# Virginia Association of Broadcasters
# Legal Review

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## SPECTRUM AUCTION PROPOSALS LIKELY TO BE ANNOUNCED SEPTEMBER 28

Long-awaited proposals for spectrum incentive auctions will likely be announced at the Commission's open meeting on September 28, 2012. The proposals will be contained in a *Notice of Proposed Rulemaking*, which will invite comment from the public over a period of three months or more. The *Notice* is expected to include detailed proposals for the auction process, payments to television stations who relinquish spectrum, and the plan for repacking spectrum.

Chairman Genachowski recently released a statement promising the proposed plan as well as further efforts aimed at informing television stations of their opportunities and responsibilities. The FCC is also expected to provide new resources—including the Broadcaster LEARN Program—to inform broadcasters about the auctions. Chairman Genachowski has urged television stations to participate, promising "a new and unique financial opportunity as a result of incentive auctions."

We will continue to keep you apprised of important announcements regarding the spectrum auction plan. Assuming the proposals are voted upon and released by the Commission on September 28, 2012, industry reports indicate there will be a comment period lasting at least through the end of the calendar year. The Chairman intends to implement a schedule to adopt rules to implement the auctions in mid-2013 and to finish the auctions in 2014.

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## FCC SEEKS COMMENT ON REFORMS TO REGULATORY FEE PROGRAM

The FCC has initiated a new proceeding to evaluate the policies and procedures for assessing and collecting annual regulatory fees. In the *Notice of Proposed Rulemaking* (the "*Notice*"), the Commission seeks comment on issues related to how the Commission should allocate fees among different segments of the communications industry. According to the *Notice*, the proceeding is largely intended to update the process based on the changes in the communications industry over the last 15 years, which have caused shifts in the amount of time the Commission devotes to specific industry segments and activities.

What follows is a list of important issues on which the *Notice* seeks comment.

* *What should be the overarching goals of the regulatory fee program?* The FCC proposes that the three goals for the regulatory fee program should be fairness, administrability, and sustainability. According to the *Notice*, fairness should account for

the services and benefits to the communications industry with the burdens of regulatory fees applied in "an equitable manner that does not distort the marketplace." The *Notice* also states that the program should be efficiently administrable. The proposed goal of "administrability" would encompass the complexity and predictability of the regulatory fee program; in other words, the Commission seeks to avoid unpredictable and extreme shifts in fee rates from year to year for fee payors. Finally, the *Notice* proposes that the program should have the goal of "sustainability" and be flexible enough to adapt to the evolving marketplace regulated by the Commission. The *Notice* seeks comment on these goals and invites commenters to propose others.

* *How should regulatory costs be allocated? How should current cost allocation percentages be revised?* As directed by Congress, the FCC derives regulatory fees by determining the number of full-time equivalent employees (FTEs) performing certain activities at the Commission. The *Notice* now proposes to change the way it allocates FTEs by bureau and within each bureau. As a result, the FCC intends to adjust the cost allocation percentages, which could create fee increases for certain categories of fee payors (such as broadcast station licensees). For example, the proposed changes would result in a projected increase in fees for International Bureau fee payors (for example, earth station licensees). The allocation percentage would increase only slightly for fee payors in the Media Bureau category (from 31.9 percent to 32.9 percent of the total budget). The *Notice* also asks whether and how the fee allocations should be adjusted based on benefits provided to fee payors. How would such benefits be measured? By market share or revenues?

The comment period for this proceeding closes October 16, 2012. We will continue to monitor the proceeding and apprise you of significant developments.

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## SOUNDEXCHANGE TO AUDIT ACCOUNTS FOR STREAMING OF SOUND RECORDINGS

The Copyright Royalty Board recently announced that SoundExchange, the organization charged with collecting royalties for streaming of copyrighted sound recordings, will audit certain commercial webcasters, including a broadcast group. SoundExchange will audit the broadcaster's royalty payments for 2009, 2010, and 2011.

Broadcasters that transmit copyrighted sound recordings over the Internet (such as streaming music programming) are generally required to comply with the SoundExchange compulsory license and pay royalties for the use of such sound recordings. Licenses from ASCAP, BMI, and SESAC do <u>not</u> cover Internet streaming.

In light of the audits, stations who stream music over the Internet will wish to confirm that they are in compliance with the SoundExchange compulsory license, including complying with monthly reporting requirements.

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## ENFORCEMENT REMINDER: FCC ISSUES SERIES OF FINES

### A. Radio Station Fined for Violation of Telephone Broadcast Rule

The FCC recently fined a radio station $16,000 for "willfully and repeatedly" violating the Commission's telephone broadcast rule, which prohibits recording a telephone conversation for broadcast without prior notification to the called party.

The fine arose after the station broadcast a prank call made to a member of the public recorded by an independent contractor hired to make the prank call. During the call, the caller pretended to be an employee of a local hospital and told the call recipient that her husband had been seriously injured in a motorcycle accident and that he later died at the hospital. When the call recipient became distraught, she was informed that the call was "a joke." The call recipient was not informed that the call was being recorded for later broadcast until after it was recorded. The station argued that it did not violate the telephone broadcast rule because 1) the person who initiated the call was an independent contractor, and 2) the call recipient gave permission to broadcast the call *after* it was recorded.

The Commission rejected both of the station's contentions because as a licensee, the station was responsible for violations of Commission rules by the independent contractor, and the telephone broadcast rule requires stations to provide notice that a call will be recorded for broadcast *before* recording commences. Consent obtained after the fact is not sufficient to satisfy the rule.

This fine serves as a significant reminder that the FCC enforces violations of the telephone broadcast rule with hefty penalties. In light of the FCC's continuing interest in enforcement of these rules and the substantial penalties associated with violations, stations may wish to review their policies with respect to compliance.

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### B. FCC Fines Radio Station For Violations Of Contest Rule

A radio station was recently fined $4,000 for violations of the FCC's station-conducted contest rule. The station conducted a contest in which listeners called in to identify the speaker of a voice recording. The contest lasted over a year. The FCC fined the station for violations of the contest rule arising from its failure to properly announce the contest prize list. The Commission's decision emphasizes important guidelines for contest compliance.

First, the Commission found that the station did not announce the list of prizes with sufficient frequency. The contest rule requires that a "reasonable number" of announcements must be broadcast "periodically" during the life of the contest. The station's contest lasted for over a year, and, at some point while the contest was still underway, the station stopped announcing prizes. As a result, the FCC concluded that the material terms of the contest, including the prizes offered, were not "periodically broadcast" throughout the course of the contest.

Second, the Commission found that the station should not have excluded prizes of low value from the list. The FCC's contest rule requires that stations "fully and accurately disclose the material terms of the contest." The rule states that the "extent, nature, and value of prizes" are material terms. The Commission's decision in this case makes clear that the rule demands a complete list of *all* prizes, even those of low value, be announced to listeners.

Third, the station did not announce any change in or possible substitution of prizes. Although at times the station announced that new prizes would be added each week, the station did not announce the entire list of accumulated prizes. And, at a certain point during the contest, some originally-identified prizes were no longer available. The FCC determined that the possibility of substituting prizes of equal or greater value is a material term and that the act of substituting a prize for another without having announced that possibility means that the contest has not been conducted in conformity with the rules as announced.

In light of this substantial fine, stations may wish to review and evaluate their policies and practices regarding on-air contest disclosures.

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### C. Radio Stations Fined For Public File Violations

The FCC fined a group of radio stations a total of $25,000 because the stations were missing issues/programs lists from their public inspection files. The fines serve as a reminder to all broadcasters to properly maintain their public files. For television stations, the online public file rules also require television stations to upload their issues/programs lists to the online public file this next quarter, by October 10, 2012. (A reminder of other online public file obligations for television stations follows in this *Legal Memorandum*.)

In this case, the radio stations were fined because the stations' public files did not contain issues/programs list for twelve consecutive quarters, spanning from third quarter 2008 through second quarter 2011.

The FCC's issues/programs list rule requires radio and television (including Class A stations) licensees to place in their public inspection files each quarter a list of programs that have provided the station's most significant treatment of community issues during the preceding quarter. The list of programs must include a "brief narrative describing what issues were given significant treatment and the programming that provided this treatment." The quarterly lists must be kept in the station's public file for the license term, until final action has been taken on the next license renewal application.

As we have previously reported, the Commission is evaluating in a separate proceeding whether to modify the requirements for issues/programs lists or to create a standardized form. For now, the more flexible "brief narrative" format is permissible under the rules.

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**REMINDER: FULL POWER AND CLASS A TV STATIONS MUST REGULARLY MAINTAIN ONLINE PUBLIC FILE**

With quarterly filing requirements just around the corner, TV stations are reminded to check routinely and maintain their online public file materials. In addition to verifying and uploading quarterly materials next month, by October 10, stations may wish to take the following steps to evaluate their online public files:

* Check and, if needed, add or correct the station's main studio address and closed captioning contact information.

* Verify the station's contour map is current and accurate.

* Confirm a link to the station's online public file is available on the station's website home page. Post contact information identifying station staff who can respond to inquiries regarding access to the public file for persons with disabilities.

* Confirm that the station's Form 398 Children's Programming Reports are correct, completed, and posted for each quarter of the current license term.

* Upload quarterly Issues/Programs Lists for Third Quarter 2012 by October 10, 2012.

* Upload quarterly records concerning children's commercial time limits for Third Quarter 2012 by October 10, 2012.

* By February 2, 2013, upload existing paper file materials to the online public file (excluding letters and emails from the public and political file materials from before August 2, 2012).

* Remember: Only Big Four network affiliates in Top-50 DMAs are currently required to upload new political file materials on an ongoing basis. Other stations are not required to do so until July 2014.

Some technical obstacles still exist in the online public file interface, and not all folders within the online public file have upload functionality. Stations should note any difficulties and report them to the FCC using the e-support link available in the online public file and at the following URL: *https://esupport.fcc.gov/request.htm*. If stations have questions regarding their public file obligations, please contact your communications counsel.

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If you should have any questions concerning the information discussed in this memorandum, please your contact your communications counsel or any of the undersigned.

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