p.m. ET
- Bidding Tutorial Available (via the Internet) – No later than July 9, 2020
- Auction Registration Materials – By July 15, 2020, 12:00 p.m. ET
- Mock Auction – July 20, 2020
- Bidding Begins in Auction 105 – July 23, 2020

Please contact us for more information, or if you are interested in participating in this auction.

## FM Auction 106 Postponed Indefinitely

As we have seen over the past few weeks, COVID-19 has taken up much of the FCC's time and attention, with other duties and proceedings getting pushed back. That list of impacted proceedings includes FM Auction 106, which has been postponed indefinitely via a [Public Notice](#) released March 25.

Applicants who submitted upfront payments can request refunds through the *Auction Applications Manager* page. These requests must be submitted by fax to the Revenue & Receivables Operations Group/Auctions at (202) 418-2843 or by email to [RROGWIREFAXES@fcc.gov](mailto:RROGWIREFAXES@fcc.gov).

Should you choose to send a refund request apart from the application manager you must include (in writing):

- Name, address, contact, and phone number of Bank
- Automated Clearing House (ACH) ABA Number (Please verify this number with your Bank)
- Account Number to Credit
- Name of Account Holder
- FCC Registration Number (FRN)

All short-form applications (Form 175) are dismissed but may be refiled at a later date to be determined. Also, the prohibited communications rules that had gone into effect on the filing of short-form applicants are now suspended.

## FCC Proposes to Drop Cable TV Public File Reports of Interest in Video Programming Services

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The FCC has proposed to eliminate the rule that requires cable television systems to post in their public file information about the nature and extent of their attributable interests in video program services and which of those services they own are carried on their system.

Cable operators have acquired ownership interests in a significant number of program services that they distribute to their customers. There are many possible reasons for such acquisitions, including making a profit from operating the services, controlling whether and at what cost competing multichannel video programming distributors ("MVPDs") can get access to the services, and controlling the fees that the cable operator might otherwise have to pay for the right to carry the services.

Concerned that there might be too much vertical integration in the cable industry because of the number of programming services coming under cable control, the FCC adopted rules in 1992 limiting carriage of affiliated services to 40% of the channels of cable systems with up to 75 channels and requiring that larger systems carry at least 45% unaffiliated channels. The U.S. Court of Appeals for the D.C. Circuit reversed and remanded those rules in 2001, holding that they

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failed to meet the Constitutional requirement that constraints on speech be the least restrictive available.

After the Court's decision, the FCC requested new comments multiple times but never adopted any new limit on cable system ownership or carriage of owned programming services. As a result, while public file posting requirements remain in the Rules, there are no consequences regardless of what information is posted.

Ever on the march to repeal rules that don't have a clear purpose, the FCC has suggested that the rule requiring the posting of information about programming interests should simply be deleted. It asks whether anyone reads the public file postings and uses the information, particularly because only one complaint has been filed over more than two decades, it was withdrawn, and no sanctions have ever been imposed for violation of this aspect of the public file rules.

At least one Commissioner raised his eyebrows and asked whether maybe the FCC ought to reconsider whether the original regulatory purpose – controlling how many channels on a cable TV system the cable operator may own or control – should be looked at again. But a substantive review of vertical integration in the cable TV industry is not on the table in the current proceeding.

Comments will be due May 4, with Reply Comments due May 18.

## TV Must-Carry/Retransmission Consent Elections Must Be Made This Year: Election Notification System Will Now Be All Electronic

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In *Report and Orders* released in [July of 2019](#) and [February of 2020](#), the FCC has converted the system for television broadcast stations to notify MVPDs, of their election of must-carry or retransmission status from paper sent by certified mail to electronic notices posted on the FCC's website, with notices sent by email to MVPDs only when and if a station changes its election. MVPDs include cable television systems, Open Video Systems ("OVS"), and direct broadcast satellite systems ("DBS").

The new electronic system promises to be simpler and less expensive than the old paper system; but since the electronic system is new, both every TV broadcaster and every MVPD will have to upload some information this year, by specific deadlines, to preserve their legal rights. Keep in mind that must-carry/retransmission consent elections are made every three years, and the three-year cycle requires elections this year – which must be made on time, with no grace period, to avoid reverting to default status, which remains must-carry for cable TV/OVS and retransmission consent for commercial stations on DBS. Noncommercial stations, which are never entitled to choose retransmission consent, must still "request" carriage to take advantage of their DBS must-carry rights.

The two critical deadlines are July 31 and October 1, 2020. By July 31, both TV broadcasters and MVPDs must make sure that contact information on file with the FCC is up-to-date. By October 1, all TV stations must upload their must-carry/retransmission consent elections.

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**By July 31, 2020:** All TV stations that have the right to elect must-carry status must upload both email and telephone contact information for carriage inquiries, which must appear both in the Licensing and Management System (“LMS”) and in the station’s OPIF. It is not clear whether the FCC will migrate contact information from one system to the other, so broadcasters should verify that correct information is displayed in both online systems. The email and telephone information must be kept current, and stations must respond promptly to any inquiry from an MVPD received through either contact method.

**By October 1, 2020:** Full power and Class A commercial TV stations must upload their must-carry/retransmission consent elections to their OPIF. They no longer have to upload a separate election for each MVPD. One blanket election for all MVPDs is sufficient. If a station elects retransmission consent on some systems and must-carry on others, it must specify which is which in its online election notice. A one-time notice upload is all that these TV stations need to do. They are not required to send any notices directly to MVPDs.



Notices must be sent to MVPDs only when and if a station changes the status it elects. Status changes will continue to be permitted only once every three years; so the election made by October 1, 2020, will be effective January 1, 2021, and may not be changed until October 1, 2023, effective January 1, 2024. Change notices must include the station call letters; the community of license; DMA; changes the station wants to make; to which communities the changes apply; and a telephone number, email address, and the name of a person to whom questions may be addressed. A copy of each status change notice must be emailed to ElectionNotices@FCC.gov and placed in the station’s OPIF.

Full power noncommercial educational (NCE) stations, because they do not have the option of electing retransmission consent, are not required to upload must-carry/retransmission consent elections for cable TV and OVS; but they must still upload their DBS carriage requests to their OPIF.

The situation is different for those low power television (LPTV) stations and NCE translators that have must-carry rights but do not maintain an OPIF. By October 1, these stations must email their initial elections to all affected MVPDs, with a copy to ElectionNotices@fcc.gov. The emails must be sent to the contact point specified for each MVPD in the FCC’s online Cable Operations and Licensing System (COALS). All stations with carriage rights but no OPIF must send an election notice this year, even if their prior election status is not being changed; but they will not have to send notices in future years unless they want to change their status.

All MVPDs must upload contact information (both email and telephone number) for election status inquiries to COALS by July 31. The FCC states that it will migrate this information to each MVPDs OPIF, but MVPDs should check their OPIF to make sure that accurate information is displayed. Each MVPD must specify one single point of contact for the entire company, not a separate contact for each system or DMA. (The FCC does not state whether MVPDs with legally separate operating subsidiaries may specify a separate contact for each subsidiary.) MVPDs must acknowledge receipt of any election change notice received from a TV station; if they do not respond, the TV station should inquire. If inquiries are not answered, notices sent to the posted email address with a copy to the FCC may be deemed valid and binding on the MVPD. The required simple acknowledgment of receipt will not impair an MPVDs ability to claim later that a notice was legally defective.

The home page of COALS already has a notice alerting MVPDs of the need to provide contact information. No notice yet appears on the LMS home page. Broadcasters should note that if their information in LMS is not correct, filing different information in an application will usually not result in an update of permanent contact information. An “Administrative Update” filing is available in LMS to make permanent updates. Stations should also note that MVPDs may use the contact information in LMS for the licensee and are not required to use separate contact information such as law firms and consultants; so it is important that LMS reflect “licensee” contact information that will reach a person who will pay attention to it.

Are you marking your calendar now to upload the required information on the deadline date or maybe the day before? That is not a very good idea. The FCC’s online systems are known to slow down, and sometimes crash, on big filing deadline days. Remember that the must-carry/retransmission deadline is inflexible. Play it safe and finish your uploading at least a week in advance of each deadline. Avoid suffering the slings and arrows of procrastination.

## Upcoming FCC Broadcast and Telecom Deadlines for April – June

### Broadcast Deadlines:

#### **April 6, 2020**

*All-Digital AM Broadcasting* – Reply Comments are due in response to the Commission's *Notice of Proposed Rulemaking* (NPRM) 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**

*Class A Television Stations Continuing Eligibility Documentation* – The Commission 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 Commission has given no guidance as to what this documentation must include or when it must be added to the OPIF, 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 that it lists the titles of such locally produced programs should be sufficient.

#### **June 1, 2020**

*Radio and Television License Renewal Pre-Filing Announcements* – Radio stations licensed in Illinois and Wisconsin, as well as TV stations licensed in North Carolina and South Carolina, must begin broadcasts of their pre-filing announcements concerning their applications for renewal of the license. These announcements must be continued on June 16, July 1, and July 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the OPIF within seven days.

*Radio License Renewal Applications Due* – Applications for renewal of license for radio stations located in Michigan and Ohio must be filed in the LMS. These applications must be accompanied by Schedule 396, the Broadcast Equal Employment Opportunity (EEO) Program Report, also filed in LMS, regardless of the number of full-time employees.

*Radio Post-Filing Announcements* – Radio stations licensed in Michigan and Ohio must begin broadcasts of their post-filing announcements concerning their license renewal applications on June 1. These announcements must continue on June 16, July 1, July 16, August 1, and August 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the OPIF 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.

*Television License Renewal Applications Due* – Applications for renewal of license for television stations located in the District of Columbia, Maryland, Virginia, and West Virginia must be filed in the Commission's License and Management System. These applications must be accompanied by Schedule 396, the Broadcast EEO Program Report, also filed in LMS, regardless of the number of full-time employees.

*Television Post-Filing Announcements* – Television stations licensed in the District of Columbia, Maryland, Virginia, and West Virginia must begin broadcasts of their post-filing announcements concerning their license renewal applications on June 1. These announcements must continue on June 16, July 1, July 16, August 1, and August 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the OPIF 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 Arizona, Idaho, Michigan, Nevada, New Mexico, Ohio, Utah, and Wyoming 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.

### Extensions:

***Radio License Renewals for IN, KY, and TN (originally due April 1)*** – In light of the unique circumstances presented by the coronavirus pandemic, the FCC has adopted a liberal policy for any stations that request extensions of

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time to file their renewal applications and related Equal Employment Opportunity (“EEO”) Program Reports.

Extension of time requests can be submitted to Audio Division Chief Albert Shuldiner ([Albert.Shuldiner@fcc.gov](mailto:Albert.Shuldiner@fcc.gov)) by email. Stations should make clear that additional time is needed based on a lack of resources and/or a lack of access to necessary documentation.

Outside counsel are also welcome to file consolidated requests in a single email on behalf of multiple stations or multiple owners. The FCC says that they believe they will be able to address these requests on a case-by-case basis. Also, to the extent that stations file during April, even without a formal extension request, the FCC says it does not intend to take any enforcement action or impose fines in recognition of the current emergency. However, they strongly encourage those stations that can file on time to comply with the April 1st deadline. Under FCC rules, stations that file after April 1 extend the time during which objections to their renewals can be filed.



### July 10, 2020

**Children’s Television Annual Report** – The first annual Children’s Television Report (covering the period from September 16, 2019-December 31, 2019) was already extended to a March 30 due date. Now that due date has been further extended until July 10.

**Issues-Programs Lists** – Quarterly issues-programs lists for the first quarter of 2020, which were due to be uploaded to stations’ OPIFs by April 10, are now due in the public file on or before **July 10**. This will mean they will be filed at the same time as the issues-programs lists for Q2 2020.

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.

### Telecom Deadlines:

#### 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 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, incumbent local exchange carriers (ILECs), and competitive local exchange carriers (CLECs).

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**May 15, 2020**

*Quarterly Percentage of Internet Usage (PIU) Certification* – USF prepaid calling card providers must file a certification stating that it is making the required USF contributions. The certification must be signed by an officer of the company under penalty of perjury and can be filed electronically using the FCC’s Electronic Comment Filing System (ECFS). The Quarterly PIU Certification due May 15, 2020 will cover the First Quarter of 2020 (January 1, 2020 through March 31, 2020).

**May 31, 2020 (Dues June 1, 2020 this year because May 31 falls on a Sunday)**

*Annual Employment Report and Discrimination Complaint Requirement (FCC Form 395)* – FCC licensees or permittees of common carrier stations **with 16 or more full-time employees** must complete FCC Form 395 and file it with the Commission by May 31 annually. The report should be filed in Docket No. 16-233 of the FCC’s ECFS filing systems. However, filers should not submit any confidential information using ECFS. If a filer seeks confidential treatment of any information in its Form 395 filing, the filer should submit a redacted version of the report using ECFS and send a request for confidential treatment along with its non-redacted Form 395 filing to the FCC at:

Office of the Secretary  
Federal Communications Commission  
Attn: Industry Analysis and Technology Division, Wireline Competition Bureau  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

In addition to the Form 395 filing, all licensees or permittees of common carrier stations, **regardless of the number of employees**, must submit discrimination reports to the Commission. Filers that submit Form 395 can satisfy this requirement by completing Section V of Form 395 and need not submit a separate report.