



Virginia Association of Broadcasters Legal Review



Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
Counsel to VAB • (919) 839-0300

250 West Main Street, Suite 100
Charlottesville, VA 22902 • (434) 977-3716

IMPORTANT

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DEADLINE TO IMPLEMENT CALM ACT RULES IS APPROACHING

Television broadcasters (as well as cable operators and other MVPDs such as satellite companies) now have less than five months to comply with the rules implementing the Commercial Advertisement Loudness Mitigation Act (the “CALM Act”). In fact, the FCC’s Order adopting rules to implement the CALM Act was published in the Federal Register on July 7, 2012. The new requirements go into effect on December 13, 2012 and impose a mandatory technical standard that is designed to prevent digital television commercial advertisements from being broadcast at louder volumes than the program material they accompany. All stations, regardless of size, are required to have the equipment necessary to ensure that all commercials are transmitted to consumers at the appropriate loudness level in accordance with the industry standard.

For stations that wish to apply for a waiver, all requests must be filed electronically through the Commission’s Electronic Comment Filing System (“ECFS”) by no later than October 12, 2012.

Most stations will be able to rely on turn-key technology to meet the technical requirements, and should begin making these arrangements if they have not done so already. The procedure to request a waiver and a refresher on how the new rules will impact broadcasters is set forth below.

I. Procedures to Request Financial Hardship and General Waivers

In the event that the cost of obtaining the equipment required for compliance with the CALM Act requirements presents a financial hardship, a station may request from the Commission a one year waiver of the effective date of the rules. Once granted a waiver, a station may request a renewal of the waiver for one additional year if they can demonstrate that circumstances continue to prevent them from purchasing the necessary equipment for compliance. To request a waiver, the station must provide: (1) evidence of its financial condition, such as financial statements; (2) a cost estimate for obtaining the required equipment to become compliant; (3) a detailed statement explaining the reason its financial condition justifies postponing compliance; and (4) an estimate of how long it will take to comply, including supporting information. The Commission requires that an assertion of financial hardship “be reasonable under the circumstances.”

In recognition that smaller stations are more likely to face financial hardship in complying with the rules, the Commission adopted a more streamlined financial hardship waiver for these entities. A small station that seeks a waiver must file a certification with the Commission that it: (1) has no more than \$14 million in annual receipts or is located in television markets 150 to 210, and (2) needs a delay of one year to obtain specified equipment in order to avoid financial hardship that would be imposed if the station were required to obtain the equipment sooner.

In addition to hardship waivers, stations may seek general waivers when “necessitated by unforeseen circumstances.” As stated above, most stations will be able to comply with the complex requirements of the CALM Act with the use of equipment provided by outside vendors. However, for those stations that would like more information on the technical standard adopted by the Commission and the new requirements implementing the standard, a summary is set forth below.

II. An Overview of the ATSC Recommended Practice

The CALM Act was enacted on December 15, 2010 in response to consumer complaints about “loud commercials.” Prior to the passage of the CALM Act, the television broadcast industry already recognized the importance of measuring and controlling volume in television programming. In November 2009, the Advanced Television Systems Committee (“ATSC”) completed and published the A/85 Recommended Practice (the “Recommended Practice”) to provide guidance on loudness measurement methods for different types of program content and to help television networks and broadcast stations avoid large variations in loudness during transitions between different types of content. The CALM Act requires the FCC to incorporate the

ATSC Recommended Practice as the appropriate standard applicable to television stations.

III. Rules Apply to All Commercials Transmitted by Television Stations

The rules adopted by the FCC to implement the CALM Act require all commercials transmitted by television broadcast stations to comply with the ATSC's Recommended Practice, regardless of whether they are inserted locally by the television broadcaster or embedded by a third party programmer. The new rules try to navigate the tension between the directive of the CALM Act that puts the burden of compliance on local broadcasters and MVPDs while acknowledging that in many instances compliance with the technical standard requires the cooperation of third parties such as upstream program providers. In the end, the Commission did not adopt the most intrusive and burdensome requirements proposed to implement the Act—most significantly, broadcasters will not be required to measure the audio of and retain detailed records for every commercial aired, including commercials provided by third party programmers. Instead, the new rules adopt a “safe harbor” approach with respect to third party programming, where local broadcasters are deemed in compliance so long as they can certify their own transmission equipment is not at fault and they have a certification of compliance from the third party supplier.

The new rules apply to all commercials, including political advertisements, program-length commercials, and station promos. In the Order, the Commission specially states that compliance with the technical requirements of the Recommended Practice will not be deemed to conflict with the no-censorship provisions of federal law with respect to political ads, so a local broadcaster may modify the loudness of a locally produced political ad in conformity with the Recommended Practice without running afoul of federal no-censorship requirements.

Non-commercial broadcast stations are generally excluded from the new rules as they are precluded under the law from airing commercial advertisements (except when commercials are transmitted as part of an “ancillary or supplementary” service, in which case the new rules do apply).

IV. Compliance

The Commission's new rules require all stations, regardless of size, to have the equipment necessary to pass through programming compliant with the ATSC's Recommended Practice. Most significantly, under the Recommended Practice stations must have installed equipment capable of embedding and passing through the “dialnorm”

value, which is a numerical value that indicates the perceived loudness of the content and is encoded in the programming stream as metadata that is transmitted to the consumer's reception equipment. So long as the dialnorm value correctly identifies the loudness of the content it accompanies, the viewer's receiver will automatically adjust the volume to prevent spikes in loudness.

Under the Commission's new rules, stations must maintain records to demonstrate that such equipment has been properly installed, maintained, and utilized. Stations should have their technical staff review their equipment to make sure it conforms to this requirement and the Recommended Practice.

In lieu of requiring stations to continuously monitor programming to ensure compliance with the Recommended Practice, the new rules establish different compliance methods, which are generally based on whether a commercial is locally inserted or embedded.

A. Local Insertions

For commercials inserted locally, the station generally will be deemed in compliance if it "installs, utilizes, and maintains in a commercially reasonable manner" equipment that ensures each commercial complies with the ATSC's Recommended Practice prior to the insertion of each commercial so that the loudness level of a locally inserted commercial is matched to the dialnorm of the programming stream into which the commercial is being inserted. Therefore, as a practical matter, the station must use the equipment prior to the insertion of each commercial to ensure compliance. In order to satisfy this requirement, a station must:

- (i) install, maintain and utilize equipment to properly measure the loudness of inserted commercials and to ensure that the ATSC's Recommended Practice dialnorm metadata value correctly matches the loudness of the commercials when encoding the audio for transmitting the content to the viewer;
- (ii) provide records showing the consistent and ongoing use of this equipment in the regular course of business and demonstrating that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation;
- (iii) certify that it either has no actual knowledge of a violation of the ATSC's Recommended Practice, or that any violation of which it has become aware has been corrected promptly upon becoming aware of such a violation; and

- (iv) certify that its own transmission equipment is not at fault for any pattern or trend of complaints.

With respect to local commercials added to a station's programming stream by a third party (such as the station's commercial sales agent), the station may generally demonstrate compliance with the new rules by relying on a certification of compliance by the third party inserter. In the event of a Commission inquiry, the station must be prepared to perform a spot check (consistent with the procedures discussed below) of the third-party inserted commercials.

B. Embedded Commercials

For commercials that are embedded into programming by third party programmers and passively transmitted by the local station, the station may demonstrate compliance with the ATSC's Recommended Practice by satisfying the FCC's new "safe harbor" criteria or by using real time processing. The safe harbor differs depending on whether a compliance certificate is available from the third party programmer.

Where a certificate of compliance is available from the third party programmer, stations may take advantage of the safe harbor when they:

- (i) obtain a certificate of compliance from the third party programmer and have no reason to believe that the certification is false (such certification is required to be made widely available by website or other means to local stations);
- (ii) certify that their own transmission equipment is not at fault for any pattern or trend of complaints; and
- (iii) perform a "spot check" on programming in response to an enforcement inquiry.

"Spot checks" entail monitoring 24 uninterrupted hours of the actual loudness of the subject programming with an audio loudness meter employing the measuring technique described in the Recommended Practice. Stations must maintain "appropriate" maintenance records for the audio loudness meter to ensure that it is working properly.

For programming where a certificate of compliance is not available from the third party programming supplier, a different safe harbor standard applies. In this situation, the station must (as with certified programming) be able to certify that its own transmission equipment is not at fault for any pattern or trend of complaints and also perform a "spot check" on programming in response to an enforcement inquiry. In addition, "large stations" (defined as stations with more than \$14 million in 2011 annual receipts) must perform annual spot checks of the non-certified commercials. If there is no single 24

hour period in which programming from all non-certified programmers is represented, the spot check should consist of a series of loudness measures totaling no fewer than 24 hours, over the course of a 7 day period. At least one program provided by every non-certified programmer that supplies programming for that channel or stream of programming must be measured in its entirety. The station, of course, should maintain records to demonstrate that spot checks have occurred at the appropriate times and that the station's audio loudness meter is appropriately maintained.

Stations with \$14 million or less in 2011 annual receipts are not required to conduct annual spot checks but must be prepared to conduct a spot check in response to an enforcement inquiry. Where annual spot checks are being performed, they may be discontinued (within the safe harbor) if the spot checks are performed for two consecutive years without finding evidence of noncompliance.

If the Commission becomes aware of a "pattern or trend of sufficiently specific complaints," it may open an enforcement inquiry with the station in question which triggers a 30 day period in which the station must complete a spot check. To remain in the safe harbor, all stations regardless of size or reliance on a programmer certification must perform a spot check within 30 days of notification of an inquiry.

Since small stations are not required to conduct annual spot checks for non-certified programming, there is no requirement that they obtain loudness measurement equipment prior to a Commission enforcement inquiry. To save expense in the event of an inquiry, such stations may borrow or contract for the use of the equipment to complete the required spot check within 30 days.

C. Real-Time Processor Compliance

For any commercial advertisements, whether local inserts or embedded commercials, a station will also be deemed in compliance with the ATSC's Recommended Practice if it installs, maintains, and utilizes real-time (or "conventional") processing equipment for its programming stream. Such processing equipment modifies the dynamic range of audio content by lowering the level of very loud portions and raising the level of very soft portions, and is in lieu of relying on a dialnorm to be encoded into the programming stream.

A station relying on real-time processing must (i) provide records showing the consistent and ongoing use of this equipment in the regular course of business and demonstrating that the equipment has undergone commercially reasonable periodic maintenance and testing to ensure its continued proper operation; (ii) certify that it either has no actual knowledge of a violation of the ATSC's Recommended Practice, or that any violation of which it has become aware has been corrected promptly upon becoming aware of such a violation; and (iii) certify that its own transmission equipment is not at fault for any pattern or trend of complaints.

The Order acknowledged that real-time processing is less desirable and generally disfavored by stations, content providers, and consumers alike because it can distort overall audio quality. Accordingly, it is anticipated that most stations will rely on the compliance criteria and safe harbor outlined above for local insertions and embedded commercials in lieu of real-time processing.

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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.

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
David Kushner
Coe W. Ramsey
Charles E. Coble
Charles F. Marshall
Stephen Hartzell
J. Benjamin Davis
Julia C. Ambrose
Elizabeth E. Spainhour
Eric M. David
Mary F. Peña
Dorrian H. Horsey
Laura S. Chipman

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