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Legal Review

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Legal Memorandum

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FCC Proposes Changes to and Seeks Comment on Children's E/I Television Programming Rules

As we reported previously, at its July 12, 2018, meeting, the FCC adopted a Notice of Proposed Rulemaking ("Notice") to examine the children's television programming rules. The Notice considers significant changes to the children's television programming rules that would, if ultimately adopted, affect both the E/I programming and reporting obligations of television broadcasters.

Background. Under federal law, the FCC is required to consider, when evaluating a television licensee's renewal application, the extent to which the licensee "has served the educational and informational needs of children through its overall programming, including programming specifically designed to serve such needs."

The consumption of video programming has changed dramatically since the FCC first adopted children's television programming rules more than 20 years ago. Viewers, including

children, increasingly watch video programming through DVRs and on-demand, rather than at its scheduled time, and more programming for children is available through non-broadcast platforms.

In light of these developments, the Notice observes that it is appropriate "to take a fresh look at the children's programming rules, with an eye toward updating our rules to reflect the current media landscape in a manner that will ensure that the objectives of the [Children's Television Programming Act of 1990] continue to be fulfilled." The FCC hopes that the Notice's proposals, if adopted, will provide broadcasters more flexibility in fulfilling their legal obligations, while at the same time offering them particularized guidance in order to give them greater regulatory certainty.

Chairman Pai tasked Commissioner O'Rielly with spearheading the effort to launch a review of the FCC's children's programming rules. O'Rielly has publicly stated that he hopes to conclude this proceeding by the end of 2018. That is a very aggressive timeline by FCC standards; if it is met, it would mean that the next license renewal cycle (which starts for television stations in 2020) would cover a period of time during which broadcasters would—potentially, depending on the outcome of the proceeding—have been subject to varying children's E/I programming obligations.

Below is a summary of the proposals on which the Notice seeks comment.

Proposed Changes to the Definition of "Core Programming." Full-power and Class A television operators should be familiar with the concept of "Core Programming." Currently, "Core Programming" is defined as programming that meets all of the seven following criteria: (1) it has serving the educational and/or informational needs of children ages 16 and under as a significant purpose; (2) it is at least 30 minutes in length; (3) it airs between the hours of 7:00 a.m. and 10:00 p.m.; (4) it is regularly scheduled on a weekly basis; (5) the symbol "E/I" airs on the screen throughout the program; (6) the station instructs publishers of program guides that the program is educational/informational and provides an indication of the age group for which it is intended; and (7) for commercial stations only, it is accounted for in the station's quarterly Children's Television Programming Report (a/k/a "Form 398"). (Under current rules, noncommercial stations are exempt from the Form 398 filing requirement.)

The Notice proposes to change or eliminate several of the current criteria. Specifically, the Notice proposes—and seeks comment on whether—to eliminate the requirements that Core Programming be at least 30 minutes in length and air on a regular weekly schedule. The Notice observes that elimination of the 30-minute, weekly scheduling requirement would enable broadcasters to receive Core Programming credit for PSAs, interstitials (i.e., programming of brief duration that is used as a bridge between two longer programs), and other short segments. The Notice also asks several questions on these topics, including:

- Are there any recent studies that evaluate the utility of short form programming relative to long form programming?
- If the FCC eliminates the requirement that educational and informational programming be at least 30 minutes in length to be counted as Core Programming, should the FCC require

broadcasters to promote short segments, addressing the concerns that these segments may be difficult to locate?

- If this requirement is eliminated, should the FCC "count" short segment programming on a minute-for-minute basis (e.g., 30 minutes of short segment programming would be equivalent to 30 minutes of Core Programming), or in some other manner?
- Would elimination of the regularly scheduled weekly programming requirement likely incentivize broadcasters to invest in high quality educational specials and non-weekly programming?

The Notice also seeks comment on whether to expand the timeframe during which Core Programming can be aired or, alternatively, whether the timeframe requirement should be eliminated altogether. For its part, NAB has suggested expanding Core Programming hours to between 6:00 a.m. and 11:00 p.m.

Further, the Notice proposes to eliminate the requirement that *noncommercial* stations identify Core Programming with the "E/I" symbol. On this topic, the Notice asks:

- What technical and viewability challenges are created for noncommercial stations when displaying the E/I symbol on children's programming?
- How will parents distinguish programming aired on noncommercial stations that is specifically designed to educate and inform children from programming that may be educational or informative but is intended for general audiences?
- If the requirement that noncommercial stations include the E/I symbol on Core Programming displayed on television sets is not eliminated, should the FCC nevertheless eliminate the requirement when the programming is transmitted over-the-air to, and received by, smaller devices, such as smartphones and tablets?

Additionally, the Notice seeks comment on whether the FCC should also consider eliminating the "E/I" symbol requirement for *commercial* stations.

And, the Notice seeks comment on whether to maintain the requirement that stations provide information identifying children's programming—including the age group for which the programming is intended—to publishers of program guides.

In all, five of the seven definitional Core Programming criteria are "in play" in the Notice, meaning that this proceeding may result in a significant overhaul of the Core Programming concept.

Quarterly Form 398 Reporting Requirements. Additionally, the Notice seeks comment on whether the FCC Form 398 *quarterly* filing requirement for commercial stations should be changed to an *annual* filing obligation. The Notice also proposes to streamline the Form 398 Children's Television Programming Report by eliminating the Form's requirements that broadcasters: (1) provide information on children's E/I programs that they plan to air in the future, (2) specify the educational and informational purpose and the target age group of each Core Program, and (3) publicize the existence and location of their Form 398s. Note, however, that the FCC is not

proposing to change the requirement that each Form 398 be maintained in the station's online public file.

In what would be an even more dramatic change (if ultimately adopted), the FCC also seeks comment on whether a television licensee should be allowed to simply *certify* that it has complied with the children's programming requirements for a particular reporting period, as opposed to providing detailed information documenting its compliance.

Proposed Changes to License Renewal Processing Guideline and Multicast Option. Under the current rules, the Media Bureau can approve the children's programming portion of a station's license renewal application if the station has aired approximately three hours per week of Core Programming (as averaged over a six-month period) on its primary channel and an additional three hours of Core Programming per week for each of its multicast channels on which the station is multicasting. This three-hour-per-week "processing guideline" for the primary channel and for each multicast channel has provided regulatory certainty for stations over the course of multiple license renewal cycles. The Notice seeks comment on whether (and how) the FCC should modify the processing guideline, and the FCC tentatively concludes that the current "primary-plus-multicasting" requirements should be eliminated and replaced with a more flexible approach that would require most stations to air less Core Programming.

More specifically, the Notice proposes to allow multicasting stations the flexibility to choose the channels on which to air Core Programming. In other words, stations would no longer be required to air three hours per week of Core Programming on their primary channel and an additional three hours per week of Core Programming on each multicast channel; instead, a station would be required only to air three hours per week of Core Programming total (irrespective of how many multicast channels the station broadcasts), and it could elect to distribute the Core Programming on one or more of its channels, including the option to air all of its Core Programming on a multicast channel (even if that multicast channel lacks MVPD carriage). The Notice also questions whether the three-hour quantitative processing guideline is even necessary at all. The following are some of the questions the FCC asks on this topic:

- To what extent do consumers benefit from the additional Core Programming hours that currently must be provided on multicast channels? Is this programming well-known to or frequently watched by children?
- Does over-the-air commercial television continue to be an important source of video programming, including educational and informational programming, for children of low income families?
- To what extent does this requirement increase programming costs for stations or require them to forego other programming options?
- Should the flexibility to choose on which free multicast stream to air required Core Programming hours come with additional public interest obligations? For example, if a broadcaster decides to air its Core Programming on a multicast stream rather than its primary stream, should it be required to air additional hours of children's programming or provide some other service to its community?
- In light of the contemplated changes to the children's programming rules, should there be any modifications to the ATSC 3.0 rules?

- Should there be a requirement that broadcasters provide on-air notifications to consumers that they intend to move the Core Programming from the main program stream to another channel?
- The Notice points out that these potential rule changes may provide broadcasters sufficient flexibility to schedule their Core Programming so as to avoid the need for preemptions. It asks commenters who believe that these rule changes would not fully address concerns with the preemption policies whether there are other ways to provide broadcasters greater flexibility in rescheduling preempted Core Programming?

Preemption Flexibility. Under the current rules, when a station preempts a Core Program for any reason other than breaking news, it must—in order to get "credit" for airing the episode—reschedule the preempted episode to a consistent day and time (known as a "second home") and notify the public of the schedule change. The Notice seeks comment on NAB's proposal to eliminate the "second home" policy and, instead, to permit stations to reschedule preempted Core Programming whenever they choose, so long as they give the public adequate notice of the rescheduled time.

Special Non-Broadcast Efforts and Special Sponsorship Efforts. Historically, the FCC's rules have given stations the option (which stations have rarely—if ever—used) to demonstrate compliance with the children's programming rules by relying in part on special non-broadcast efforts and special sponsorship efforts. Under the current rules, to receive "credit" for special non-broadcast efforts, a licensee must show that it has engaged in substantial community activity that has a close relationship with its Core Programming, i.e., that such non-broadcast efforts "enhance the value" of children's E/I programming. To receive "credit" for special sponsorship efforts, a licensee must demonstrate that its production or support of Core Programming that aired on another station in its market increased the amount of Core Programming that aired on such other station.

There is ambiguity associated with these special non-broadcast and sponsorship efforts options, as well as regulatory risk of relying upon them to demonstrate compliance with the children's programming rules at license renewal time. Thus, the number of stations that have relied on these options during the past two decades is probably close to (and may well be) zero. Indeed, we don't know of any stations that have done so. The Notice seeks comment on how the FCC could create a framework under which special non-broadcast and sponsorship efforts would be more viable options for broadcasters to use to fulfill their children's E/I programming obligations.

Note: the Notice only addresses children's educational/informational programming, and it specifically declines to consider making any changes to the children's commercial time limits rules applicable to programming that targets children under the age of 13.

Comments on the Notice will be due 60 days after it is published in the Federal Register, and reply comments will be due 30 days after that.

ATSC 3.0 Simulcasting Rules Now In Effect – But FCC Not Accepting Next Gen TV Applications Just Yet

The FCC released a Public Notice ("Notice") last week announcing that its ATSC 3.0 rules governing simulcasting and consumer education requirements have now taken effect, but the Commission is still working on the application form that stations wishing to begin using Next Gen TV must complete. In other words, the ATSC 3.0 rules are now effective, but stations cannot yet log onto the FCC's Licensing and Management System ("LMS") and apply to start broadcasting in 3.0.

As we've reported previously, many aspects of the rules that the FCC's adopted in its November 2017 Order governing the use of ATSC 3.0 on a voluntary, market-driven basis took effect in early March. But that effective date had relatively little practical, operational implication for stations because certain of the new rules were subject to review and approval by OMB (the Office of Management and Budget) and, therefore, did not take effect until OMB approved them. Those included the rule that requires stations using ATSC 3.0 to partner with another local station to simulcast their programming using ATSC 1.0; the rule governing the content of local simulcasting agreements; and the rule that requires, for five years, that the programming aired on an ATSC 1.0 simulcast channel be "substantially similar" to the programming aired on the ATSC 3.0 channel—i.e., the programming must be the same, except for programming features that are based on the enhanced capabilities of ATSC 3.0, advertisements, and promotions for upcoming programs.

The FCC announced in the Notice that OMB had indeed approved those rules, and, accordingly, that the rules took effect when the Commission's announcement of OMB's approval was published in the Federal Register last week.

However, the Media Bureau is not yet accepting applications for Next Gen TV licenses. That's because the Bureau is in the process of making changes to LMS to accommodate Next Gen TV license applications. Completion of such changes is expected in the beginning of 2019. The Bureau will issue a public notice announcing when it will start accepting such applications. The Notices states that the Bureau will continue to consider requests to commence ATSC 3.0 market trials and product development under its experimental licensing rules (like the trial currently underway in the Phoenix DMA).

The bottom line: we are getting closer to Next Gen TV becoming reality, but we aren't there yet. We'll keep you posted on further developments.

Comment Dates Set on FCC's Proposal to Create a New Class of FM Stations and Amend "Short-Spacing" Rules

Comment dates are now set on the Notice of Inquiry ("Notice") in which the FCC (1) explores the possibility of creating a new intermediate class of FM radio stations—to be designated as Class C4—and (2) queries whether it should amend its "short-spacing" rules (through which stations can seek to locate transmitters at distances shorter than the FCC's standard separation requirements).

Comments may be filed on or before August 13, 2018, and reply comments may be filed on or before September 10, 2018.

Class C4 Proposal. As we previously reported, the proposed Class C4 stations would be grouped in Zone II, in between Class A and Class C3. Creation of the Class C4, according to proponents of the new station class, would enable hundreds of Class A stations that meet certain spacing requirements to upgrade their service by raising their maximum power levels from 6 kilowatts to 12 kilowatts. The FCC estimates that 127 Class C3 stations would be impacted and potentially subject to reclassification as Class C4 stations.

Section 73.215 Facility Proposal. The Notice also seeks input on whether it should revise Section 73.215 of the Commission's rules. That section provides a procedure by which an applicant can propose a "short-spaced" transmitter site; that is, a transmitter site at a location that does not meet the FCC's requirements as to distances separating stations. Currently, when an applicant seeks to avail itself of Section 73.215, the Commission analyzes the application by seeking to provide interference protection to a station's maximum class facilities (power and height)—instead of its actual facilities. Some argue that the FCC's rules, in this way, overprotect stations that operate with facilities below their class maximums.

The Notice seeks comment on a proposal to revise Section 73.215 to create a procedure whereby an FM station seeking short-spacing protects against interference to the other station's actual facilities, instead of its maximum facilities, in cases where the other station has operated continuously with an ERP or height below its class maximum for at least ten years. A rule change along these lines could remove some protections for such stations operating below their maximum facilities.

The Commission seeks comment on how the two proposals discussed above would affect stations seeking to upgrade (and their listeners), as well as FM translators and low-power FM stations.

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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