Virginia Association of Broadcasters Legal Review

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FCC PROPOSES TO ELIMINATE UHF DISCOUNT IN NATIONAL MULTIPLE OWNERSHIP RULE

The FCC recently issued a Notice of Proposed Rulemaking ("*Notice*") in which it proposes to eliminate the "UHF discount" in the existing national television multiple ownership rule. Currently, the national television ownership rule prohibits a single entity from owning television stations that, in the aggregate, reach more than 39 percent of the total television households in the nation. UHF stations, however, are only attributed with 50 percent of the television households in their DMA—hence the term "UHF discount."

The UHF discount was adopted in 1985 to mitigate the competitive disadvantages that UHF stations then faced because of the poorer propagation characteristics of *analog* broadcasting in the UHF band, resulting in weaker signals, higher electricity costs, and smaller audience reach. Even before the digital transition in June 2009, the Commission recognized that these inherent physical limitations of the UHF band would likely not exist with digital broadcasting, and experience since the digital transition has borne this out. Today, in fact, the UHF band is seen as inherently better for digital transmissions, which is why the band is considered beachfront property in the spectrum auction proceeding.

Although the current national television ownership rule, incorporating the UHF discount, was established by Congress in the 2004 Consolidated Appropriations Act, the Commission claims in the *Notice* that it retains the authority to alter the ownership cap, including the UHF discount. While the FCC is not proposing at the current time to alter the 39 percent cap itself, it is proposing to eliminate the UHF discount altogether, which has the effect of tightening the cap on national ownership.

Several station groups would already exceed the 39 percent cap, absent the UHF discount, including ION and Univision. And at least one pending transaction, Tribune Company's acquisition of Local TV, LLC, would exceed the 39 percent cap, absent the UHF discount.

To deal with these situations, the *Notice* proposes to grandfather both (1) existing station combinations that would exceed the 39 percent cap solely as a result of the elimination of the UHF discount and (2) proposed station combinations that would exceed the 39 percent cap but for the UHF discount, but only to the extent an application is pending with the Commission, or the transaction has already received approval but not yet been consummated, as of September 26, 2013, the day the *Notice* was released. In other words, proposed station combinations that are filed after September 26, but before a final order is actually adopted, and that would exceed the 39 percent cap without the UHF discount will not be considered grandfathered and will be deemed to violate the national multiple ownership rule.

In addition, it is proposed that a grandfathered combination cannot convey its grandfathered status to a subsequent buyer. Any combination would have to satisfy the then-existing national ownership cap at the time of transfer.

Recognizing that in the digital world broadcasting in the VHF band, particularly the low VHF band, faces technical challenges, the *Notice* seeks comment on whether the Commission should adopt a new "VHF discount" and, if so, what percentage the discount should be.

The Commission issued the *Notice* with only three Commissioners, and Commissioner Pai dissented on two grounds, making the *Notice*'s adoption a 2-1 decision, which is exceedingly unusual for a Notice of Proposed Rulemaking.

First, Commission Pai argued that it was illogical to eliminate the UHF discount without simultaneously examining whether any change in the 39 percent cap itself was warranted. Indeed, he suggested that the 39 percent cap should be raised because the media landscape has changed dramatically since it was implemented.

Second, Commissioner Pai dissented because the *Notice* could only *propose* to eliminate the UHF discount, yet the proposal to grandfather only existing or proposed combinations as of the date of issuance of the *Notice*, September 26, 2013, was tantamount to telling "the private marketplace to behave as if the UHF discount has already been eliminated, [and] treating the rest of the rulemaking process like an empty formality."

Comments will be due 30 days after publication of the *Notice* in the Federal Register, with reply comments due 60 days after publication. At this time, publication in the Federal Register has not yet occurred.

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PANDORA SEEKS TO QUALIFY FOR "BROADCASTER" ROYALTY RATES WITH PURCHASE OF TERRESTRIAL RADIO STATION

The Internet radio service Pandora recently purchased a terrestrial radio station in Rapid City, South Dakota. By this move, Pandora may be seeking to take advantage of "broadcaster" royalty rates for Internet streaming.

Broadcasters who stream over the Internet generally pay lower royalty rates for streaming than do solely Internet-based "pure-play" radio services like Pandora. Presumably, by owning a terrestrial radio station, Pandora will now seek to qualify for and enjoy the benefit of lower "broadcaster" rates.

Pandora has already been in widely publicized legal battles with performance rights organizations, including ASCAP, and the purchase is undoubtedly another strategic move for Pandora to challenge Internet radio royalty rates. BMI has also initiated legal action against Pandora over the purchase of the Rapid City radio station, alleging the purchase was a "stunt" intended to circumvent the proper administration of royalties. In that case, BMI has asked a federal district court for a blanket determination of reasonable royalty rates for all music streamed over the Internet by Pandora, and the case remains pending.

At this early stage, it's not known whether Pandora will be successful in qualifying for "broadcaster" rates, and the result may depend on how the BMI legal challenge proceeds.

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FCC SEEKS COMMENT REGARDING VIDEO DESCRIPTION FOR REPORT TO CONGRESS

The FCC has opened a new proceeding seeking comment on certain issues relating to (1) video description in television programming and (2) video description in video programming distributed on the Internet. The Commission will use the data collected to prepare a report to Congress by July 1, 2014.

Specifically, as directed by the Twenty-First Century Communications and Video Accessibility Act of 2010, the FCC is seeking comment on the following general topics related to video description in television programming:

- The availability, use, and benefits of video description in video programming distributed on television.
- The technical and creative issues associated with providing video description.
- The financial costs of providing video description for providers of video programming and program owners.

The statute also directs the Commission to inquire about the technical and operational issues, costs, and benefits of providing video description for video programming delivered using Internet Protocol.

Comments in this proceeding are due November 4, 2013, and reply comments are due December 4, 2013.

As previously reported, FCC rules require certain television stations to provide video description on a secondary audio channel to make television programming

accessible to individuals who are blind or visually impaired. At this time, the video description rules, in general, do not apply to programming delivered via Internet Protocol. But many devices are required to technologically accommodate secondary audio streams for video description. The FCC now seeks comment on what other technologies and functionalities must be developed to accommodate the delivery of video-described programming on the Internet. What are the costs of providing video description for IP-delivered programming? What are the benefits to consumers of making video-described programming available on the Internet? The Commission also invites commenters to provide information on other relevant legal and policy issues regarding the provision of video description for purposes of the report to Congress.

Some stations may wish to provide information regarding their experiences with video description technologies. Others may wish to weigh in on the potential costs if the FCC ultimately requires stations that distribute programming with video description on television to "pass through" the video description if the programming is also distributed over the Internet, as the FCC has done with its Internet closed captioning rules.

If you have questions regarding video description requirements or the questions posed for comment, please give one of our FCC attorneys a call.

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FCC ENFORCEMENT ACTIVITY LEADS TO HEFTY FINES FOR TELEVISION STATIONS MISSING QUARTERLY FILINGS

The FCC continues to impose hefty fines on broadcast stations for failing to comply with reporting requirements and public file obligations. The Commission's recent enforcement activity serves as a reminder for all broadcast stations to be diligent in preparing, filing, and placing quarterly materials in their public inspection files and in certifying compliance with these requirements at license renewal time.

In recent cases, the FCC found several television stations failed to prepare and timely file children's television programming reports (FCC Form 398) and place them in the stations' public files. In one case, a television station was fined $20,000 for failing to timely file quarterly children's television programming reports for 18 quarters. In another, a station faced a penalty of $15,000 for missing more than two years' worth of quarterly children's television programming reports. Still more reports were filed late by the station.

Neither station reported the violations in its license renewal application. As a result of each station's failure to disclose the violations, the FCC imposed an additional $3,000 on top of the base forfeiture amounts in both cases.

As a reminder, television stations are required to file quarterly children's programming reports (FCC Form 398) for each calendar quarter reflecting the efforts that the station made during the quarter to serve the educational and informational needs of children. The FCC's rules also require licensees to publicize the location and existence of the reports in the public file. Once the reports are filed each quarter, the reports are automatically imported to the stations' online public files, but stations would be well-advised to check to confirm the reports are visible in the online public file after they have been filed.

If you have questions about your station's quarterly filing obligations, please give one of our FCC attorneys a call.

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CABLE SYSTEM FINED $2.25 MILLION FOR UNAUTHORIZED RETRANSMISSION OF BROADCAST SIGNALS

The Commission recently fined a cable system $2.25 million for unauthorized retransmission of the broadcast signals of six different television stations.

The cable system, TV Max, did not dispute that it retransmitted the stations' signals without express consent of the stations. Instead, it defended its actions by arguing that the retransmission fell within the master antenna television ("MATV") exception to the Commission's retransmission consent rules.

FCC rules provide that consent is not required for retransmission of broadcast signals received by (1) MATV facilities or (2) direct over-the-air reception in conjunction with the provision of MVPD service as long as reception of the signals is available at no charge and at the subscribers' option and the antenna used for the reception of such signals is either owned by the subscriber or building owner, or under the control and available for purchase by the subscriber or building owner upon termination of service.

In other words, the MATV exception generally allows retransmission without consent for broadcast signals received by MATV facilities installed on multiple dwelling units (for example, apartment complexes or hotels) if the signals are available without charge at the residents' option and the building owner or resident owns or controls the antenna. In adopting the MATV exception, the Commission noted that a MATV facility installed by a building owner is similar to an individual installing a roof-top antenna to receive broadcast signals.

The MATV exception does not apply to signals retransmitted from an off-site headend facility, even if the customer also has access to a MATV or over-the-air version of the signal and has the option whether or not to receive it. Here, TV Max argued that it fell within the exception because all of its subscribers resided in multiple dwelling units

("MDUs"); however, the units had not yet been converted to MATV systems. And the Commission's Media Bureau determined that even once the MATV systems were installed TV Max retransmitted at least some broadcast signals received at its off-site cable headend rather than through the on-site MATV system.

The Bureau determined that TV Max intentionally retransmitted broadcast signals without consent before and after installing the MATV systems on its MDU buildings. During the Bureau's investigation, TV Max claimed it was no longer improperly carrying the signals, but the Bureau found evidence to the contrary, including that the cable system was still retransmitting the signals over its fiber ring even during a conference call with the FCC staff.

Despite the Bureau's clear directive that TV Max immediately discontinue retransmission of the stations' signals without station consent, TV Max continued the illegal transmissions. Moreover, TV Max was not candid in its representations to the Commission regarding the status of its operations. As a result of these flagrant violations, the FCC imposed an enormous fine of $2.25 million on TV Max. The fine is based on a base forfeiture maximum amount of $37,500 per day for more than 365 days of ongoing violations.

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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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