Virginia Association of Broadcasters Legal Review

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TABLE OF CONTENTS

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FCC FINES STATIONS FOR VIOLATIONS OF LICENSING AND MAIN STUDIO STAFFING RULES

The FCC imposed substantial penalties on stations for operation of unlicensed studio transmitter links ("STLs") and failure to appropriately staff a station's main studio.

The first set of fines arose from a broadcast station's operation of several STLs without authorization by the Commission. In that case, the station operated each of the STLs without licenses for more than ten years; in one instance, the STL was in operation for more than 16 years without a license. The FCC fined the broadcaster $20,000 *per STL* for the unlicensed operations. The broadcaster also operated another STL that was licensed but that had been relocated nearly ten years ago. Because the station failed to modify the STL to reflect its current location, the broadcaster was fined another $8,000 for operation at an unauthorized location.

Another broadcaster was recently fined as a result of its failure to staff appropriately its main studio during normal business hours. In that case, an FCC enforcement agent attempted to inspect the station's main studio at 11:31 am and found it unattended. After calling the station's manager, the agent met with a station technician at the studio at 1:30 pm. The agent learned that the technician was the only person working at the studio and that the manager worked an hour and a half away. The FCC had little difficulty finding that this arrangement failed to satisfy the requirement that a station maintain a "meaningful management and staff presence at its main studio." The phrase "meaningful management and staff presence" has long been interpreted to mean, at a minimum, full-time managerial and full-time staff personnel who report to work at the main studio on a daily basis, spend a substantial amount of time there, and use the studio as a "home base." As a result of the violation of these requirements in this instance, the station was fined $7,000.

These fines are important compliance reminders for stations to maintain current authorizations for all operations and a meaningful staff presence—at least one full time manager and one full-time staff person—at their main studio location. Please contact your communications counsel if you have questions about your station's compliance.

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CABLE SYSTEM FINED FOR RETRANSMISSION WITHOUT BROADCASTER CONSENT

The FCC fined a cable system $30,000 for retransmission of two broadcast station signals without the express authority of the originating stations.

The FCC investigated the cable system following complaints by the originating stations alleging that the cable system retransmitted each station's signal without consent. Although the stations had elected retransmission consent in the then-current election cycle, the retransmission agreements between the stations and the cable system each expired at the end of 2011. The stations had again elected retransmission consent for the new cycle, but there were no immediate extensions or renegotiations of the agreements. During the parties' negotiations for new agreements, the cable system continued to retransmit each station signal despite the expiration of the prior agreements and despite each station's insistence that no retransmission was permitted.

In a "win" for television stations, the penalties demonstrate that the FCC is willing to enforce the no-retransmission-without-consent rule, even during contentious retransmission consent negotiations. The parties eventually reached agreements extending the term of their retransmission consent following the stations' complaints to the FCC. In both cases, the cable system admitted that it continued to retransmit the station signals in the interim without consent, and it attempted to justify its unlawful actions on the ground that it faced a "dramatic increase" in each station's demand for retransmission consent fees. But the FCC found that an increase in fees demanded by a station does not justify an MVPD's retransmission of the signal without the originating station's express authority. The cable system has discretion to decide whether to enter into an agreement, but in the absence of one, it is prohibited from retransmission of the station's signal. As a result, the cable system faced $7500 *per day*, per station in fines from the Commission for continuing to retransmit each station's signal without consent after the agreement expired, resulting in a total liability of $510,000. Ultimately, however, the fines were reduced to $30,000 based on the demonstrated financial hardship of the cable system.

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FCC ADOPTS NEW RULES AND SEEKS COMMENT REGARDING CERTAIN BAS AND FIXED MICROWAVE FACILITIES

The FCC has taken further action in its ongoing rulemaking proceeding regarding broadcast auxiliary service ("BAS") stations and fixed microwave facilities. The Commission has released a new, multi-part *Second Report and Order, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, and Memorandum Opinion and Order* (the "*Order*"). In the *Order*, the FCC has adopted new rules and seeks comment on further proposals relating to spectrum licensed for microwave use. Certain aspects of the new rules and proposals will affect broadcasters' use of BAS stations and the use of microwave facilities to transmit video programming material. The *Order* builds on the changes adopted and proposed by the Commission last August, which were discussed in our *Legal Memorandum* dated September 19, 2011.

What follows are the highlights of the rules most relevant to broadcasters adopted by the *Order*, and a summary of significant questions posed for comment.

I.
Adopted Rules

In the *Order*, the FCC adopted several of the proposals on which it sought comment last fall.

First, the FCC acted to modify the antenna standards for certain BAS stations and fixed service ("FS") licensees. The *Order* changes the rules to allow the use of smaller antennas in the 6 GHz band, the 18 GHz band, and the 23 GHz band.

Second, the *Order* adopted new rules to exempt licensees in non-congested areas from efficiency standards. The *Order* implements a "Rural Microwave Flexibility Policy" to relax efficiency standards in rural areas to reduce the cost of deploying microwave backhaul facilities to promote broadband in those areas. The modifications to the efficiency standard enforcement are tied to antenna standards. For example, licensees will no longer be required to comply with efficiency standards if the environment requires antennas under the so-called "Category B" or "Standard B" (for less congested areas). The standards will be more strictly enforced in spectrum congested areas which require a so-called "Category A" antenna. Thus, under the new rules, the FCC directs the Wireless Telecommunications Bureau to consider favorably waivers of the payload capacity requirements if the applicants demonstrate compliance with certain detailed criteria. (This proposed new waiver standard is not intended to replace the FCC's general waiver standard, under which all relevant factors may be considered.) According to the *Order*, the FCC expects the new policy to provide benefits to BAS stations and FS operators in rural areas.

Third, the *Order* also updates the definition of "payload capacity," as previously proposed, to account for Internet protocol radio systems. The existing payload capacity requirements for FS operators are now updated based on bits-per-second-per-Hertz values.

Fourth, the new rules allow BAS stations and FS operators to apply for wider channels in the 6 GHz and 11 GHz bands. The FCC will now license 60 MHz and 80 MHz channels in the 6 GHz and 11 GHz microwave bands, respectively. The wideband channels will be assigned by preference to the highest available channels in the relevant bands, except where such a choice would impede the efficiency of local frequency coordination efforts. According to the *Order*, the new rule will allow backhaul operators to handle more capacity and offer faster data rates.

Finally, the FCC has amended its rules, as proposed, regarding waiver filings for certain BAS stations and FS transmitters pointing near the geostationary arc. The new

rules will limit the circumstances under which FS transmitters must obtain a waiver in order to point near the geostationary arc in order to allow more efficient microwave deployments. According to the *Order*, the modification conforms to International Telecommunications Union ("ITU") standards. A waiver filing will be necessary for FS facilities pointing near the geostationary arc only if the station's EIRP is greater than the values listed in the ITU regulations.

For now, in the *Order*, the FCC has also affirmed the rules and policies adopted at earlier stages in the proceeding and denied petitions for reconsideration of the rules.

II.
Issues For Comment

In the *Second Further Notice of Proposed Rulemaking* contained in the *Order*, the Commission seeks additional comment on proposals related to the rules and to wireless backhaul. What follows is a list of significant questions posed for comment.

* *Allow Smaller Antennas In 13 GHz Band?* The *Order* asks whether smaller (2-foot) antennas should also be allowed for BAS stations and FS transmitters in the 13 GHz band for the same reasons the FCC has acted to allow them in the 6 GHz, 18 GHz, and 23 GHz bands.

* *Revise Antenna Rules for 11 GHz Band?* The *Order* invites comment on revising the circumstances under which BAS stations and FS transmitters in the 11 GHz band can reduce power in order to avoid having to upgrade their antennas.

* *Allow Intermediate Antenna Upgrades?* Under the current rules, if a licensee must upgrade its antenna in order to resolve an interference problem, the licensee must upgrade to a Category A antenna. The FCC has proposed to allow licensees to make lesser upgrades (i.e., to an antenna that does not meet Category A standards) if the lesser upgrade would solve the problem.

In a *Notice of Inquiry* contained in this *Order*, the Commission also seeks comment and proposals regarding a comprehensive review of and additional changes to its Part 101 microwave antenna standards, which may be of interest to those broadcasters who are using fixed microwave facilities to transport program material with greater regularity.

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Comments on the questions posed for comment are due 30 days after the *Order* is published in the *Federal Register*, and reply comments are due 45 days after publication. Publication has not yet occurred.

We will continue to keep you apprised of developments in this proceeding that affect BAS and microwave use by broadcasters.

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U.S. COURT OF APPEALS ACTS TO RESTRUCTURE AUTHORITY OF COPYRIGHT ROYALTY BOARD

The U.S. Court of Appeals for the District of Columbia Circuit recently vacated certain actions by the Copyright Royalty Board because the Board's actions exceeded its authority and were unconstitutional. The case arose out of the review of certain royalty rates assessed against a digital music service for webcasting digitally recorded music. The music service complained of the high royalty rates and challenged the rates on the basis of the structure and constitutional authority of the Board itself. As stations may know, the Copyright Royalty Board also determines the rates broadcasters pay for copyright licenses, and the rates content producers receive for distant retransmission by others of their original programming.

In this case, the court found that the Board acted with significant authority but with limited supervision. The members of the Board—three permanent copyright royalty judges—were appointed to six-year terms by the Librarian of Congress. Once the judges were appointed, the Librarian of Congress retained very little discretion to supervise or remove any of the judges from the Board. The court found that the degree of authority conferred on the judges with such limited supervision violated the Appointments Clause of the U.S. Constitution.

To solve the problem narrowly, the court took the unusual step of striking down only the removal provisions of the law that restricted the Librarian's authority to remove judges from the Board. In other words, the Librarian of Congress now has discretion to remove judges a little more easily than he did before. With that additional check in place, the court was satisfied that the Copyright Royalty Board's actions would be constitutional going forward.

The court then vacated and sent the royalty rates back to the Copyright Royalty Board for reconsideration under the new structure.

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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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