



Virginia Association of Broadcasters Legal Review



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TABLE OF CONTENTS

**NPR URGES FCC TO CONSIDER SPECTRUM INCENTIVE
AUCTIONS’ POSSIBLE ECONOMIC IMPACT ON RADIO STATIONS1**

Another radio group has asked the FCC to consider whether radio
broadcasters should get a slice of the \$1.75 billion TV Broadcaster
Relocation Fund that will be used to reimburse broadcasters for certain costs
incurred as a result of repacking after the spectrum auctions.

**ENFORCEMENT REMINDER: FCC FINES BROADCASTERS FOR
VIOLATIONS OF EEO RULES1**

The FCC recently fined radio and television broadcasters \$20,000 each for
violations of the Commission’s EEO rules.

D.C. CIRCUIT REJECTS CHALLENGE TO EXPIRATION OF
“VIEWABILITY” RULE, JUDGE ATTACKS MUST CARRY2

The U.S. Court of Appeals for the D.C. Circuit has declined to review the expiration of the FCC’s “viewability” rule, which previously required hybrid cable systems to down-convert digital television signals for analog subscribers. Equally, if not more important, a concurring judge attacks “must carry.”

COMMISSION SEEKS COMMENT ON CAPTIONING FOR
TELEVISION “VIDEO CLIPS” DELIVERED OVER THE INTERNET4

The FCC has invited comment from broadcasters on the closed captioning of video clips delivered by Internet Protocol, and, in particular, video clips of news programming.

NPR URGES FCC TO CONSIDER SPECTRUM INCENTIVE AUCTIONS' POSSIBLE ECONOMIC IMPACT ON RADIO STATIONS

Another radio group has asked the FCC to consider whether radio broadcasters should get a slice of the \$1.75 billion TV Broadcaster Relocation Fund that will be used to reimburse broadcasters for certain costs incurred as a result of television channel reassignments.

As we have previously reported, the FCC sought comment from broadcasters and others regarding the costs that will be incurred as a result of the reassignment of television stations in connection with the proposed spectrum incentive auctions.

National Public Radio ("NPR") recently urged the FCC to add to its catalog of expenses that are eligible for reimbursement certain radio-specific costs associated with the reassignment of television channels in connection with the auctions. Among those costs NPR argued that radio broadcasters will incur are those associated with the "dislocation of radio station transmitting antennas and related hardware." NPR pointed out that television stations moving to new channels will need new antennas, which may require modifications to existing towers or construction of new ones. NAB previously made similar points in comments it submitted in the proceeding.

In such instances, NPR argued, radio stations that use television towers will likely incur costs, such as those relating to relocating antennas: "The most common impact of the impending television channel reassignment on noncommercial FM licensees will concern FM antennas and transmission lines. These may need to be moved to accommodate a new television transmitting antenna, a new transmission line or waveguide for the television transmitting antenna, or to allow removal of the original television lines. Additional costs for temporary relocation of the FM station antenna are likely to be incurred while the television and tower work proceeds, which could require many months. Engineering and relocation costs will accompany these capital and equipment costs in virtually every instance of dislocation."

The deadline for broadcasters to comment on the costs that should be reimbursed has passed. We will keep you posted on further developments, including any further guidance the FCC offers regarding which costs it deems eligible for reimbursement.

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ENFORCEMENT REMINDER: FCC FINES BROADCASTERS FOR VIOLATIONS OF EEO RULES

The FCC recently fined two broadcasters \$20,000 each for violations of the Commission's EEO rules.

In one instance, the Commission fined a television broadcaster in large part for failing to send vacancy notifications to an organization that requested them. The *Notice of Apparent Liability* (the “*Notice*”) issued to the licensee also imposed rigorous reporting requirements on the licensee for a three-year period.

In that case, enforcement activity focused on the random audit of the 2008-2010 reporting period, during which the licensee of several television stations filled 11 vacancies in its employment unit. The licensee failed, as FCC rules require, to provide notification of each of these full-time vacancies to an organization that had requested vacancy notifications, as required by the rules. The organization was the only organization to request such notifications from the licensee. According to the *Notice*, the violations were exacerbated by an apparent lack of self-assessment and incorrect factual information provided by the licensee to the Commission in its initial audit response.

For a similar violation, the Commission also imposed a \$20,000 fine on the licensee of FM radio stations and imposed the same rigorous reporting requirements. In that case, the licensee filled 36 full-time vacancies during the 2009-2011 reporting period and failed to provide notification to numerous (as many as 21) organizations that requested vacancy notifications. Here, the FCC identified \$16,000 of the total fine for violation of the vacancy notification rules and another \$4,000 for the apparent failure by the licensee to self-assess its EEO performance.

These examples of rigorous enforcement are a reminder to all broadcasters to engage in thorough, routine self-assessment to evaluate compliance with the Commission’s EEO rules and to maintain careful records of compliance. They also underscore the importance of candor to the Commission.

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D.C. CIRCUIT REJECTS CHALLENGE TO EXPIRATION OF “VIEWABILITY” RULE, JUDGE ATTACKS MUST CARRY

The U.S. Court of Appeals for the D.C. Circuit has weighed in on challenges by broadcasters to the expiration of the FCC’s “viewability” rule for cable carriage of must-carry television stations. In an opinion released at the end of December 2013, the Court sided with the cable industry and declined to review the sunset of the viewability rule, which expired more than a year ago—on June 12, 2012.

The expiration of the viewability rule means that cable systems are no longer required to down-convert digital television signals to analog. Hybrid cable systems (i.e., those that offer both analog and digital service to customers) were required to carry the signals of must-carry stations in analog format for an additional 6 months, but the FCC allowed cable systems considerable flexibility in meeting that requirement (for example, by providing notice and conversion equipment at a low cost to subscribers).

Also in 2012, the Commission considered whether to extend or let expire the HD carriage exemption, which exempts eligible small cable systems from the requirement to carry in HD television signals broadcast in HD. The FCC acted at that time to extend until 2015 the HD carriage exemption for small cable system operators.

NAB and others challenged the Commission's decision to allow expiration of the viewability rule, arguing that doing so would undermine broadcaster "must-carry rights" and the ability to reach as many as 12.6 million households who receive analog-only cable service. The broadcasters petitioned the U.S. Court of Appeals for the D.C. Circuit to review the sunset of the FCC's rule. By a unanimous ruling, the Circuit Court rejected the challenge and denied the broadcasters' petition.

The Court found that "the congressionally mandated transition from analog to digital broadcasting is complete" and that "many cable companies have abandoned analog service altogether in favor of all-digital operations." The broadcasters argued, however, that the viewability rule should remain in effect so long as there are hybrid cable systems providing service to subscribers who use analog television sets. The Court disagreed. The Court held, instead, that the FCC's action allowing cable operators to offer analog subscribers set-top equipment in lieu of downconversion was reasonable and within the Commission's authority.

In a concurring opinion, Judge Kavanaugh went several steps further, arguing that given the dramatic changes in technology and the marketplace, cable no longer has "market power" over local television stations and, as a result, he argued that the Congressionally enacted "must carry" statute is now unconstitutional. He said:

In the two decades since Congress enacted the Cable Act of 1992, the video programming marketplace has radically transformed. . . . The upshot is that the cable "bottleneck monopoly" on which. . . [the law] rested no longer exists—and, as a result, the [must-carry] Act's infringements on cable operators' editorial discretion no longer can withstand First Amendment scrutiny.

Although this reflects one judge's view, it is an indication that the battle over video programming distribution continues.

The Court's ruling is a setback for broadcasters on the narrow issue of the viewability rule, but it will certainly not be the final word on the broader issues of must-carry protections and video programming distribution.

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COMMISSION SEEKS COMMENT ON CAPTIONING FOR TELEVISION “VIDEO CLIPS” DELIVERED OVER THE INTERNET

The Commission’s Media Bureau has solicited input from broadcasters on the closed captioning of video clips delivered by Internet Protocol (“IP”), including the extent to which the industry has voluntarily captioned IP-delivered video clips. “Video clips” are defined by the Commission as “excerpts of full-length video programming.”

As you will recall, the FCC’s rules for closed captioning over the Internet have taken effect in phases over the last two years. The rules apply to full-length programming that previously aired on television with captions. “Video clips” have so far been expressly exempted from the rules. Now, the Commission intends to revisit that exemption and consider whether to also require captioning for video clips. In the meantime, the Commission has encouraged video programming providers to provide captions for IP-delivered video clips, especially news clips.

In this new proceeding, the Commission released a Public Notice inviting comment on the current state of captioning of IP-delivered video clips to update the record. What portion of IP-delivered video clips—especially news clips—are captioned? Has the availability of captioned versions of such clips been increasing? What is the quality?

More to the point, the Commission now asks whether it should require captioning of IP-delivered video clips. With respect to this proposal, the Public Notice asks the following important questions relevant to television broadcasters:

- * What are the potential costs and benefits of requiring closed captioning of IP-delivered video clips?
- * What specific steps must be taken to caption IP-delivered video clips?
- * To the extent that some have already captioned these clips, what technical challenges had to be addressed?
- * How does the captioning of IP-delivered video clips differ from the captioning of full-length IP-delivered programming?
- * If the Commission imposes closed captioning obligations for IP-delivered video clips, should the requirement apply to all video clips, or only to a subset of video clips?
- * If it should apply only to a subset, what subsets would be most appropriate and what would be the rationale for excluding others?

Comments on these and other issues relevant to the Commission's determination of whether it should require closed captioning of IP-delivered video clips are due January 27, 2014. Reply comments are due February 26, 2014.

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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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