



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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2016 INCENTIVE AUCTION PROCEDURES ADOPTED

In an open meeting yesterday, August 6, 2015, the FCC adopted bidding procedures for the 2016 Incentive Auction. The procedures were adopted in the form of a Public Notice by a vote of 3-2, with Republican Commissioners Pai and O'Rielly dissenting. The Auction is scheduled to begin on March 29, 2016. Below is listed a summary of the items adopted, as set forth in a News Release issued by the FCC (as of the time of distribution of this memorandum, the text of the FCC's Public Notice has not been made public). According to the FCC's News Release, the Incentive Auction procedures adopted today do all of the following (among other things):

- Establish a formula for calculating opening price offers for each eligible television station based equally on its interference and population characteristics, noting that population is an important indicator of value in the forward auction.

- Eliminate the “Dynamic Reserve Pricing” (or DRP) proposal that would have reduced opening bids for stations that cannot be repacked in the TV band.
- Ensure that broadcasters receive information about channel vacancies from round to round so that they can assess whether to drop out of the Auction based on the likelihood that the current price will continue to decrease.
- Authorize the Auction system to relocate TV stations in the downlink, uplink, or duplex gap in a limited number of geographic areas where necessary to accommodate market variations in broadcaster participation (and the FCC will seek further comment on a proposal to preserve an additional vacant channel for licensed wireless microphones and unlicensed devices in such geographic areas in which a TV station is assigned a channel in the duplex gap).
- Establish optimization techniques to determine a final TV channel assignment plan that strives for these policy goals:
 - Maximizing the number of stations that stay on their pre-Auction channels;
 - Minimizing aggregate new interference to individual stations; and
 - Avoiding channel reassignments for stations with high anticipated costs.

According to the FCC, these goals, in turn, will help to ensure that the total reimbursement costs associated with the repacking process remain below the \$1.75 billion in the TV Broadcaster Relocation Fund that Congress made available, speed the post-auction transition process, and minimize disruption for stations and viewers alike.

To reiterate, at the time of this memorandum’s distribution, the FCC has only released a News Release, and the full text of the Public Notice adopted on August 6 has not yet been made publicly available. Thus, there is almost certainly more to come on this subject.

The FCC Is Not Kidding Around with Children’s E/I Programming!

Don’t repeat the same children’s program over and over again. Don’t repeat the same children’s program over and over again. Don’t repeat the same children’s program over and over again

Ignoring this mantra could result in a fine (for example, \$90,000!) or even a “time out” (stations could, theoretically, lose their FCC license). The FCC, in an [Order](#) adopted in July, brought home this point and expounded on the policy behind requiring television stations, both commercial and noncommercial, to provide educational and informational (“E/I”) programming for children. More specifically, during the most recent license renewal cycle, the licenses of several co-owned television stations were put at risk of nonrenewal for the stations’ failure to meet their children’s E/I programming obligations. In the end, the stations were able to renew their licenses in exchange for a \$90,000 “voluntary contribution” and adoption of a strict compliance plan.

The license renewal applications came into question when the FCC’s Media Bureau staff identified a possible violation of the standards for children’s E/I programming as set forth in the FCC’s rules and policies. The license renewal applications at issue relied on the broadcaster’s quarterly Children’s Television Programming Reports (FCC Forms 398), which had identified four single-episode specials aired over and over for the stations to meet their E/I “core” programming obligations. The broadcaster was investigated by the Media Bureau for failure to meet one of the criteria of the E/I “core” programming rule, namely that children’s E/I programming be comprised of *regularly scheduled weekly programs* (i.e., that “core” programming shows be part of an “episodic series”).

In the Order, the Commission explained that “programs that air regularly can reinforce lessons from episode to episode” and “can develop a theme which enhances the impact of the educational and informational message.” Moreover, the criterion of being “regularly scheduled” “was intended to be comprised of different episodes of the same program, not repeats of a single-episode special.” This decision is a clear “warning shot” to television stations everywhere.

Because the broadcaster entered into a consent decree with the Commission agreeing to address the subject programming issues, it was permitted to renew its licenses. However, by the terms of the consent decree, it had to also implement a compliance plan at each of its stations, designate a Children’s Television Compliance Officer with specified responsibilities and make a voluntary contribution to the U.S. Treasury in the amount of \$90,000.

In short, for television stations to keep their license renewal applications kid-friendly in terms of E/I programming, stations should assure that their operations and children’s E/I programming meet all of the following criteria:

- Air at least three hours of “core” children’s programming per week (the so-called “safe harbor”) on the station’s main digital channel;
- “Core” children’s E/I programming must be specifically designed to serve the educational and informational needs of children ages 16 and under and must be regularly scheduled each week in episodes of at least 30 minutes each;
- Air an additional three hours of “core” children’s programming per week for each additional digital channel broadcast 24/7 by the station for free, over-the-air reception by

viewers (and a proportionately lesser amount for multicast digital channels that are broadcast somewhat less than 24/7);

- Appoint a “Children’s Liaison” as the station’s contact person for children’s programming issues;
- Place quarterly Children’s Television Programming Reports (FCC Form 398) in the station’s public inspection file and file the reports electronically with the FCC on a quarterly basis;
- Provide periodic on-air announcements concerning the existence and location of the station’s Form 398s;
- Identify each “core” children’s program as “educational and informational for children” at the beginning of each such program, and air an “E/I” logo throughout the duration of each episode;
- Notify publishers of programming guides and television listings of the educational and informational nature of designated programming.

Stations that fall below the minimum requirements set forth above—including stations that rely on a limited number of episodes of programs or programming that is not regularly scheduled in a weekly episodic format—should consult with legal counsel to ensure that they will not run a risk of non-renewal (or even a fine) during the next renewal cycle.

FIVE-MONTH COUNTDOWN REMINDER:
Single “Straight Lift” Video Clips Must Be
Closed Captioned Online as of January 1, 2016

As of January 1, 2016, so-called “Straight Lift” video clips must be captioned on the web in accordance with the FCC’s closed captioning requirements. As we previously reported, the FCC released an [Order](#) about a year ago, requiring the closed captioning of IP-delivered video clips if those clips first appear on the television platform with closed captions. This new requirement is consistent with the Commission’s ongoing policy goals to assist people with disabilities in gaining the full benefits of online video programming.

Straight Lift Clips. The upcoming January 1, 2016, deadline is specific to Straight Lift video clips, i.e., video clips which contain a single excerpt of a program that aired on television with closed captioning with the same video and audio and are subsequently posted by the station on the web. (The Straight Lift rule applies only to video clips published or exhibited on television in the United States with captioning.)

Does the Length of the Clip Matter? The Straight Lift clip closed captioning requirements apply regardless of the length or content of the video clip and, additionally, even in instances where a brief introduction or advertisement to an otherwise covered video clip is included with the video clip—in other words, the addition of an introduction or advertisement does not fundamentally change the clip in a way that would exempt the clip, itself, from closed captioning in the web environment if it was captioned on the television platform.

Reversal of Course. Yes, you probably remember that when the FCC’s web closed captioning rules originally were adopted several years ago, video clips were specifically exempt from the rules that required captions to follow “full length” programming from the television platform to the web. But, in 2014, the Commission reversed course. In changing course and examining the economic burden to the industry, the FCC found that sufficient technology is currently available to efficiently manage closed captions for video clips and is, therefore, not a burden to utilize.

On January 1, 2016, Will the Website Closed Captioning Requirements Apply in All Cases? No. The Straight Lift video clip website closed captioning requirements will not apply to the following clips:

- Video programming which is in the distributor’s or provider’s library before January 1, 2016.
- Video clips of video programming that was not shown on television with captions.
- Video clips posted online which contain an audio track that is substantially different from the audio track that aired on television.
- Video clips provided by third party video programmers and distributors, such as Hulu and other services, that may embed or host video programming on entertainment or news websites. (The FCC currently has an open proceeding on this issue, and such programming may, in the future, become subject to the web closed captioning rules.)

Quality and Technical Requirements. The quality and technical standards required by the web closed captioning rules for full-length programming also apply to video clips. In other words, video programming owners must provide captions of at least the same quality as the televised captions for the same programming, and video programming distributors and providers must maintain the quality of captions provided by the video programming owner. So long as the same caption file accompanies the clips on the web as were associated with the programming when it aired on television, the requirements will be met. (In adopting the new rule, the FCC noted that if the video clip has to be recaptioned, *de minimis* differences will be permitted.) Furthermore, in order to be in compliance with existing rules, the video clips must also include the same consumer tools or “technical capabilities” (e.g., the ability to change caption font, size and color) as the captioned video programming clips.

Implement Solutions Now! The compliance deadline for Straight Lift web video clips is January 1, 2016, which means that stations repurposing television content to their website (or

any other IP-delivery platform) have just under 5 months to make sure their technical solutions have been tested and are in place. Other deadlines, such as those that apply to “montage” clips and “live” or “near-live” clips are coming in the future beginning in 2017. The dog days of summer are the perfect time to initiate implementation of the new website captioning requirements.

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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