Virginia Association of Broadcasters Legal Review

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FALSE ALERT SIGNALS IN ADVERTISING DRAW ENFORCEMENT ACTIVITY AGAINST BROADCASTERS

Emergency Alert System (EAS) sound-alikes in advertisements have recently drawn the attention of the Commission's Enforcement Bureau.

The FCC's rules prohibit the broadcast of false, deceptive, or simulated alert signals in any circumstances other than in an actual national, state, or local area emergency or an authorized test of the EAS.

In early November, the FCC issued several releases addressing false alert signals, including an Enforcement Advisory and substantial fines against broadcasters.

In the first instance of enforcement, the FCC entered into a consent decree with a broadcast station that aired a spot for a local sports apparel retailer. The advertisement contained an auditory signal that resembled the EAS attention signal. In response to a complaint from a listener, the FCC investigated and determined the broadcast was a violation of the rules. The station entered into a consent decree requiring a rigorous compliance plan, including emergency and disaster preparedness public service announcements, and a $39,000 "voluntary contribution."

In the second case, the FCC issued a Notice of Apparent Liability (the "*Notice*") against a major cable network for producing a promotional spot for a comedian's appearance on a late night talk show on the network. According to the *Notice*, although the spot did not include any portion of an actual EAS code, it did include prerecorded sounds that *simulated* the alert signal. The FCC found that the sequence of sounds in the promo spot were substantially similar to EAS alert signals—"such that an average listener would reasonably mistake the sounds for an actual EAS attention signal." Based on the nature of the violation, the nationwide scope of the network's audience reach, and the network's ability to pay, the FCC found the network liable for a $29,000 fine.

The Commission's recent Enforcement Advisory cautions broadcasters against the misuse and simulation of EAS alert signals and observes that the FCC is continuing to investigate other cases. According to the Enforcement Advisory, a "simulation" includes not only recordings of *actual* EAS codes or attention signals, but also sounds that mimic or are substantially similar to them, such that an average listener could reasonably mistake the sounds for an actual EAS alert. By contrast, general alarms or other loud noises, including bells, claxons, and sirens are not considered "simulations" of EAS alert signals and are not prohibited. Unfortunately, at the margins it may be difficult to distinguish between permissible and impermissible sounds.

The rules against false alert signals apply to a station that transmits the signals or sounds *even if that station did not create or produce the prohibited programming*. In other words, broadcasters will be liable for airing advertisements with false EAS alerts even if they did not produce the spot. The Enforcement Advisory also warns that

broadcasters could in some circumstances be liable for violations of other laws and Commission rules, such as the Commission's rules against the broadcast of hoaxes.

A copy of the Enforcement Advisory is available at the following URL: *http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1106/DA-13-2123A1.pdf*.

The Enforcement Advisory signals the FCC's intention to continue investigations and enforcement against violations. Broadcast stations may wish to consider new or improved protocols for review of advertising spots and other programming for false alert signals and sound-alikes. Please contact your communications counsel if you have any questions about the EAS rules.

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FCC SEEKS COMMENT ON MODIFIED RECOMMENDED PRACTICES FOR TELEVISION STATIONS TO COMPLY WITH CALM ACT RULES

The Commission has released a Notice of Proposed Rulemaking (the "*Notice*") seeking comment on new recommended practices for compliance with the FCC's rules implementing the Commercial Advertisement Loudness Mitigation ("CALM") Act.

The new set of recommendations was released earlier this year as a successor to existing guidance published in 2011. The FCC now seeks comment on the Successor Recommended Practice (the "Successor RP") before adopting it as mandatory.

The Commission tentatively concludes in the *Notice* that the only substantive change for purposes of the rules will be an adjustment to the measurement algorithm for loudness in commercial advertisements. The *Notice* observes that this change in the Successor RP intends to prevent advertisers from using silent passages to offset excessively loud passages when calculating the average loudness of program material.

Some stations may require a software or device upgrade to implement the modified algorithm and comply with the proposed change. The *Notice* invites comment on the costs and timing associated with any necessary upgrades to comply with the Successor RP. The *Notice* tentatively concludes that a deadline of one year from when the change is formally adopted will allow sufficient time for upgrades. The *Notice* also asks whether small TV stations may need more time to implement the Successor RP.

The existing guidance, known as the 2011 A/85 RP, remains mandatory while this proceeding is pending. According to the *Notice*, the FCC will permit stations to adopt the new recommendations voluntarily in the meantime. In other words, stations must continue to comply with the 2011 A/85 RP, but stations may implement the Successor RP now if they wish.

Comments in this proceeding will be due 30 days after publication in the Federal Register, and reply comments will be due 45 days after publication. As of the date of this Legal Review, publication has not yet occurred.

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FCC OPENS PROCEEDING AIMED AT AM RADIO REVITALIZATION

The FCC has opened a new proceeding to introduce a number of potential improvements to its rules governing AM radio broadcasting. In recent months, then-Acting Chairwoman Clyburn and Commissioner Pai have expressed their support for rules to improve and expand AM radio service. Now, in a Notice of Proposed Rulemaking (the "*Notice*"), the Commission has invited comment on new proposals to support local AM radio stations that are looking to make changes in their operating facilities. The highlights of these proposals are discussed below.

I.
Proposed FM Translator Filing Window

First, the Commission has proposed to open an FM translator filing window exclusively for AM licensees and permittees. The *Notice* tentatively concludes that the Commission should allow AM broadcasters an opportunity to apply for authorizations for new FM translator stations for the sole and limited purpose of enhancing their existing AM radio service to the public.

As proposed in the *Notice*, the filing window would have the following limitations:

* Only AM broadcast licensees and permittees may participate;

* Filers may apply for one (and only one) FM translator per AM station;

* Applications must strictly conform to the existing fill-in coverage area technical restrictions on FM translators for AM stations (i.e., the translator must be located such that no part of the 60 dBu contour of the FM translator will extend beyond the smaller of a 25-mile radius from the AM station's transmitter site or the AM station's daytime 2 mV/m contour); and

* Any FM translator station acquired under these rules will be permanently linked to the AM primary station acquiring

> it—the FM translator may only be used to rebroadcast the signal of the AM station to which it is linked or originate nighttime programming during periods when a daytime-only AM station is not operating. Accordingly, the FM translator may not be assigned or transferred except in conjunction with the commonly owned primary AM station.

The FCC seeks comment on each of these proposals. The potential dates of the filing window are not yet known, but broadcasters are encouraged to submit comments to the FCC regarding the limited filing window and other issues faced by AM stations in the current marketplace.

II.
Daytime And Nighttime Community Coverage Standards

The Commission proposes to relax daytime and nighttime community coverage standards for existing AM stations. The modifications would allow existing AM broadcasters more flexibility to propose antenna site changes.

As proposed in the *Notice*, daytime coverage standards would be relaxed to require that the station cover either 50 percent of the population or 50 percent of the area of the community of license with a daytime 5 mV/m principal community signal. The *Notice* seeks comment on this proposal. Specifically, the *Notice* asks whether it would be better to modify the daytime community coverage standard for all AM application types, including those for new stations and those seeking to change community of license. The *Notice* also asks whether, as an alternative, the existing AM daytime coverage requirements should remain in place for all stations, subject to a waiver on an appropriate showing. Interested broadcasters are invited to discuss issues they have encountered when trying to comply with the rule, particularly instances in which the rule may have prevented them from implementing beneficial station improvements.

The *Notice* tentatively concludes that nighttime standards should also be relaxed to improve antenna siting for AM radio stations. Under the current rules, many AM stations are required to reduce power or cease operating at night in order to avoid interference to other AM radio stations. Moving to remote sites can prove unsuccessful because, among other reasons, changes in community and population coverage would take the station out of compliance with the current nighttime coverage rule.

The *Notice* proposes to *eliminate* the nighttime coverage requirement for existing AM stations and to require that new AM stations and AM stations seeking a change to their communities of license cover either 50 percent of the population or 50 percent of the area of the community of license with a nighttime 5 mV/m signal or a nighttime interference-free contour, whichever value is higher. The *Notice* asks what benefits and potential negative consequences might result from this proposed change. Would it be

better to relax the rule for existing stations from 80 to 50 percent, as proposed for the daytime coverage rules? The Commission seeks comment on these and other questions related to the community coverage standards.

III.
Proposal To Eliminate The "Ratchet" Rule

The *Notice* also proposes to eliminate the AM "ratchet" rule, which currently requires that an AM broadcaster seeking to make facility changes that would modify the station's signal to demonstrate that the improvements would result in an overall reduction in interference to certain other stations. The rule has reportedly discouraged service improvements and has apparently resulted in a net loss of interference-free AM nighttime service.

Broadcast engineers have previously petitioned the FCC asking the Commission to eliminate the ratchet rule because it has been a "serious impediment for stations wishing to make modifications to alleviate nighttime coverage difficulties due to noise and man-made interference." Engineers have also observed that the rule disadvantages AM stations that have been on the air the longest in favor of new operations.

The Commission tentatively supports elimination of the ratchet rule. The *Notice* asks for comment on the following questions: Is elimination of the ratchet rule both feasible and desirable? What would be the benefit to AM broadcasters, and to the listening public, of eliminating the rule? Would there be negative consequences to other AM stations and/or to listeners if the Commission eliminates the rule? Does the ratchet rule tend to discourage service improvement in general? Conversely, does it serve a valuable function in reducing interference? Would elimination of the rule allow a broadcaster to change its facilities in ways that might increase the levels of interference that the broadcaster imposes on other stations beyond an acceptable threshold? Or are sufficient safeguards in place to prevent that result? The *Notice* asks commenters to describe and quantify the costs and benefits of the proposal and any suggested alternatives.

IV.
Other Proposed Changes

The *Notice* also proposes to permit wider implementation of Modulation Dependent Carrier Level ("MDCL") technologies. MDCL technologies are transmitter control techniques that allow AM stations to reduce power consumption (and related electrical power costs) while maintaining audio quality and preserving their licensed coverage areas. The Commission acknowledges that these technologies serve to reduce broadcasters' operating costs. Accordingly, the *Notice* proposes to amend the rules to permit AM stations to implement MDCL operation by simply notifying the Commission within 10 days of beginning operation, rather than having to seek experimental authorization or waiver in advance as is currently required.

In addition, the *Notice* proposes to make other adjustments in the AM broadcasting rules, such as modifying AM antenna efficiency standards, which would reduce minimum effective field strength values by approximately 25 percent, thus allowing the use of shorter AM antennas.

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While all of the proposals would have their benefits, many of these benefits would be of limited utility in practice because they would apply only to those stations looking to make changes in their current facilities.

Comments will be due 60 days after publication in the Federal Register, and reply comments will be due 90 days after publication. As of the date of this Legal Review, publication has not yet occurred.

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OPT-IN RULES FOR TEXT MESSAGES MAY IMPACT BROADCASTERS' ADVERTISING AND PROMOTIONAL CAMPAIGNS

The Commission's new rules under the Telephone Consumer Protection Act (the "Act") may impact broadcasters and their advertising clients. The FCC now requires that consumers opt in to receive commercial text messages by "prior express written consent" before stations and advertisers may send them a commercial text message. The new rules apply to text messages sent on or after October 16, 2013.

Many stations take advantage of texting to connect with listeners and viewers and also to facilitate promotional campaigns with their advertising clients. Under the Act, SMS text messaging qualifies as a call, and therefore all automated text messages that contain advertising content are subject to the written consent rules.

Under the Commission's new rules, stations may not send sponsored text messages unless viewers and listeners expressly agree in advance in writing to receive them. "Prior express written consent" is a rigorous standard that requires specific disclosures and acceptance by the person who will receive the text messages. Written consent may be obtained electronically so long as the method meets the standards of the E-Sign Act (including email, website form, or text message agreement). A consumer's provision of a phone number is no longer sufficient authorization for stations and advertisers to send promotional text messages. In other words, a station may <u>not</u> send text messages that contain advertising content if they have not provided the required disclosures or if the listener has not expressly agreed in advance in writing to receive the messages.

How does opt-in consent work in practice? For example, a radio station may air a promotional spot inviting listeners to join their texting club by signing up online at the station website, where the station provides the required disclosures and the listener agrees in writing to receive text messages. There must be clear and conspicuous disclosure of the consequences of acceptance (i.e., the listener will receive automated, commercial text messages) and unambiguous acceptance to receive the texts at a designated phone number. It must also be clear that acceptance is not a condition or requirement of a purchase of any goods or services. The station should keep records of written consent for each phone number in its database.

The FCC has emphasized that the new rules do not apply to text messages that are purely informational, non-marketing messages, such as emergency information and school closings. But stations must be careful: If the text message contains an advertisement in any form, it will trigger the prior express written consent requirement under the new rules.

Broadcasters engaged in promotional texting campaigns with advertisers should review their practices and develop protocols to ensure compliance with the laws. The risks of non-compliance are significant—not only can the new rules be enforced by the Commission, but the law also permits private class action lawsuits for violations of the rules, which could mean very expensive consequences for errant text messages. In fact, in recent years there has been a significant uptick in class action lawsuits filed under the Act.

If your station uses a third-party texting platform service, you may have already heard from the service about its plans for compliance; the major players have contacted many of their clients and offered their position on compliance and several have petitioned the FCC for greater clarification on the rules. A group of mobile marketers has also asked the FCC to clarify whether *new* written consent is now required for existing customers, and the Commission has invited public comment on that issue in a new proceeding. There will certainly be more to come on this expanded regulatory scheme.

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

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