



Virginia Association of Broadcasters Legal Review



Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
Counsel to VAB • (919) 839-0300

600 Peter Jefferson Parkway, Suite 300
Charlottesville, VA 22911 • (434) 977-3716

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FCC RELEASES ORDER REINSTATING VIDEO DESCRIPTION RULES WITH FEW CHANGES

Recently, the FCC issued an *Order* reinstating video description rules almost exactly as they were proposed earlier this year. The new rules will be formally reinstated on October 8, 2011. However, to give affected entities sufficient time to comply, the deadline for compliance will be July 1, 2012. In addition, the *Order* adopted a proposal for a new exemption relating to “breaking news” interruptions of video-described programming.

The key provisions of the reinstated rules are summarized below:

I. Requirements

* *50 Hours Per Quarter of Video-Described Programming.* In the top 25 markets, stations affiliated with ABC, CBS, Fox, and NBC will be required to provide 50 hours per calendar quarter of video-described programming during prime time or children’s programming. For purposes of this requirement, the rules define children’s programming as programming directed at children 16 years of age and under. (This definition includes, but is not limited to, all educational and informational children’s programs.)

The rules will count a video-described program toward the 50-hour requirement the first time it is aired on the station and once more when it is re-run. In other words, a station may “count” toward its required hours each program it airs with video description a maximum of two times once the rules become effective. Similarly, a station may count programming toward its obligation even if that programming has aired elsewhere with description, so long as it is airing with description for the first or second time on that station. For purposes of counting the 50 hours, the FCC will only consider programming on a station’s primary programming stream *unless* the station carries a Big Four network on another stream and is in a top-25 DMA, in which case both Big 4 program streams will be required to comply.

Compliance for affiliates of Big Four networks in the top 25 DMAs will be required beginning July 1, 2012, 6 months later than initially proposed. The applicability of the requirement will be based on the top 25 markets as determined by Nielsen as of January 1, 2011. The *Order* also adopts a grace period for new affiliates in a market, allowing the newly-affiliated station three months from the date of the affiliation agreement to begin compliance.

* *Pass-Through Requirements for All Network-Affiliated Stations.* The reinstated rules require all network-affiliated stations, including all Big Four and non-Big Four network affiliates, to “pass through” video-described programming where they are

“technically capable” of doing so, beginning July 1, 2012. The technical capability exception is discussed in more detail below.

II. Exceptions and Exemptions

* *Technical Capability Exception to Pass-Through Rule.* The adopted rules reinstate the “technical capability” exception. By definition, a station is technically capable of passing through video description if it has “virtually all necessary equipment and infrastructure to do so, except for items that would be of minimal cost.” Pass-through of video description is required to the extent that a station is technically capable, and when that technical capability is not being used for another purpose related to the programming. Thus, for example, if a station is technically capable of passing through video description of a particular program but is using its SAP channel for a Spanish-language audio track, the station is, in such circumstance, not required to pass through the video description. Although the *Order* encourages stations to provide video description alongside other audio streams using digital technology, the adopted rules retain this exception where it is not feasible for the station to do so. The *Order* explains that “a station may refrain from passing description through if it would be able to demonstrate, in the event of a complaint, that at the time of the failure to pass some description through, it was not technically capable of doing so (and could not become capable at minimal cost).” With this standard in mind, stations will wish to institute relevant recordkeeping practices to document the reasons for any failure to pass through video description. The technical capability exception is not available to Big 4 affiliates in the top 25 markets.

* *Exemptions – Live/Near-Live, Economic Burden, And “Breaking News.”* The reinstated rules include exemptions for live and near-live programming, as proposed, so that, for example, a station is not required to provide video description for live sporting events and live news programming. The exemption for “near-live” programming includes programs recorded 24 hours or less before airing. The rules also allow a provider to petition the FCC for an exemption upon a showing that the requirements are “economically burdensome,” following a standard that mirrors the standard currently used in the closed captioning context. Finally, the *Order* adopts a new “breaking news” exemption—proposed by commenters—which allows a full program with video description to count toward the 50-hour requirement even if it is interrupted by breaking news.

III. Market Expansion and Other Issues

The *Order* also provides clarification on the Commission’s plans for expanding the rules to apply to other stations beyond Big Four affiliates in the top 25 markets, as well as some other issues. In particular, the *Order* clarifies the following points:

* *Expansion to Top 60 Markets on July 1, 2015.* The *Order* accelerates the timetable for expansion of the rules to a date shortly after the Commission’s required report to Congress on the state of the video description market. The *Order* indicates that the rules will be expanded on July 1, 2015 to the top 60 DMAs (based on the Nielsen rankings as of January 1, 2015). Congress requires the expansion to take place no later than October 8, 2016.

* *No Plans for Updates to Market List.* The *Order* declines to establish a timeline to reconsider the ranking of the top 25 (and eventually top 60) markets at certain intervals. Instead, the Commission will revisit this issue at the time of its two-year report to Congress on the state of the video description market in 2014 to determine what, if any, impact the updates would have on the availability of programming.

* *Video Description Rules Apply to All Television Stations.* Although the legislation requiring the rules was unclear whether video description requirements would apply to all stations, the new rules clarify that they will apply to all television stations, including low power broadcasters, subject to any applicable exemptions or exceptions.

* *Video Description Rules Apply to Digital Programming.* The *Order* clarifies that the rules will apply to digital programming transmitted for display in digital format. The previous rules, adopted in 2000, did not explicitly cover digital format.

* *No Quality Standards Adopted.* At this stage, the FCC declines to adopt quality standards for video description as part of its requirements.

* * *

As discussed above, compliance for video description in the top 25 markets and pass-through for all network-affiliated stations will be required beginning July 1, 2012. In advance of that date, each station should take steps to evaluate the applicability of the rules based on its market and affiliation, as well as the station’s “technical capability” to comply with the applicable requirements.

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DEADLINE EXTENDED FOR 2011 BIENNIAL OWNERSHIP REPORTS FOR COMMERCIAL STATIONS

The FCC has extended the deadline for filing 2011 Form 323 biennial ownership reports for commercial stations until December 1, 2011. The filing should still include information current as of October 1, 2011. The extension applies only to the 2011 biennial filing requirement. Going forward, the deadline established by the rules—November 1—will apply uniformly.

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FCC ADOPTS RULES AND SEEKS COMMENT IN RULEMAKING REGARDING BAS AND FIXED MICROWAVE FACILITIES

The FCC has adopted new rules and seeks comment in its ongoing rulemaking proceeding regarding broadcast auxiliary services (“BAS”) stations and fixed microwave facilities. In August, the Commission released a multi-part *Report and Order* (“*Order*”), *Further Notice of Proposed Rulemaking* (“*Notice*”), and *Memorandum Opinion and Order* (“*Opinion*”) adopting some changes to the rules, but also seeking further comment on certain issues relating to spectrum licensed for microwave use. Certain aspects of the *Order* directly affect broadcaster use of BAS stations and the use of microwave facilities to transmit television material.

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

I. Adopted Rules

* *Permit FS Operations in Certain BAS and CARS Frequencies.* The adopted rules will permit Fixed Service (FS) operators to share the 6875-7125 MHz and 12700-13150 MHz bands currently used for broadcast auxiliary services and cable TV relay service. According to the *Order*, this action will make 650 MHz of additional backhaul spectrum available in rural areas where the band is not currently licensed to mobile TV Pickup stations.

The Commission has concluded that it is not feasible to allow FS operations to share spectrum with mobile and temporary fixed TV Pickup operations in areas where mobile *and* temporary fixed TV Pickup operations are licensed. The *Order* also indicates that the FCC will not attempt to adopt band segmentation for uniform spectrum throughout the nation because of the varied uses for BAS operations across bands. Thus, for areas where TV Pickup licenses are not authorized, the *Order* concludes that sharing between FS and fixed BAS operations is feasible. To protect broadcasters’ TV Pickup use, FS paths will be prohibited from crossing the service areas of TV Pickups, and FS operators will be required to coordinate with all relevant licensees under formal coordination procedures. Certain channels in each band (6975-7025 and 13150-13200 MHz) will still be reserved to accommodate TV Pickup stations covering events that occur outside the licensed areas of current BAS operations.

Mobile TV Pickup licensees will continue to be able to use informal coordination procedures within their service areas, where FS will not be permitted.

* *Eliminate Final Link Rule.* The adopted rules will also eliminate the “final link” rule that prohibited broadcasters from using Part 101 microwave stations as the final radio frequency (RF) link in the chain of programming distribution to stations. The *Order* finds that the rule was restrictive based on content alone, unnecessary in light of

digital technology, and both costly and inefficient for some broadcasters. Generally speaking, broadcasters have supported the elimination of this rule. Thus, broadcasters may wish to examine their infrastructure and signal delivery systems to determine whether this rule change may provide them with new operational flexibility.

* *Decline to Permit “Auxiliary” Fixed Stations.* Under the new rules, FS licensees will not be permitted to coordinate additional “auxiliary” fixed stations because of the risk of interference with primary FS stations.

II. Proposals and Issues for Comment

In the *Notice*, the FCC seeks additional comment on proposals related to the rules and to wireless backhaul.

* *Allowing Smaller Antennas for FS Licensees.* The *Notice* seeks further comment on proposals to modify the antenna standards for FS licensees to allow the use of smaller antennas in the 6 GHz band, the 18 GHz band, and 23 GHz band. The *Notice* invites discussion of the appropriate standards for each band, including specific technical parameters, and on the potential risk of interference to other users in the band.

* *Exempting Licensees in Non-Congested Areas from Efficiency Standards.* The *Notice* also proposes to relax efficiency standards in rural areas to reduce the cost of deploying microwave backhaul facilities to promote broadband in those areas. Some commenters have already expressed concern that lowering efficiency standards means, intuitively, less efficient use of spectrum. The modifications to the efficiency standard enforcement would be tied to antenna standards. For example, licensees would not be required to comply with efficiency standards if the environment requires antennas under the so-called “Standard B” (for less congested areas) as set forth in the current rules. The standards would be more strictly enforced in congested areas which required a so-called “Standard A” antenna. The *Notice* seeks comment on this proposed rule.

* *Allowing Wider Channels in 6 and 11 GHz Bands.* According to the *Notice*, allowing 60 MHz channels in the lower 6 GHz band and 80 MHz channels in the 11GHz band could allow backhaul operators to handle more capacity and offer faster data rates. The Commission seeks further comment on this proposal, including whether the band is too congested to accommodate a wider channel in some areas. Would the primary benefit be in rural areas, or is there sufficiency capacity to support use of wider channels in more urbanized areas? Should the Commission adjust the minimum payload requirements to account for increased capacity in wider channels?

* *Revising Waiver Standard for Microwave Stations Near the Geostationary Arc.* The *Notice* also discusses amending the Commission’s rules regarding waiver filings for certain FS transmitters pointing near the geostationary arc. The *Notice* seeks comment on amending the rules to 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.

* *Updating Definition of Payload Capacity.* Finally, the *Notice* also invites comment on an appropriate definition of “payload capacity” as the term is used in the rules, in particular whether the efficiency requirement should be measured in bits-per-second-per-hertz or in terms of an alternative metric. Should the requirements vary for rural areas or legacy systems?

* * *

Comments on the *Notice* are due October 4, 2011, and reply comments are due October 25, 2011.

At this stage, the released *Opinion* defers consideration of other related proposals, but the FCC will likely revisit issues related to broadcast auxiliary services again as deployment of 4G broadband accelerates. We will continue to keep you apprised of developments in this proceeding that affect BAS and microwave use by broadcasters.

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PAYOLA CONSENT DECREE SERVES AS REMINDER TO STATIONS OF BEST PRACTICES FOR COMPLIANCE

Recently, the FCC released a consent decree related to the investigation of sponsorship ID violations by a radio station in Texas. The station was investigated for a payola scheme involving sponsored events and air time.

The essence of the complaint against the station was the improper conduct of a particular host of a program broadcast by the station. The complaint alleged that independent artists were unable to secure airplay unless they sponsored events organized by the station and directed or hosted by the host of a radio program. The complaint also alleged that the host received something of value (“consideration”) from a music store, a venue, and a booking agent. The licensee entered into a consent decree to ensure compliance with the FCC’s sponsorship ID rules and avoid burdensome enforcement proceedings. As part of the consent decree, the licensee agreed to make a “voluntary contribution” of \$12,000 to the United States Treasury. The licensee also agreed to a Compliance Plan to improve sponsorship ID practices at the station.

The Compliance Plan outlines the following general practices for compliance by the station: a commitment to high standards of enforcement, creating an annual report on compliance for three years, additional training for programming personnel, designation of a compliance officer, the maintenance of a hotline for advice or reporting on compliance, and documentation of all relevant expenditures. In addition, all contractual agreements

with respect to programming personnel will contain an obligation relating to compliance with sponsorship ID laws.

More specifically, the station agreed to certain business reforms related to music broadcast sponsorship, including the following:

- * *Pay-for-Play Prohibited.* Station employees should not be permitted to receive anything of value from record labels, artists, or promoters in exchange for airplay. In addition, the station may not accept any item of value from an independent music promoter, unless that promoter certified in writing that no compensation to the promoter from a record label or artist is based upon airplay.
- * *Permissible Advertising and Sponsorship.* The station is permitted an exception for contests and giveaways on the air to persons other than station employees (or their immediate families or households), where the value of the prize and the provider of the prize is clearly indicated in on-air announcements.
- * *Gifts.* Employees may only accept goods worth less than \$25 each, and should not accept unreasonable amounts of such goods. Station employees may also be permitted to receive moderately priced (less than \$150) gifts for important life events (e.g., a wedding) or for meals and other entertainment related to a legitimate business purpose.
- * *Documentation.* The station agreed to mandatory documentation in databases of all items of value received from a record label and the disposition of the gift, all sponsored contests or giveaways, and all advertising by records labels.

The Compliance Plan is the latest example of FCC guidance on best practices to comply with sponsorship ID requirements, and it demonstrates once again that the FCC continues to take its sponsorship ID rules seriously. Stations should consider adopting some of the practices to help avoid payola problems. Your station may wish to consult with your communications counsel to consider a set of best practices to prevent violations of the sponsorship ID rules.

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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.

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
David Kushner
Coe W. Ramsey
Charles E. Coble
Charles F. Marshall
Stephen Hartzell
J. Benjamin Davis
Julia C. Ambrose
Elizabeth E. Spainhour
Eric M. David
Dorrian H. Horsey
Laura S. Chipman

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