



Virginia Association of Broadcasters Legal Review



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

250 West Main Street, Suite 100
Charlottesville, VA 22902 • (434)
977-3716

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Legal Memorandum

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FCC’s Enforcement Bureau Provides Helpful Guidance on “Due Diligence” Requests

It’s not unusual for broadcasters (and their attorneys), often as part of the “due diligence” process when they are working on potential transactions and other big deals, to request information from the FCC’s Enforcement Bureau (the “Bureau”) concerning pending enforcement-related investigations and complaints. That kind of information is important, as it could affect planned deals, including assignments, transfers of control, renewals, mergers, public stock offerings, and the like.

But it’s been about 15 years since the Enforcement Bureau provided guidance regarding the submission of such due diligence requests, and during that time, the Bureau has processed thousands of them. In a [Public Notice](#) (the “Notice”) released recently, the Bureau announced that it had reviewed its procedures regarding the due diligence process and wished to provide additional clarification and guidance about that process. This procedural information will be useful to broadcasters who are buying or selling stations now and in the future.

According to the Notice, the Bureau’s aim in the due diligence process is to provide parties with the information they need in a timely, consistent, efficient manner, while protecting its investigatory processes and the non-public information of the parties involved with the Bureau’s investigations.

Here's what the Bureau had to say:

- Due diligence requests can only be made about matters that are pending before the Enforcement Bureau; the Bureau cannot provide information concerning matters pending before other FCC bureaus and offices. Thus, for example, if a station has an open proceeding/investigation with the Media Bureau, the Enforcement Bureau will not and cannot provide information about the Media Bureau's ongoing proceeding.
- The Enforcement Bureau will only provide information to the licensee itself or to its attorneys, but not to third parties, such as lenders or prospective station buyers. This is a significant point, and buyers will want to ensure that they arrange with sellers for the sellers to obtain the relevant information and provide it to the buyers.
- The Bureau will not routinely provide information regarding past enforcement action (such as Notices of Apparent Liability, Forfeiture Orders, or Citations) in connection with a due diligence request. It's difficult to understand the rationale for this approach, but presumably it is because such actions are already publicly available.
- The Enforcement Bureau's response will not include the nature of any pending case or the current status of its review of the case. If the subject of a pending case or ongoing investigation seeks additional information regarding its case, the licensee or its attorney should directly contact the Enforcement Bureau staff that is handling the matter in question. These inquiries should be made independent of the due diligence process. Thus, again, buyers may wish to arrange with sellers to obtain the relevant information and provide it to the buyers.

The Notice also provides a reminder regarding how to request a due diligence review (i.e., not by phone or fax), and the nature of the information that must be contained in such a request. And, the Enforcement Bureau strives for a timely response; the Notice explains that the Bureau tries to send the results of a due diligence review by e-mail—within 7 business days of the request. Notwithstanding the Notice's helpful guidance, we recommend that any broadcaster wishing to make a due diligence request should consider contacting its communications counsel before doing so.

FCC Releases Results of October 2018 Nationwide EAS Test

The Commission recently released a [Report](#) ("Report") detailing the results of the nationwide test of the Emergency Alert System ("EAS") that it conducted with FEMA on October 3, 2018. Stations will recall that they were required to file EAS Forms One, Two, and Three (the "Forms") via the FCC's EAS Test Reporting System ("ETRS") at various points after the test. The Report, compiled using data from those three Forms, concludes that the nationwide EAS test again revealed that the Integrated Public Alert and Warning System ("IPAWS") delivers high-quality, effective, and accessible EAS alerts. Results from the 2018 test were comparable to those seen in the 2017 nationwide EAS test, with continued improvement in several areas:

- A majority (58.7%) of EAS participants received the test alert first (i.e., ahead of the broadcast daisy-chain) via IPAWS, as compared to 41.9% in 2017;
- The rate of EAS participants both successfully receiving and retransmitting the test alert was roughly the same in 2018 versus 2017 (95.7% receipt, as compared to 95.8% in 2017; 92.1% retransmission, as compared to 91.9% in 2017);
- The 2018 test saw an increase in EAS participants that received and retransmitted the test alert in both English and Spanish (rates were up from 2017 by 388% for receiving the alert and by 350% for retransmitting the alert); and
- The 2018 test saw a decline in the number of audio issues that participants reported as their explanation for complications in receipt and retransmission (there were 68 explanations in 2018, which was significantly lower than the 1056 such explanations provided in 2017).

In the Report, the FCC also noted that some EAS participants failed to file one or more of the required Forms One, Two, and Three, with radio and television broadcasters having two of the lowest Form completion rates as compared with other EAS participants. In addition, low-power broadcasters had lower filing rates and lower alert receipt and retransmission alert success rates than did broadcasters overall.

The overwhelming majority of participants (97.4%) reported no complications with the test; among the issues described by participants who did report complications were audio quality issues, equipment configuration issues, failure to update equipment software, equipment failures, alerting source issues, and clock errors.

As a result of these findings, the Commission has directed its Public Safety and Homeland Security Bureau (“PSHSB”) to, among other things, follow-up with EAS participants to improve the accuracy of reporting in ETRS and to address commonly reported complications. Specifically, the Commission has instructed PSHSB to reach out to low-power broadcasters, through directed mailing and a webinar, to improve their participation in the nationwide EAS test.

Pay Up! FCC Takes Extreme Action Against Broadcasters for Failure to Pay Regulatory Fees

Two FCC orders issued in just the past week involving broadcasters who failed to pay required regulatory fees serve as a reminder (as if licensees needed one!) that when it comes to collecting money owed, the Commission does, in fact, mean business—at least eventually. The first order takes the extreme step of revoking a broadcaster’s radio license for its failure to pay required regulatory fees (the “[Revocation Order](#)”); the second order initiates a separate revocation proceeding as a result of a different broadcaster’s failure to pay required regulatory fees and associated penalties and interest (the “[Order to Pay or to Show Cause](#)”).

In the Revocation Order, the FCC reminds broadcasters that a failure to pay *any* “regulatory fee, related interest or penalties, or any portion thereof is grounds for revocation.” That said, the Commission is rarely quick to issue that “death penalty.” The broadcaster at issue in the Revocation Order, for instance, had failed to pay its required regulatory fees for five years; on top

of that, the licensee had failed to respond to multiple FCC communications. Meanwhile, the FCC recommended that the broadcaster that was the subject of the FCC’s Order to Pay or to Show Cause might be able to avoid license revocation by filing documentary evidence within sixty days that full payment had been made—despite its failure to pay delinquent fees and interest accrued from six fiscal years. We don’t yet know the final result of that proceeding.

Note, also, that whether or not the Commission ultimately initiates license revocation proceedings due to a missed fee payment, it is statutorily obligated to assess a penalty equal to 25 percent of the amount of the late fee.

The bottom line: the Commission is fairly patient when it comes to dropping the hammer on delinquent reg fee payors. But, ultimately, that patience runs out—and the consequences can be severe; *very severe*. As always, the best practice is to do what the Commission requires, when required to do so.

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

Tim Nelson, Editor

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

Mark J. Prak
Marcus W. Trathen
David Kushner
Coe W. Ramsey
Charles F. Marshall
Stephen Hartzell
Julia C. Ambrose
Elizabeth E. Spainhour
J. Benjamin Davis
Timothy G. Nelson
Amanda M. Whorton
Patrick Cross

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