



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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FCC Proposes New Video Description Rules

The FCC has issued a Notice of Proposed Rulemaking (the “Notice”) relating to video description of television programming. The Notice’s proposals seek to expand the availability of video-described programming for viewers who rely on the service. To be clear, these are merely proposals at this time; the FCC has not yet adopted any new video description requirements in this proceeding. Moreover, there appears to be a difference of opinion among FCC Commissioners as to whether the FCC actually has the authority to adopt the rules as proposed, which means that there is surely more to come on these issues as the proceeding unfolds.

As television stations are probably already aware, video description involves the insertion of audio narrated descriptions of a television program’s key visual elements into natural pauses in the program’s dialog. The Notice further contextualizes the importance of this accessibility service by observing that video description is a service through which “individuals who are blind or visually impaired can independently enjoy and follow popular television programs and be more fully included in the shared cultural experience that television offers.” Between and among closed captioning, video description, and the “Audible Crawl” rule for emergency information, television broadcasters are leaders in the effort to make television programming accessible to all viewers, and the Notice seeks to take another step forward.

In a nutshell, the Notice proposes the following changes and additions to the FCC’s existing video description rules:

- An increase in the amount of described programming on each included network carried by a covered broadcast station or MVPD, from 50 hours per calendar quarter to 87.5 hours per calendar quarter;
- An increase in the number of included networks carried by covered distributors, from four broadcast and five non-broadcast networks to five broadcast and ten non-broadcast networks;
- Adoption of a “no-backsliding” rule, which would ensure that once a network is required to provide description, it would be required to continue to provide description even if it falls out of the top-five or top-ten (as applicable) ranking;
- Removal of the threshold requirement that non-broadcast networks reach 50 percent of pay-TV (or MVPD) households in order to be subject to inclusion; and
- A requirement that covered distributors (including television stations) provide dedicated customer service contacts who can answer questions about video description.

Because the current and proposed rules impact only television stations that are Big 4 network affiliates and because virtually all television stations rely on their respective Big 4 Network to provide the requisite number of hours of video described programming, many of the proposals are unlikely to have a significant, direct impact on television stations from an operational or financial standpoint. On the other hand, stations may wish to be aware of the following issues that have been teed up by the Commission in this proceeding:

- *Programming on the Internet.* The FCC is not proposing any rules to require video description of programming distributed via the internet.
- *Programming That “Counts”.* The increase in the number of hours of video described content to 87.5 hours per quarter would apply only to Big 4 affiliates in the top 60 DMAs. Video described prime time and children’s programming are the only two categories of program material that would “count” toward meeting the requirement. The FCC seeks comment on whether any other programming should count toward the requirement.
- *Implications of “No Back-Sliding” Rule When TV Station Changes Affiliation.* With respect to the proposed “no back-sliding” rule, it is unclear in the Notice whether a *local station* that changes (or loses) a Big 4 affiliation would be bound by the number of video described hours that had been previously aired on that station. For example, if a station were to be a Big 4 affiliate and air 87.5 hours of video described programming per calendar quarter and, then, subsequently become a station that is no longer affiliated with a Big 4 network, would the station still be required—under the proposed “no back-sliding” rule—to maintain the same level of video description performance? The short answer is “possibly”; if so, it would become difficult and expensive for such a station to meet the

requirements, and the Notice provides no insight on this issue. Stations may wish to comment on this issue.

- *Identification of Video Described Programming in Listing Services.* The FCC has proposed to require television stations (and other distributors) to notify and identify for listing services the programming that will be video described. Stations are already required to take such steps with respect to children’s E/I programming. Would this new notification requirement present a burden to television stations? Do networks already provide such information to listing services? Should distributors (including TV stations) be required to maintain a list (separate and apart from listing services) of video described programming?
- *Contact Information for Video Description Issues.* Responding to consumer complaints that video programming distributors provide insufficient customer service with respect to video description issues, the FCC has proposed to require distributors (including TV stations) to provide “dedicated customer service contacts to assist viewers in accessing their video described programming,” to make the contact information available to the public, and to respond to viewer inquiries relating to video description within one business day. These proposals would bring the video description rules into harmony with the closed captioning rules in this particular respect. This proposal probably does not represent a regular, significant burden for TV stations, but if it is adopted, stations may need to train relevant staff and add contact information to their websites.
- *Video Description in VOD Content.* The FCC seeks comment on whether video on demand (“VOD”) programming includes video description. According to the FCC, when a program is carried on a linear programming stream (such as a TV station) with description and such programming is also made available on an MVPD’s VOD service, “it is not clear whether MVPDs are making the video description available to the VOD viewer.” In 2014, the FCC confirmed that closed captioning must be preserved in VOD programming and now seeks comment on whether it should adopt a rule that specifically requires the preservation of video description in VOD content. (Of course, many television stations already negotiate such requirements into their retransmission consent agreements.)
- *“Audio” Description?* The FCC seeks comment on whether the preferred “term of art” should continue to be “video description” or whether it should be changed to “audio description.” Such a change would not represent any additional substantive change to the rules.

The comment dates in this proceeding have not yet been announced. When they are, stations and other interested parties will have 30 days from the date of publication in the Federal Register to submit comments and an additional 30 days to submit reply comments. Stations may wish to begin considering now which, if any, issues warrant comment.

FCC Clarifies That, if Certain Conditions Are Met, Pre-Repack Expenses May Be Reimbursable

The Commission is required to reimburse broadcast television licensees for “costs reasonably incurred” in relocating to new channels assigned in the post-auction repacking process. Such reimbursements must be made from the \$1.75 billion TV Broadcaster Relocation Fund within three years of completion of the forward auction. When the process by which eligible stations may seek relocation reimbursement was established, the FCC did not address whether pre-auction expenses incurred in furtherance of the repack would be eligible for reimbursement. To dispose of this ambiguity, the FCC recently released a [Declaratory Ruling](#) which clarifies that relocation expenses incurred by full power and Class A television stations **prior** to the post-incentive auction repacking, under certain conditions, will qualify for reimbursement. Significantly, the Commission warns in the Declaratory Ruling that stations that incur expenses prior to the repack do so “at the station’s own risk.” In order to qualify for reimbursement of such “early” expenses:

- (1) The station must actually be reassigned to a new channel in its pre-auction band in the post-auction repacking process; and
- (2) The expense for which the station seeks reimbursement must, in fact, be a qualified reimbursable repack-related expense (as determined by the Media Bureau); and
- (3) The cost must have been reasonably incurred (as determined by the Media Bureau).

In October 2015, the FCC issued a [Public Notice](#) announcing the creation of the “Catalog of Expenses” and reimbursement form (FCC Form 2100, Schedule 399) to give broadcasters guidance as to what the FCC may consider to be “a reasonable expense.” As the Commission has explained, the Catalog of Expenses is not intended to be a definitive list of all reimbursable expenses. Rather, it is a means of facilitating the reimbursement claims process by setting forth the categories of expenses that are most likely to be commonly incurred by relocated broadcasters, irrespective of when the costs were incurred. Additionally, eligibility for reimbursement will be determined on a case-by-case basis. After reviewing cost estimates to ensure that each expense is reasonable, the Media Bureau will allocate funds to each eligible station. Prior to the end of the three-year reimbursement period (which will begin after the auction is complete), eligible stations will be required to provide information regarding their actual and remaining estimated costs and will be issued a final allocation, if appropriate, to cover the remainder of the eligible costs.

Keep in mind, too, that broadcasters who engage in any “early” post-auction repack efforts must continue to observe the FCC’s anti-collusion rules. For example, in the course of securing estimates or engaging in due diligence for repack equipment or services, it is critically important that station personnel refrain from sharing information relating to auction bidding or bidding strategy.

Finally, it cannot be overstated that a broadcaster should carefully consider—prior to incurring what it may believe to be a viable repacking expense—the risk of failing to be able to recoup those expenses from the TV Broadcaster Relocation Fund. Given that the Commission has been very clear in its warning that pre-repack expenses will be incurred “at the station’s own risk,”

any station considering incurring a significant expense in anticipation of the post-auction repack would be well-advised to consult with legal counsel prior to committing to incur such an expense.

Is Your Station Publicizing the Existence and Location of Its Children’s Television Programming Reports?

Each commercial full power and Class A television station is required to prepare and place in its public inspection file a Children’s Television Programming Report (“Children’s Report”) for each calendar quarter reflecting the efforts that it made during that quarter to serve the educational and informational needs of children. The FCC rules also require licensees to file the Children’s Reports with the Commission and to publicize—on the air—the existence and location of the Children’s Reports. Recently, enforcement actions were taken against three stations for repeatedly failing to publicize the existence and location of the stations’ Children’s Reports, and the FCC imposed a total of \$13,000 in fines in those cases.

Commercial full power and Class A television stations must provide periodic on-air announcements concerning the existence and location of the Children’s Reports. According to the FCC, the theory behind the announcements is that they will “minimize the Commission’s involvement in enforcing the Children’s Television Act by facilitating public monitoring of broadcasters’ educational programming.” The FCC has not provided definitive guidance on how often or when such announcements should air, but each quarter (and at license renewal time) stations are required to certify whether they have publicized the existence and location of their Children’s Reports.

Three *Notices of Apparent Liability for Forfeiture* were issued by the Commission in April 2016, in three separate proceedings. In the first case, the FCC imposed a fine in the amount of \$2,000 for the station’s failure to publicize the existence and location of the Children’s Reports for five calendar quarters. In the second case, the FCC imposed a fine of \$3,000 for the station’s three-year failure to publicize the existence and location of its Children’s Reports. Finally, the third station was found apparently liable in the amount of \$8,000 for its failure to publicize the existence and location of Children’s Reports for the entire eight-year license term. Generally, then, it appears that stations may expect a \$1,000 fine for every year of non-compliance with this requirement. Although each of the stations had already implemented a plan to prevent future violations of the rule, the FCC found that such efforts did not mitigate the prior violations.

All three sets of violations were discovered when the stations filed their license renewal applications. In each respective application, the licensee revealed that each station, for the periods of time described above had “inadvertently dropped” from the broadcast schedule the announcement of the existence and location of the Children’s Reports.

These cases serve as an important reminder that the FCC enforces its children’s programming rules with hefty penalties. In light of the FCC’s continuing interest in enforcement of these rules and the substantial penalties for violations, stations may wish to review their performance carefully. All stations should ensure that they are actually airing announcements to

publicize the existence and location of Children's Reports and that their on-air announcement accurately describes the location of the reports (i.e., the station's online public file) and publicizes the URL address of the online public file. In addition, stations would be well-advised to implement a policy of checking their traffic system every six months to ensure these spots are properly scheduled in the system. Finally, to keep them fresh, stations may wish to change the creative in these spots every few years or when there are significant changes made to the children's programming aired by the station.

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

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