



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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APPROACHING ENTRANCE RAMP:

FCC Provides Direction to Incentive Auction Stakeholders

Last week, the Chair and Vice Chair of the FCC's Incentive Auction Task Force provided a so-called Incentive Auction "roadmap" via a [blog post](#) published on the FCC website. While the roadmap and blog post do not constitute legally binding Commission policy, the roadmap appears to be intended to provide broadcasters and other auction stakeholders with a general timeline of how the next steps in the Incentive Auction will unfold. The roadmap comes on the heels of the FCC's release of its 150+ page [Bidding Procedures Public Notice](#) in which the FCC announced that March 29, 2016, will be the "start date" for the Incentive Auction.

Borrowing from the roadmap, here are some of the more significant signposts in the road for broadcasters who are interested in Incentive Auction participation. (This information is being provided at a high level of generality; the Incentive Auction will affect stations differently, and each broadcaster needs to consider and weigh its own, unique circumstances and options carefully with the assistance of consulting engineers and legal counsel.)

Application Procedures Public Notice. In “early fall,” the FCC will release the next Incentive Auction public notice—the *Application Procedures Public Notice*—which will describe the nuts and bolts of the auction application process and post-auction procedures, including the opening dates for the application filing windows, the application filing deadline, the schedule for mock auctions, and the information required on the auction application forms.

Opening Bid Prices for the Reverse Auction. According to the roadmap, the FCC will publicly announce the reverse auction opening bid prices for all broadcasters no later than 60 days before the deadline for reverse auction applications. (As noted above, the deadline for reverse auction applications will be established in the *Application Procedures Public Notice*.)

Commencing the Auction. Following the release of the information referenced above, the FCC will open the windows and set the deadlines for applications to participate in the reverse auction (and the forward auction). According to the roadmap, the application windows will close before the end of 2015. After the reverse auction application deadline, FCC Staff will review broadcaster applications for completeness and accuracy, and, according to the blog post, broadcasters will subsequently have the opportunity to make minor modifications or corrections necessary to complete their applications. Then, by March 29, 2016, each broadcaster that has completed an application for the reverse auction must commit to its preferred initial bid option (e.g., go off the air and exit the business; move to a VHF channel; etc.).

Webinars and Workshops. The FCC acknowledges that the Incentive Auction is complicated and that stations have been given “a great deal of information” that may be overwhelming for entities that have not previously participated in an FCC auction. Accordingly, FCC Staff will be offering three types of training this fall, even before Incentive Auction applications are due: workshops, webinars and an interactive on-line tutorial. (The FCC has also committed to providing a technical hotline during the application and bidding processes.) The first webinar (relating to channel sharing) was provided in August, and the slides from that webinar are [available here](#). According to the blog post, the FCC will offer a webinar on the *Bidding Procedures Public Notice* “shortly after Labor Day.” Later in the fall, after the *Application Procedures Public Notice* is released, the FCC is planning to hold a workshop relating to the reverse auction (and another workshop relating to the forward auction). These workshops will provide guidance about the application process overviews of the reverse and forward bidding systems. The FCC Staff will also be offering online interactive auction tutorials, which will walk potential reverse auction participants through the application and bidding processes.

Further Guidance. Of course, neither the blog post, the roadmap, this brief overview, nor the FCC’s public notices provide sufficient information to prepare stations for how to evaluate the opportunities presented by—and/or participate in—the Incentive Auction. If you haven’t already done so, please contact one of the undersigned to discuss how the various Incentive Auction nuances may apply to your station.



ATTENTION TELEVISION STATIONS: Don't Forget to Get Closed Captioning Certifications for New Programs

It is common for television stations to acquire new programming in September, which means that now is a good time to refresh your memory about the FCC's requirement that video programming distributors (including television stations) obtain closed captioning certifications from programming providers.

As television stations (and programming providers) should already be aware, new FCC rules went into effect in mid-March 2015, relating to closed captioning quality standards. The new rules not only establish four key components of quality for closed captioning—accuracy, synchronicity, completeness, and placement—but they also require stations to obtain from all video programming providers written certifications of compliance with the quality standards.

The obligation of stations to obtain written certifications was in the forefront of everyone's minds when the rules became effective on March 16, 2015. But, as with many regulatory compliance issues, once the initial push for compliance has been satisfied, the need for ongoing vigilance may fall by the wayside. This memorandum is to remind television stations to be vigilant as you take on new programming for the fall and for the 2015-2016 broadcast season.

Stations Must Obtain Written Certification from All Video Programmers. The rules require stations (and other video programming distributors such as MVPDs) to make "best efforts" to obtain a written certification from all video programmers from whom they obtain programming regarding compliance with the closed captioning quality standards. To achieve compliance with the "best efforts" standard, stations can retrieve the programmer's certification from a website or other widely available location. If a station is unable to so locate a programmer's certification, the station is then required to make a written request to the video programmer in order to obtain the certification. In such case, the written request must ask each programmer to certify that the programmer either (1) complies with the captioning quality standards; **or** (2) adheres to the Best Practices for video programmers set out in the new rules (and discussed below); **or** (3) is exempt from the closed captioning rules under one or more properly attained and specified exemptions. The written request must also ask the programmer to make the certification "widely available." Finally, if a station cannot locate the certification itself and is unable to obtain the certification after requesting it in writing from the programmer, the station "shall promptly submit a report" to the FCC to identify the programmer that did not make a certification available. Please note that even when a station qualifies for exemption from the general closed captioning requirements under the \$3 million gross revenue exemption, the station must still request certification from all programmers because such a station is still required to pass-through and air all captions embedded in programming by the program provider.

“All” Video Programmers. Stations must obtain the certifications referenced above from all video programmers. Thus, stations must obtain such certifications not only from networks and syndicators but also all paid programming providers, religious programming providers, pre-season football game programming providers, and any other provider of program material to the station. (Note, however, that when the FCC adopted the certification rules, it specifically stated that MVPDs are not required to request or obtain certifications from a television station for programming provided by the television station.)

New Certifications for Existing Programming Not Necessary. The rules do not require stations to obtain a new or “fresh” certification from programming providers with any particular regularity. Thus, for example, if a station received a certification from a particular network or for a particular show in March 2015, the station does not need to now get a new certification from the same network or program provider simply because it is a new broadcast season. On the other hand, if a station is now or will be carrying pre-season professional football games provided by the football team or college football games provided by a regional network *and the station has not previously obtained a written closed captioning certification regarding the programming provider’s compliance with the closed captioning quality standards*, then the station now needs to be thinking about how to obtain a certification for that programming.

Back to School: Children’s Television Programming Commercialization Rules and Policies Are Alive and Well!

With August coming to an end and back-to-school advertising underway at stations across the country, now is a good time for television station staff to re-educate themselves about the FCC’s rules and policies governing commercial content in certain children’s programming. While the bullets below are not intended to cover every conceivable children’s programming commercialization scenario, we hope it will provide a study guide for the ultimate test: station license renewal applications at the end of the current license term.

- *Programming for Children Ages 12 and Under.* The FCC’s commercialization rules and policies relating to children’s programming govern the commercial content for all programming that is “originally produced and broadcast primarily for an audience of children 12 years old and younger.” It does not matter whether the programming is “educational/informational” or merely entertainment programming, and the “test” is not whether or not a station lists the program on its quarterly Children’s Television Programming Report (FCC Form 398); the “test” is whether the program is primarily directed to children under the age of 13. A program that is primarily directed to children 12 and under means a program for which children 12 and under are the target audience. Thus, according to informal guidance from the FCC Staff, a program geared to children ages 9-14 is a program directed primarily to children ages 12 and under, and a program geared to children ages 11-16 is a program directed primarily to children ages 12 and under. On the other hand, general audience programming that might appeal to children is not subject to the commercialization rules.

- *10½ Minutes of “Commercial Matter” Per Hour on Weekends.* The rule states that shows for children ages 12 and under may contain no more than 10½ minutes of “commercial matter” per clock hour on weekends. A clock hour refers to the period from the top of an hour to the top of the next hour. And if a program is shorter than an hour or runs on a schedule that is not a clock-hour schedule, then the commercial time must be pro-rated (i.e., no more than 5:15 of commercial matter per half hour of programming).
- *12 Minutes of “Commercial Matter” Per Hour on Weekdays.* The rule states that shows for children ages 12 and under may contain no more than 12 minutes of “commercial matter” per clock hour on weekdays. A clock hour refers to the period from the top of an hour to the top of the next hour. And if a program is shorter than an hour or runs on a schedule that is not a clock-hour schedule, then the commercial time must be pro-rated (i.e., no more than 6:00 of commercial matter per half hour of programming).
- *“Commercial Matter” Includes More Than Traditional Commercials.* It is important (and occasionally difficult) in the case of children’s programming for stations to identify the “commercial matter” within each program. “Commercial matter” is defined as “air time sold for purposes of selling a product or service and promotions of television programs or video programming services other than children’s or other age-appropriate programming appearing on the same channel or promotions for children’s educational and informational programming on any channel.” Thus, there are two categories of material that constitute “commercial matter” under the commercialization rules. *First*, “commercial matter” includes any program material which (1) promotes or offers for sale a product or service **and** (2) is broadcast in exchange for valuable consideration given either directly or indirectly to the station by an advertiser as an inducement for airing the material. This portion of the definition includes, among other things, commercial spot announcements, trade-out spots, promotional announcements by a commercial television station for or on behalf of another commonly-owned or controlled radio station serving the same community, and promotional program announcements where the announcement identifies the sponsor of the program beyond mention of the sponsor’s name as an integral part of the title of the program. *Second*, “commercial matter” includes promos (1) for all programming scheduled to be aired on the same channel that is not “age-appropriate” for children 12 and under, and (2) for all programming that is not children’s E/I programming, whether or not it is age-appropriate, scheduled to be aired on another channel. (Un-sponsored PSAs from non-profit organizations, governmental entities, and media companies in partnership with non-profits or governmental entities generally do not constitute commercial matter. In some circumstances, sponsored PSAs would constitute “commercial matter,” and stations should check with legal counsel before airing sponsored PSAs in children’s programming.)
- *“Program Length Commercials” Are Prohibited.* The Commission defines a “program length children’s commercial” as a program associated with a product (or service) during which commercials for that product (or service) are aired. A program that falls within this definition will be treated as a commercial in its entirety. For example, an advertisement for a home video featuring Donald Duck, which aired during “Quack Pack” (a show in which Donald Duck was a main character) converted the show into a

program length commercial and resulted in FCC enforcement action. The FCC has also sanctioned stations for violation of the program length commercial policy where as little as a corner of Pokemon cards—only the letters “MON” appeared and not the character’s image itself—appeared for only **one second** in a commercial that aired during the “Pokemon” show directed to kids 12 and under. Traditionally, the FCC has viewed program length commercials as the most egregious form of commercialization violation, imposing tens of thousands of dollars in fines on stations that air program length commercials.

- *No “Host Selling” on the Air.* Host selling in children’s programming raises difficult questions and must be structured carefully to prevent commercialization violations. The “host selling” policy prohibits the broadcast of commercials containing “program hosts” within or adjacent to those shows. “Program hosts” include any person or character appearing in a children’s program. Distinguishing a host selling violation from a program length commercial violation is not always easy, but can be important—the FCC has been more willing to admonish stations for host selling violations while imposing significant monetary penalties for program length commercial violations.
- *Some Website Addresses Cannot Be Displayed During Children’s Programming.* In general, if a web address displayed in children’s programming does not meet the following four requirements, then it will cause the programming in which it appears to count as commercial matter:
 - (i) The webpage that viewers are first directed to on the site (i.e., the web page corresponding to the web address shown in the programming) must not be used at all for commercial purposes (e.g., the page cannot sell or advertise products or contain direct links to any other page that sells or advertises products);
 - (ii) The website, in general, must offer a substantial amount of bona fide program-related or other non-commercial content;
 - (iii) The website must not be primarily intended for commercial purposes (including e-commerce or advertising); and,
 - (iv) The website’s home page and other menu pages must be clearly labeled to distinguish the noncommercial sections from the commercial sections.

Of course, there are all sorts of nuances that apply to this rule, and a different analysis may apply depending on whether the website address is displayed during a PSA, a program promo, or traditional commercial matter. It would be difficult to describe all of the possible permutations and consequences in this brief summary, and the important thing for stations to remember is to be vigilant about policing the display of website addresses during children’s programming so that questionable situations may be brought to the attention of legal counsel as soon as possible.

- *These Concept Seem Simple, but They're Actually Really Tricky.* The FCC requires stations to certify at license renewal time that they have complied with the commercial time limits. Between the “clock hour” concept (and the pro-ration corollary), on-air host-selling and program length commercials, website addresses, website host-selling, age-appropriate program promos, and so forth, there are numerous opportunities for stations to inadvertently violate the commercial time limits for children’s programming. In fact, during the most recent license renewal cycle, a number of NBC affiliates were required to disclose a violation of the website display rule because the network provided all affiliates with a program (from a third-party source) that contained a non-compliant website address in the closing credits of one episode of the show. (Each disclosure resulted in a formal admonishment from the FCC.) That incident, by itself, should illustrate how difficult it can be to remain vigilant and aware of all possible issues. But that means that stations need to pay close attention to all aspects of the commercialization rules and policies in order to minimize risk at license renewal time.

Will the FCC Get a Prize for Adopting New Rules to “Modernize” the Station-Conducted Contest Regulations? We Will Know Soon!

On August 27, the FCC released the “tentative” agenda for its open meeting scheduled for September 17, and we are excited to report that the following item is listed:

Modernizing Contest Rules – The Commission will consider a Report and Order to provide broadcasters greater flexibility in their disclosure of contest terms.

As we have reported previously, the FCC proposed late in 2014—in response to a Petition filed by Entercom in early 2012—new rules that would allow stations greater flexibility to meet their on-air disclosure requirements for station-conducted contests. More specifically, the FCC proposed to allow stations to meet the obligation to disclose the material terms of contests either through on-air announcements (as under the current rule), or by making the material terms available in writing on a publicly available website and announcing that website’s address on the air. To be sure, the proposal—if adopted—would create some much-needed flexibility for all stations that conduct promotional contests and sweepstakes.

Unfortunately, the FCC’s proposal was not entirely favorable: the new rules proposed by the FCC stated that if a station were to choose to meet its disclosure obligation by posting the material terms to a website, the station would have to announce—*each time* the station mentions or advertises the contest over the air—the availability of the material terms on the website and identify the *complete*, “*direct*” website address where the terms are posted. Virtually all broadcasters that filed comments in the FCC’s proceeding opposed the “each time” requirement and the “*direct* website address” requirement. Whether the final rules adopted by the FCC will include the “each time” and/or “*direct* website address” requirements remains to be seen—but the good news is that we should know the answer in about three weeks.

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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