Virginia Association of Broadcasters Legal Review

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POTENTIAL COMPLICATION FOR RETRANS NEGOTIATIONS: THE FCC'S RECENT CABLE RATE DEREGULATION DECISION

Last week, the FCC adopted an Order establishing a "rebuttable presumption" that all cable operators are subject to "effective competition." Over the vigorous objection of broadcasters, public interest groups, and federal, state, and local government officials, Democratic FCC Chairman Wheeler and the two Republican FCC Commissioners voted to streamline the process by which *all* cable systems may be relieved of local rate regulation of the "basic tier" of service. (The two Democratic Commissioners dissented.) The Commission's action was in response to a Congressional mandate in last year's satellite reauthorization legislation for the Commission to streamline the rate deregulation process for "small" cable systems.

Public interest groups, local and state government officials, local governments, and Members of Congress are concerned that the decision will lead to higher cable rates. Broadcasters are concerned that if rate deregulation of the "basic tier" occurs, the cable industry will make the legal argument that there is no longer a "basic service tier" requirement and, thus, no requirement that local television stations be carried on the "basic tier." Should that argument ultimately prevail, the result would be that (a) stations electing "must carry" could be relocated to a higher, less popular tier, and (b) stations electing retransmission consent could be forced to negotiate for carriage on the "basic tier" which could complicate and adversely affect retransmission consent negotiations. To be clear, it is not certain that the Commission's decision will, in fact, eliminate the "basic tier" carriage requirement for local stations, but broadcasters should expect cable companies to make that argument.

On a positive note, Commissioner O'Rielly, who voted for the Commission's decision, issued a statement reflecting that he does not believe the decision will affect the "continued existence of the 'basic tier' and it is 'certainly not [his] intent to do so.'" He added that those who read the decision in such an "extended way" would be "misguided." He astutely suggested that a decision on this issue is one for Congress to make—in fact, when Congress reauthorized STELA last year, the issue whether to eliminate the "basic tier" carriage requirement was squarely in front of Congress, and a determination was made not to eliminate that requirement.

Accordingly, the ultimate implications for television stations of the Commission's rate deregulation decision remain to be seen.

Given the partisan character of the current FCC, it is unusual for Democratic Chairman Wheeler to be supported by the two Republican Commissioners and opposed by the two Democratic Commissioners. Commissioners Clyburn and Rosenworcel both issued dissenting opinions saying Congress had expressly directed the Commission to streamline the rate deregulation process only for "small" cable systems and not for large cable MSOs (multiple system operators).

It is yet unknown whether NAB, public interest groups, or local governments will challenge the Commission's decision in court.

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TELEVISION STATIONS CAN BEGIN COMPILING INFORMATION FOR PRE-AUCTION TECHNICAL CERTIFICATION FORMS

In a recent Public Notice, the FCC released the new Pre-Auction Technical Certification Form (FCC Form 2100, Schedule 381). The form not only requires stations to certify the accuracy of certain technical data in the FCC's databases and certain information that will be distributed in an upcoming public notice, but also the form solicits specific information about each station's technical facilities, including the antenna, transmitter, transmission line, and tower. Thus, to be prepared to complete and timely file the Certification Form, stations should begin compiling information now. (To be clear, the FCC has not yet announced the deadline for filing the Certification Form. The deadline will be announced in an upcoming public notice.)

Because summer is on the horizon and the Certification Form is likely to be due during the summer, stations may wish to begin compiling the requisite information now so that they are prepared when the FCC's public notice is issued. That way, summer vacation plans and short staffing do not create a "fire drill" situation when it is time to submit the required information and Certification Form to the FCC. Here is a link to a PDF version of the FCC's Certification Form to help you understand what information to compile and the full nature of the required certifications.

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AIRING EAS TONES ANY TIME OTHER THAN A TEST OR ACTUAL EAS ALERT IS AN EXPENSIVE PROPOSITION

The stick the FCC is using to curb the misuse of EAS tones is growing larger. A media company recently agreed to pay a fine of **one million dollars** in connection with the transmission of an EAS EAN (Emergency Action Notification) event code during a syndicated radio show. The media company entered into an agreement with the FCC to pay the fine and to engage in certain compliance practices over a three-year period, including

* creation of a strict compliance program relating to the airing of EAS tones,

* training of relevant employees on the FCC's EAS rules,

* naming of a full-time EAS compliance officer,

* filing of three annual reports with the FCC relating to the company's EAS compliance,

* an obligation to self-report violations of the EAS rules, and

* an obligation to make reasonable efforts to remove and delete all simulated or actual EAS tones from the company's audio production libraries.

The underlying incident occurred during an October 2014 broadcast of a syndicated radio show, when the show's host played a recording of the EAN event code that had aired during the November 9, 2011, nationwide test. Not only did the EAN event code air on the dozens of radio stations carrying the syndicated program, but also a multi-state activation of the EAS was triggered as a result of the broadcast.

All broadcasters should be well aware that the FCC's EAS rules (i) require stations to air Presidential EAS alerts and to air required monthly and weekly tests, (ii) permit stations to air other, non-presidential EAS alerts such as AMBER alerts and severe weather alerts, (iii) specifically prohibit the airing of EAS tones for any reason other than a test or an actual alert, and (iv) specifically prohibit the airing of false or simulated EAS tones or alerts.

In the words of the Chief of the Enforcement Bureau: "Misuse of the emergency alert system jeopardizes the nation's public safety, falsely alarms the public and undermines the confidence in the emergency alert system." Thus, the FCC's Enforcement Bureau is taking such violations very seriously, and this most recent case is just the latest in a growing line of cases over the past couple of years where the FCC has imposed significant fines totaling some $2.5 million (not including this latest fine).

To guard against the likelihood that your station will find itself in a situation similar to the media company in this latest case, it may be helpful to remember the following things (each of these applies to both the TV platform and digital platforms):

* When stations receive commercial spots that contain tones designed to grab the public's attention, careful evaluation of the tones is warranted. Consult with an engineer and/or a lawyer if necessary to determine whether a particular tone is "too close" to an EAS tone (or wireless EAS tone) such that it could, potentially, be considered an EAS "simulation."

* News reports about the EAS system (or wireless EAS system) should never contain samples of EAS tones, even if the news report is designed to educate the public.

* Stations should never replay an EAS test or EAS alert (or a simulated EAS test or alert) for commentary, news reporting, humor, parody, drama, or any other purpose.

* The only permissible transmission of EAS tones for non-alert/non-test purposes is in the context of a FEMA PSA for the WEA (Wireless Emergency Alert)

> program. More specifically, the FCC has granted a waiver (through November 21, 2015) to allow for the transmission of FEMA PSAs that make "clear that the WEA Attention Signals are being used in the context of the PSA and for the purpose of educating the viewing or listening public about the functions of their WEA-capable mobile devices and the WEA program."

Because it may be difficult to know what the FCC would consider to be a simulated EAS test or alert, stations should be cautious, especially with $1 million at stake.

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

Stephen Hartzell, Editor

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