Virginia Association of Broadcasters Legal Review

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
Counsel to VAB • (919) 839-0300

250 West Main Street, Suite 100
Charlottesville, VA 22902 • (434) 977-3716

February 9, 2012

* * * * * * * * * * * * * *

TABLE OF CONTENTS

* * * * * * * * * * * * * *

FCC FINES STATIONS FOR EEO VIOLATIONS AND IMPOSES ADDITIONAL REPORTING OBLIGATIONS

In the final days of 2011, the FCC issued two decisions in which it fined two broadcast employment units a total of $22,000 for violations of the Commission's Equal Employment Opportunity ("EEO") rules. In both cases, the FCC also imposed additional EEO reporting obligations for the next three years. Both fines arose in the context of recent license renewal filings, and in each case, notwithstanding EEO violations, the stations' licenses were renewed.

While the recent fines do not establish any new policies or standards, they present an opportunity to review the Commission's EEO rules and the consequences of violations.

A. Brief Review of EEO Requirements

By way of a brief reminder (for a detailed discussion of the FCC's EEO rules, stations may wish to reference our *Primer on the FCC's EEO Rules*), the FCC's EEO rules require broadcasters with five or more full-time employees (i.e., employees who work 30 or more hours per week) to:

* Establish an EEO Program to prevent discrimination.

* Engage in widespread recruitment for every full-time job vacancy unless an exigent circumstance exists or a position is filled by the internal promotion of a full-time employee.

* Assess the effectiveness of their recruitment programs to ensure they are achieving broad outreach and to address any deficiencies.

* Maintain recruitment records that include information about organizations that request vacancy notices, information about the recruitment sources notified about each vacancy, and information about the number of interviewees referred by each recruitment source.

* Compile annual EEO Public File Reports to be placed in the public inspection file every year on the anniversary of the date the station's license renewal application is due to be filed with the FCC.

* Engage in the proper number of outreach initiatives every two years (two or four initiatives depending upon the size of the station and market) and maintain adequate records to substantiate the performance of these initiatives.

B. The Recent EEO Decisions

The EEO deficiencies allegedly committed by stations in the recent cases primarily relate to findings of insufficient recruitment for job vacancies, specifically by relying exclusively on Internet recruitment sources or Internet along with "private" recruitment sources. The Commission found the violations in its review of the stations' two most recent annual EEO public file reports, which were required to be electronically filed with the FCC at license renewal time. Here are the highlights of the recent decisions.

In the first case, an employment unit in Virginia filled 14 full-time vacancies during the applicable two-year period but failed to adequately recruit for five of those vacancies—36 percent of total full-time hires during the two-year period. According to the decision, recruitment was inadequate for these five vacancies because the unit relied only on Internet recruitment sources to fill two vacancies and, for the remaining three vacancies, relied only on websites, word-of-mouth referrals, and internal employee board postings. With regard to the referrals and bulletin board postings, the FCC has previously determined that such "private" recruitment sources are not enough by themselves or in conjunction with Internet sources to satisfy the widespread recruitment requirement. In turn, the Commission found this failure to adequately recruit to be evidence of a lack of self-assessment, which is a separate rule violation. The unit was fined $8,000 and ordered to comply with additional reporting obligations for the next three years.

In the second case, an employment unit in South Carolina filled 13 full-time vacancies during the applicable two-year period and failed to adequately recruit for eight of those vacancies—62 percent of the full-time vacancies filled. According to the decision, recruitment was inadequate for these eight vacancies because the unit relied on Internet sources and word-of-mouth referrals only. Again, the Commission found this failure to adequately recruit evidence of a lack of self-assessment, which resulted in a second rule violation. The unit was fined $14,000 and ordered to comply with additional reporting obligations for the next three years.

Both cases were in the context of license renewals, one filed for the June 1, 2011, deadline and the other for the August 1, 2011, deadline. While fines were issued for EEO violations, the renewals were granted in each case.

C. Lessons to Learn

There are several broad principles that stations should take away from these two cases:

* Internet-only recruitment is not sufficient to comply with the requirements that stations widely disseminate notices of full-time job openings so that they reach the entire community. This remains true even though Internet access is available to many community members through work and home

computers, smart phones, and other devices with high degrees of consumer adoption.

* The use of “private” recruitment sources alone, such as word-of-mouth referrals, internal company bulletin boards, cold calls, and/or walk-ins, is also inadequate to comply with the widespread recruitment requirement for all full-time job vacancies. Even when coupled with Internet recruitment (with nothing more), “private” source recruitment does not satisfy the EEO rules.

* The fact that a particular hiree is referred to a station from an Internet recruitment source or through a word-of-mouth referral is not itself a violation. Websites and “private” recruitment sources may be used to fill job openings and may be the referral sources for hires consistent with the Commission’s rules. However, these sources must be used in conjunction with other recruitment sources so that the source or sources used to fill each full-time vacancy can reasonably be expected, collectively, to reach the station’s entire community.

* The FCC is continuing to enforce the self-assessment provisions of the EEO rules. Stations should make it a special point of emphasis to evaluate and discuss their EEO programs and the successes or failures of particular recruitment sources and techniques and outreach activities. Failure to recognize and correct EEO rule violations demonstrates, in the FCC’s eyes, failure to perform adequate EEO program assessment.

* The EEO program reports that led to the recent fines were filed with station license renewal applications due in June and August 2011. The FCC issued the fines only a few months later. It appears the Commission is acting relatively quickly on EEO information submitted during the license renewal process.

Stations will wish to discuss their EEO programs, recruitment practices, and outreach initiatives with their communications counsel on a regular basis and in advance of the time for filing EEO reports with the FCC, whether at mid-license term or with license renewal applications.

*** * * * ***

FCC STUDY FINDS LOW-POWER RADIO HAS LITTLE FINANCIAL IMPACT ON FULL-SERVICE STATIONS

The FCC recently released the results of an economic study finding that LPFM stations have little impact on the economic health of full-service commercial FM radio stations in the same market. The Commission was required complete the study and submit a report to Congress under the Local Community Radio Act of 2010 (“LCRA”). The study results are presented in four sections that are summarized below.

I.
Comparative Overview of Key Statistics for LPFM Stations to Full-Service Stations

The first section of the study examines the technical parameters, geographic distribution, format characteristics, and other operational aspects of LPFM stations in comparison to full-service commercial FM stations. The study identified a total of 835 active LPFM stations in the U.S., as compared to a total of 6,468 full-service commercial radio stations and found that LPFM stations: tend to be located in small markets and rural areas unlike their full-service commercial FM counterparts; reach an average coverage population that is more than 30 times smaller and have geographic coverage that is 55 times smaller than full-service commercial FM stations; broadcast in a religious format or carry “varied” or “miscellaneous” formats instead of broadcasting in the preferred music format of the majority of full-service commercial stations; and are significantly less likely to have their own website or stream their signals to the Internet.

Perhaps this section’s most significant finding was based on a comparative analysis of ratings data. A comparison of Fall 2009 Arbitron ratings data revealed that less than two-tenths of one percent (0.2%) of the radio listening population listened to LPFM stations and that LPFM listening represented less than one-tenth of one percent (0.1%) percent of total radio listening. The average LPFM station located in an Arbitron Metro had negligible ratings by all available measures with the vast majority of stations having insufficient listenership to even qualify for inclusion in the Arbitron reports reviewed for the study. In fact, the combined average share of listeners per quarter hour for all LPFM stations in a given market did not exceed 3.5 percent in any single market. Put in perspective, the LPFM station with the highest listenership was ranked only 18th in its market.

II.
Case Study Analysis

The second section of the study is a set of case studies compiled from interviews with the managers of eight individual LPFM stations. The Commission conducted the interviews to supplement information available from statistical databases and selected stations to represent different types of LPFM stations and the differences in the size and location of the markets in which they operate. The Commission identified the five major types of LPFM station licensees and selected stations based on the distribution of these station types in the Commission's CDBS public database and the BIA commercial database.

The chosen sample of stations located in different geographic regions and varying market sizes included three religious stations, two community stations, one music station, one station licensed to a university and one station licensed to a county agency. Station participants answered interview questions based on a written survey to help the FCC understand the extent of potential competition for listeners and sponsors between the station and full-service commercial FM stations and factors affecting the station's ability and desire to compete with full-service commercial FM stations. Although careful not to extrapolate its findings to the entire LPFM station population, the study noted that the sample stations generally had very small budgets with a median annual budget of $10,600 with funding sources that fell into three general categories: (1) organizational support from a sponsoring organization or government agency; (2) donations, membership dues, and revenues from other fundraising activities; and (3) underwriting from local businesses that tend to be too small to purchase advertising from commercial stations. Only one of the stations had measurable ratings and most of the station managers did not believe that they competed with specific full-service stations for audience.

III.
Analysis of Likely Impact of LPFM Entry on Full-Service Stations

In the third section of the study, the Commission assessed the potential ability of LPFM stations to compete with full-service commercial FM stations by observing their relative positions of economic strength in the radio marketplace. The Commission concluded that regulatory and operational constraints make it unlikely that LPFM stations will have more than a negligible economic impact on full-service commercial FM stations. The study found that the competitive threat for audience and advertising posed to full-service commercial FM stations by LPFM stations is significantly reduced by three legal factors: (1) the requirement that LPFM stations operate at a maximum power of 100 watts (the median power level of commercial FM stations is 14.0 kW); (2) the requirement that LPFM stations operate on a non-commercial basis; and (3) the prohibition on LPFM stations broadcasting commercial advertisements or promotional announcements. The study also rejected the argument that LPFM underwriting opportunities will cause substantial economic impact to full-service commercial FM stations by diverting advertising revenue, because of differences in listenership, revenue-earning goals, programming content and the built-in disincentive to attract underwriters subjected to the prohibition from advertising their products and services on LPFM stations.

IV.
Statistical Analysis

The final section of the study outlines the statistical methods used by the Commission to analyze the economic impact of LPFM stations on several performance metrics including audience ratings and advertising ratings of full-service commercial FM stations during the period 2005 to 2009. To measure the presence of LPFM stations, the study defined their common listening areas with full-service commercial FM stations in three different ways: (1) Arbitron Metro assignments; (2) predicted signal contours of the full-service commercial FM stations; and (3) a combination of both the foregoing methods. The study concluded that the analysis found no statistically reliable evidence that LPFM stations have a consistent effect on the economic performance of full-service commercial FM stations.

The Commission plans to initiate a separate proceeding to seek comment on other LCRA implementation issues, such as eliminating third-adjacent channel LPFM protection requirement, establishing LPFM interference remediation procedures, and establishing LPFM protection requirements for translator input signals on third-adjacent channels. The Commission has set a goal of opening an LPFM-only window for new station applications by summer 2012.

*** * * * ***

FEDERAL REGULATIONS NOW PROHIBIT HAND-HELD MOBILE PHONES FOR CERTAIN TRUCK DRIVERS

New federal regulations from the U.S. Department of Transportation will impact broadcasters who rely on commercial motor vehicles ("CMV"s) to transport equipment. Specifically, vehicles that have a gross vehicle weight rating (or "GVWR") or 10,000 or more pounds are affected. This would include, for example, many full-size satellite newsgathering trucks used by broadcasters at remote events. Beginning January 3, 2012, the rules prohibit the use of hand-held mobile telephones by drivers of interstate commercial motor vehicles. Violations can result in fines for motor carriers and driver disqualification.

The rules will restrict drivers' use of hand-held mobile telephones, which includes "using at least one hand to hold a mobile telephone to conduct a voice communication." Drivers will only be permitted to use hands-free devices to talk on the phone while operating a CMV. Dialing is also restricted under the rules—drivers will only be permitted to press a single button to initiate or terminate a call. ("Texting" while driving is already prohibited.) Although "push-to-talk" functions on a mobile telephone are also restricted, the rules suggest that the use of two-way radios or walkie-talkies for short periods of time would be permissible, but radio devices are not directly addressed by the proceeding.

The rules provide an exception for drivers to use either a hand-held or hands-free mobile telephone if necessary to communicate with law enforcement or other emergency services. Drivers will also be permitted to use hand-held mobile telephones when the driver has moved parked to the side of, or off, a highway.

Employers are required by the rules to put in place policies or practices that make it clear that the employer does not allow or require hand-held mobile phone use while driving. Broadcasters should also make sure their drivers are aware of the rules and update any relevant policies accordingly.

* * * * *

If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
David Kushner
Coe W. Ramsey
Charles E. Coble
Charles F. Marshall
Stephen Hartzell
J. Benjamin Davis
Julia C. Ambrose
Elizabeth E. Spainhour
Eric M. David
Mary F. Peña
Dorrian H. Horsey
Laura S. Chipman

* * * * *