Virginia Association of Broadcasters Legal Review

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Legal Memorandum

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"Defects" in ASR Applications and Records Instigates Public Notice Reminding Tower Owners of Certain Legal Obligations

Round up your engineers and hold on to your paint brushes: you have been warned. The Wireless Telecommunications Bureau (the arm of the FCC that oversees tower registrations and related tower issues) has issued an official Public Notice to remind tower owners that defects in tower registration obligations (and other tower-related requirements) may result in costly enforcement action.

FCC Staff apparently conducted an audit of a number of antenna structure registrations and applications and found numerous "defects." In light of the deficiencies found by the FCC Staff, the Public Notice is intended to serve as a reminder to tower owners of a number of FCC requirements governing towers. Because there are so many important tower rules that the FCC routinely enforces to the tune of $10,000 fines (and more!), the list below includes not only those topics addressed in the Public Notice, but a few additional ones as well. (Each tower is unique, and the list below is not intended to be a comprehensive list of all regulatory requirements touching on tower issues!)

- If a tower is subject to the FCC's registration rules, the tower owner is required to obtain both a No Hazard Determination from the Federal Aviation Administration ("FAA") and to file an ASR (Antenna Structure Registration) application with the FCC *prior* to construction or modification.

- FCC applications cannot contain premature certifications (e.g., that the antenna structure will not have a significant environmental effect) prior to the completion of certain required tasks (e.g., before an environmental review has been completed if required; before the FCC has notified the applicant that an Environmental Assessment is not required; or before the FCC has issued a Finding of No Significant Impact).

- ASR registrants must notify the FCC within five days of completion of construction or dismantlement of a tower.

- The lighting and painting used for the tower must conform to the lighting and painting specified on the tower's ASR and/or specified in the structure's FAA No Hazard Determination. Where tower lighting or painting deviates from the specifications, the tower owner must apply to the FCC to address the deviation or must correct the actual painting and lighting on the structure.

- With the exception of very minor variations, the actual height and location of a registered antenna structure must conform to the registered height and location of the structure.

- Tower owners are required to update their ASRs promptly after receiving a new Determination of No Hazard from the FAA.

- When a registered tower changes hands, the parties are required to promptly (i.e., within 5 days) file an "Ownership Change" notification with the FCC.

- Tower owners are required to maintain current contact information for their ASR for all registered towers.

- Tower owners are required to provide tenants on the tower with a copy (electronic is OK) of the ASR document.

- Tower lighting must be routinely monitored, and certain tower lighting outages must be promptly reported to the FAA so that a NOTAM can be issued for air traffic safety. Following repair of the lighting outage, a subsequent notification must be filed.

- Towers subject to mandatory painting must be cleaned or repainted as often as necessary to maintain "good visibility."

In light of the friendly warning in the Public Notice that tower owners deficient in their obligations are potentially subject to enforcement proceedings, now is a good time for all tower owners to take inventory. Review the Tower's ASR and compare the information to the actual lighting and painting scheme and the height and location of the registered antenna structure in order to ensure that all information is accurate and current. Check that appropriate procedures and protocols are in place to address lighting outages, chipped or faded paint and that required notices are sent to the proper agencies. Stations should seek the recommendations of their consulting engineers and also seek advice from legal counsel to assure that all issues are addressed.

More Legislation Proposed in House to Grandfather Pre-March 2014 TV JSAs

A bill proposing to "grandfather" television joint sales agreements ("JSAs") that pre-date the FCC's March 2014 adoption of the rule that made certain TV JSAs "attributable" as ownership interests was introduced in the House in late July. The bill, H.R. 3148, was introduced by Rep. John Shimkus (R-IL) and currently has six co-sponsors. It was referred to the House Committee on Energy and Commerce on the same day of its introduction. We previously reported on a similar Senate bill, S. 1182, which was introduced in May and currently has nine co-sponsors. Both bills contain identical language that would override the FCC's regulation requiring pre-March 2014 TV JSAs to be unwound by November 2015; in other words, the bills, if enacted, would allow broadcasters to continue to operate under their pre-existing TV JSAs that were in effect prior to the FCC's TV JSA attribution rule.

Broadcasters may recall that the House, using a different legislative vehicle, was already moving to accomplish the same thing. A provision to "grandfather" pre-March 31, 2014, TV JSAs was included as an amendment to the 2016 Appropriations Act, which was passed by the House Appropriations Committee on June 17, 2015. Following that, on July 23, 2015, the Senate Appropriations Committee approved an FCC funding package which includes, as the House appropriations bill did, an amendment to grandfather pre-March 2014 JSAs.

While all of this Congressional activity appears to be favorable to the continued existence of pre-March TV JSAs, only time will tell if there is, indeed, a legislative "fix" to this issue. We will keep you posted.

NAB Offers Compromise on "Duplex Gap" Issue; FCC Expected to Adopt Final Incentive Auction Rules Next Week

When FCC Chairman Tom Wheeler indicated in mid-July that only six markets have the potential to be affected by the Commission's proposal to place TV stations in the "duplex gap" in the post-auction environment, the television industry took some consolation. In a recent letter to the Commission, the NAB stated that if the assignment was limited to just six markets which

were not in major population centers, it believed this would not be "crippling" to the ability of newsgatherers to effectively report breaking news.

Prior to the announcement that only six markets would likely be affected, an otherwise discordant mix of industry voices came together to oppose the proposal to put TV stations in the "duplex gap" (i.e., the 600 MHz gap between the uplink and downlink frequencies bought by carriers). Multiple parties, including broadcasters, consumer groups, wireless internet providers, unlicensed advocates and technology companies joined together in early July to sign a letter to the FCC asking the agency to keep the duplex gap a TV station-free zone.

The universal concern is that use of the duplex gap for TV stations would eliminate the availability of the duplex gap for both licensed wireless microphones use and users of unlicensed devices. Putting television stations in the duplex gap could harm the public interest by preventing mobile news reporting and deployment of low-band unlicensed spectrum in places where low band spectrum is most needed to effectively provide services.

According to Chairman Wheeler, one principal rationale behind the proposal is to meet the revenue-generating goal of the auction, which will determine the success of the auction. Bringing this point home, a wireless association filed a letter with the FCC in support of the proposal, arguing that billions of dollars from the funds available to pay broadcasters who had hoped to exit the business would be potentially lost if the proposal is not adopted.

Industry reports—and prior statements from certain FCC Commissioners themselves—suggest that it is unlikely that Chairman Wheeler will get unanimous support from other Commissioners on the duplex gap issue. The FCC's next meeting is scheduled for August 6, and it is anticipated that the FCC will vote on and adopt the final incentive auction rules at that time. Only then will we know for sure how the duplex gap will be treated. Stay tuned.

FM Chips in Cell Phones: Favorable Developments Announced

Earlier this week, AT&T announced that it would begin activating FM chips in certain smartphones. Most smartphones in the U.S. already have FM chips installed in their circuitry, but they have not been activated by the wireless carriers. While it has long made sense for consumers to have free access on their smartphones, to their favorite local terrestrial radio station, wireless carriers have long been hesitant to activate the chips. Smartphone users could be enjoying important news and weather information and, of course, entertainment programming as well. And now, at least some AT&T customers will.

Broadcasters have theorized that wireless carriers prefer that their customers use their data plans to access radio-type content through music and streaming apps as opposed to free, over-the-air radio. Of course, AT&T's announcement does not mean that millions of consumers will instantly have access to free local radio on their smartphones—it sounds like 2016 is the time line—but this is an important development for radio broadcasters. Whether it will lead to an industry-wide "sea change" remains to be seen.

Department of Labor Proposes to Update "White Collar" Exemptions Which May Significantly Extend Overtime

Schedules and budgeting may have to change for many manager and director positions in radio and television stations. In July, the U.S. Department of Labor ("DOL") proposed new regulations that would significantly raise the salary requirements for executive, administrative, professional, and computer professional employees ("white collar workers") to be considered "exempt" under the Fair Labor Standards Act ("FLSA"). If the proposals are adopted, many station employees may lose exempt status and become eligible for overtime compensation. Positions such as news directors, executive producers, chief photographers, chief engineers and operations managers, to name a few, could be directly affected by the proposal.

Under the current rule, the "white collar" exemption applies only to an employee who meets all of the following critera: 1) the employee is paid a fixed salary that cannot be reduced based on the quality or quantity of the employee's work; 2) the employee's salary meets a minimum specified amount; and 3) the employee's job duties involve primarily executive, administrative, or professional duties, as defined in the DOL regulations.

The proposed update to the regulations attempts to ensure that the FLSA's overtime protections are implemented as Congress intended and to simplify the identification of employees who meet the requirements for exemption. Employees who fail to meet the salary and compensation level thresholds would not be exempt from overtime, regardless of their duties.

The key provisions of the proposed rule are:

Increasing the standard salary threshold for exempt workers. Under the current regulations, the salary threshold for exempt white collar workers is a minimum salary of $455 per week ($23,660 per year for a full-time worker). The proposed rule would increase the salary threshold to the 40th percentile of weekly earnings for full-time salaried workers, which for 2016 is projected to be $50,440 a year. Therefore, regardless of the employee's duties, if the employee does not earn $50,440 a year under the proposed rule, the employee would not be exempt from overtime.

Increasing the highly compensated employees' total annual compensation requirement for exemption. Under the current rules, the annual salary threshold for highly compensated employees to be considered exempt is $100,000. The proposed rule would increase this amount to the 90th percentile of earnings for full-time salaried workers, which is $122,148.

Establishing a mechanism for automatically updating the salary and compensation levels going forward. The DOL proposes an automatic update for the standard salary and highly compensated executive total annual compensation requirements to ensure that the test for exempt status remains meaningful and up-to-date. The DOL has updated the salary level requirement only seven times since 1938, most recently in 2004.

Other Potential Updates to the Rules and Commenting. The DOL has not proposed any changes to the current duties test; however, it is soliciting suggestions for additional occupation examples

and comments on the current requirements. The DOL also seeks comments on the possibility of including nondiscretionary bonuses to satisfy a portion of the standard salary requirement. Broadcasters interested in submitting written comments to DOL should do so by September 4, 2015. Stations may wish to consult with labor and employment counsel for assistance in evaluating the potential effects of the proposed regulations on station operations and budgets and for assistance in filing comments in the proceeding.

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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