Virginia Association of Broadcasters
Legal Review

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LEGAL MEMORANDUM

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Deadline: FCC Releases TV Station Coverage Data for Spectrum Auction; Report Problems to the FCC by July 30, 2015

The FCC has released important coverage data for all full power and Class A television station facilities that are eligible for protection in the spectrum auction repacking process. The data provides the "baseline" coverage area and population served by each of these stations. The FCC calculated the data using the final version of its *TVStudy* software, which the FCC also released on the same date. The data is available here. The final version of the *TVStudy* software is available for download here.

Stations should promptly and carefully review this data with engineering staff and/or technical consultants to ensure there are no abnormalities. The deadline for comments or to report any problems in the data is July 30, 2015.

The coverage data includes the noise-limited, terrain-limited, and interference-free coverage areas and population served by each eligible full power and Class A television facility.

The noise-limited data shows the area and population in which the station's predicted F(50,90) field strength exceeds specified levels. The terrain-limited data shows the area and population within the noise-limited contour that are not obstructed by terrain or other propagation factors. The interference-free data shows the area and population within the noise-limited contour that are not predicted to receive masking interference from any other station. This data should reflect calculations using the Longley-Rice methodology described in OET Bulletin No. 69 of the FCC's Office of Engineering and Technology (OET-69). This data also reflects "updated" input parameters adopted the Commission, including 2010 U.S. Census data.

The coverage and population data is for eligible "protected" facilities—i.e., full power and Class A television facilities that held licenses or had applications pending for licenses as of February 22, 2012. The FCC has emphasized that the list of facilities included in the current baseline data is not the final list of facilities eligible for repacking protection. The list of facilities may change pending the FCC's consideration of Petitions for Eligible Entity Status and Pre-Auction Technical Certifications. The FCC indicated that it will release the final baseline data well in advance of the auction.

The baseline coverage and population figures are critical components of the spectrum auction. For stations participating in the auction, the interference-free population data carries significant weight in calculating opening bid prices for the reverse auction—notably, the Expanding Opportunities for Broadcasters Coalition has observed that the new baseline population figures would result in a decrease in the opening bid prices for most stations by approximately 2.3%. For stations not participating in the auction, these figures establish a station's baseline coverage area that will be replicated and the baseline population that will be protected from interference in the post-auction repacking process.

Deadline: TV Station Copyright Royalty Claims Due July 31, 2015

Don't leave money sitting on the table. When a television station's copyrighted programming is retransmitted by cable or satellite as a "distant" signal, the station may be entitled to receive payment of copyright royalties. TV station copyright royalty claims for 2014 must be filed no later than 5:00 p.m. on July 31, 2015. Meeting the deadline is serious business: A copyright owner lost $10 million in copyright fees when a federal court upheld the denial by the Copyright Office of a claim for copyright royalties which was filed late.

The United States Copyright Royalty Board collects copyright royalties from cable systems and satellite carriers and then distributes them to the copyright holders. A television station is considered the copyright owner of its locally produced programming, such as news and public affairs coverage. Copyright law generally defines "distant" carriage as follows:

> **Cable Systems:** With respect to cable systems, a station's programming is considered "distant" if it is carried on a system that is (1) outside of the station's DMA, (2) at least 35 miles from the station's community of license,

(3) outside the station's predicted Grade B (now digital noise limited service) contour, **and** (4) in a community where the station is not "significantly viewed."

Satellite Carriers: With respect to satellite carriers, a station is considered "distant" if it is provided by the satellite carrier to subscribers located outside of the station's DMA.

To claim copyright royalties, a station's locally produced programming must satisfy at least one of the above definitions. In order for television stations to receive their 2014 copyright royalties for distant carriage, stations must file a claim with the Copyright Royalty Board of the Library of Congress. If a station can claim both cable and satellite royalties, the station must file a separate claim for each type of distant carriage.

Stations may wish to confer with their communications counsel for information about how to timely complete and file their claims.

Developments: Television JSAs—Can Congressional Action Save Some?

Television Joint Sales Agreements ("JSAs") have been in the news again, as a result of proposed federal legislation to "grandfather" certain JSAs. But, first, a little background:

What Is a JSA? JSAs are financial arrangements between local TV broadcasters where one station sells advertising time for another. These agreements have become increasingly popular in recent years among broadcasters in small and medium-sized markets across the country. The financial savings yielded by JSAs have helped to expand the diversity, localism, and competition of programming.

Attribution of Joint Sales Agreements. The television industry's use of JSAs was compromised when, in March 2014, the FCC voted to make certain TV JSAs "attributable" under the Commission's media ownership rules. (When the FCC adopted the new TV JSA attribution rule, radio JSAs had already been attributable for several years.) More specifically, the rules provide that JSAs are attributable to the selling station, where the JSA encompasses more than 15% of the weekly advertising time for the brokered station. (The Order adopting the rule in March 2014 expressed concern that JSAs give selling stations too much influence and control over the brokered station when the selling station controls 15% or more of the brokered station's inventory. And the FCC had already announced that it disfavors proposed JSAs "entangled" by other arrangements such as option agreements and loan guarantees.) In addition, effective November 28, 2014, new JSAs must be filed with the Commission within 30 days after the agreement is entered into, and pre-existing JSAs were required to be filed with the Commission by November 28, 2014.

Impact on Pre-Existing JSAs. The TV JSA rule is not just forward-looking—it requires that stations with pre-existing (i.e., in existence before the rule was adopted) arrangements restructure or unwind their agreements in order to comply with the ownership rules. There is no automatic "grandfathering" of any pre-existing JSAs. Under current law, stations have until December 19, 2016, to "unwind" attributable JSAs to come into compliance with ownership limits.

Legislative Developments that May Change the FCC's JSA Rules. In response to the FCC's adoption of the JSA rules, in early May 2015, a bill (S. 1182) addressing the JSA attribution rule was introduced in the Senate by Roy Blunt (R-MO), and it currently has several co-sponsors. This bill would exempt the application of the new TV JSA attribution rule for broadcasters who entered into a JSA prior to the date of the adoption of the FCC's rule (i.e., March 31, 2014). The Senate bill was referred to the Senate Committee on Commerce, Science and Transportation, and, in late June 2015, the bill cleared the Committee by a vote of 14-10. Some Democrat Senators have indicated that they want to change the bill before it advances to the Senate floor. The broadcast industry strongly supports this bill, and NAB has been seeking additional Congressional support.

Furthering the possibility of TV JSA relief, in the House of Representatives, an amendment to the 2016 Appropriations Act proposes to "grandfather" pre-March 31, 2014 JSAs, excepting them from the application of the FCC's TV JSA attribution rules. This was passed by the House Appropriations Committee in mid-June 2015.

Of course, the 2016 Appropriations Act still has to make its way through both the full House and the Senate in order for any TV JSA relief to become law. Because the 2016 Appropriations Act has three potentially controversial amendments specific to the FCC—in addition to grandfathering certain TV JSAs, the appropriations bill also threatens to substantially cut the FCC's budget and block the FCC's ability to enforce its new network neutrality rules (which went into effect June 12, 2015)—it has been referred to as "veto bait" by some observers. Moreover, the White House has expressed its concerns, particularly with respect to the net neutrality language and the allocation for an FCC budget which was millions of dollars below the current FCC funding. Thus, it is difficult to predict whether the TV JSA provisions in the appropriations bill will ultimately pass.

Waivers. The Order adopting the TV JSA attribution rule provides that waivers of the rule are available. However, there is very little elaboration offered in the Order regarding waiver standards and how they will be applied by the Commission staff. At this stage, it appears the FCC's primary concern is undue influence and control that may arise from proposed arrangements. The FCC has promised to take a "hard look" at waiver requests. Requests for waivers will be evaluated by the Commission on a case-by-case basis, considering the totality of the circumstances. Only time will tell whether FCC decisions regarding TV JSA waivers are made with any predictability.

A Final Word About Shared Services Agreements. Although shared services agreements ("SSAs") are not the same as JSAs, things remain unsettled with respect to SSAs, and stations involved in or considering entering into an SSA (and/or a JSA) should proceed with care and

discuss such matters with counsel. For example, the FCC has proposed (but has not yet adopted) rules to require broadcasters to disclose any SSAs to which they are a party. The definition of SSAs has been proposed to include any agreements in which stations collaborate to provide, or in which a station provides, any station-related services to another station that is not under common ownership, including local news sharing agreements. While the comment period on these (and other) SSA issues closed in 2014, there is surely more to come.

Developments: FCC Proposal to Set Aside UHF Channel for White Spaces Devices

A new FCC proposal threatens broadcaster's priority status for use of certain white spaces in the UHF band. The FCC recently proposed in a Notice of Proposed Rulemaking ("Notice") that one UHF channel be set aside in each market to be shared for use by unlicensed white space devices and wireless microphones. As proposed, this UHF channel set-aside would take place after the incentive auction. Broadcasters are concerned that the proposed unlicensed use would give unlicensed devices priority over various incumbent broadcaster uses.

More specifically, the FCC is proposing that, after the spectrum auction, an applicant for any full power television station, Class A television station, low power television station, TV translator station or broadcast auxiliary service station license would be required to show that the intended new, displacement or modified facilities will not eliminate the last available vacant UHF TV channel in the same area. The FCC seeks comment on this proposal. (The Notice does not contemplate the existence of a uniform UHF channel across the country or even throughout a single market; instead, the proposal would require an applicant to demonstrate that wireless mics and unlicensed white spaces devices would still have at least one channel available for operations in the same area as the applicant's proposed facilities.) In some markets, this proposal may not create the same issues as in other, more congested areas.

The Notice also seeks comment on the important (and potentially divisive) issue of whether priority should be given to digital replacement translators (i.e., post-DTV Transition digital fill-in translators) over other types of low power television (and TV translator) applicants when it comes to demonstrating the continued existence of a vacant UHF channel in the market. Moreover, the Notice acknowledges that there may be intra-service conflicts that arise—for example when two low power television stations in the same area submit applications that, in the aggregate, would eliminate the final remaining UHF channel; the Notice seeks comment on how to resolve such issues when they arise.

Significantly, the Commission is not fully aligned on the proposal. Commissioner Ajit Pai dissented from the proposal, stating: "When it comes to the repacked UHF broadcast television band, full-power television stations should receive top priority." Commissioner Pai also suggested that there is other spectrum—such as the 5 GHz band—where unlicensed devices

could operate. Commissioner O'Rielly also opposed the proposal: "Simply put, secondary users should not have a superior claim over primary users for any spectrum in the TV band."

Comments on the UHF channel set-aside proposal are due August 3, and reply comments are due August 31, 2015.

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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