Virginia Association of Broadcasters
Legal Review

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August 8, 2019

Legal Memorandum

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New FM Translator Interference Rules Take Effect on August 13

The Commission's recently overhauled FM translator interference rules have been given final regulatory approval and will officially take effect next week—on August 13, according to an FCC Public Notice (the "Notice").

We've previously written in great detail about the new changes to the interference rules; accordingly, we'll refrain from providing a comprehensive guide on the rules here. At a high level, however, here are some of the most important things of which broadcasters should be aware as the rules take effect:

- The minimum number of listener complaints required to trigger interference remediation processes will be changing, from just one complaint to a general range of between 6 and 25 complaints (depending on the size of the population served by the station that is experiencing the interference).

- Only "unique" complaints (i.e., those regarding a unique receiver at a unique location) will count toward the total number required to trigger interference remediation processes.
- Listeners and stations will have to provide certain specified information in order to render their complaint legally valid.

- Complaints will be geographically circumscribed—generally, to within a full-power station's 45 dBu contour.

- Stations will be provided new avenues by which to resolve alleged interference, and listeners will no longer be required to cooperate with FM translator operators.

- FCC staff must, generally, resolve interference complaints within 90 days.

Note, also, that some are opposed to the new rules. Five petitions for reconsideration have been filed with the FCC, and they take issue with several of the newly adopted rules and the rationales underlying their adoption. One of the petitions requests that the Commission stay (i.e., put on hold) implementation of the new rules. As of this writing, however, it seems unlikely that the FCC will grant the stay. Of course, we'll keep you posted on any developments on that front.

"Modern Television Act" Introduced; Broadcasters Opposing Legislation

Just before adjourning for Congress's August recess, House Minority Whip Steve Scalise (R-LA) and Rep. Anna Eshoo (D-CA) introduced their long-awaited video marketplace legislation, titled the "Modern Television Act of 2019" (the "Bill"). The Bill seeks to blow up the existing retransmission consent framework by, among other things, repealing retrans consent laws and regulations, including the attendant compulsory copyright licenses.

The Bill is very MVPD-friendly, and NAB was quick to voice its opposition, stating that the legislation "would undermine America's world leadership in free and local broadcasting." Initial support for the Bill appears limited; there were no additional cosponsors upon its introduction. Similar legislation introduced in prior sessions did not garner much traction.

Still, broadcasters are keeping close tabs on the Bill, and it is likely to get more attention than its past iterations because of its timing: it is no accident that Reps. Scalise and Eshoo dropped the Bill just as lobbying efforts regarding STELAR (which will expire at the end of the year if it is not reauthorized) are intensifying. We believe the co-sponsors are hoping the Bill might become part of any legislation that renews STELAR, should Congress choose—over broadcasters' strong objections—to reauthorize that law.

As of this writing, the full text of the Bill has not been published on Congress's official website. However, according to information released by the Bill's sponsors and NAB, the Modern Television Act would:

- Phase out and eliminate (effective 42 months after enactment of the Bill) the retransmission consent regime and supporting rules that underpin the current broadcast carriage ecosystem for cable and satellite providers, including phasing out and eliminating the corresponding compulsory copyright licenses for those retransmissions. According to Reps. Eshoo and Scalise, this would purportedly facilitate free-market contract negotiations under traditional copyright law.

- Impose a new, interim (for the next 42 months) carriage requirement during retransmission consent impasses, meaning that in the event a broadcaster and MVPD reached an impasse in retrans negotiations and the then-current carriage agreement was no longer extended, continued carriage of the signals and content at issue would be required for up to 60 days while the parties keep negotiating. Assuming an agreement is ultimately reached, the broadcaster would be retroactively paid for this period of government-mandated carriage (i.e., required carriage in the absence of a retransmission consent agreement). This provision would take effect 90 days after enactment of the Bill into law. We believe this provision would give additional leverage to MVPDs and would, obviously, dis-incentivize them to get a deal done without an impasse.

- Extend the FCC's "good faith" negotiating rules (that otherwise expire on December 31, along with STELAR), with the legal assurance that collective MVPD buying groups (made up of small- and medium-sized cable operator buying groups) do not violate good faith. According to the Bill's co-sponsors, "[t]his will allow smaller competitors to band together in negotiations for programming and lower costs for consumers." This provision would take effect 90 days after enactment of the Bill into law.

- Establish a mechanism by which the FCC may (but is not required to) impose forced arbitration on a broadcaster and MVPD either during a carriage impasse lasting more than 60 days or in instances where the Commission has made a finding of bad faith negotiations. This provision would take effect 42 months after enactment of the Bill into law.

- Require the Government Accountability Office to report specific metrics about the impact of the Bill on consumers and the marketplace every two years. Based on the totality of these metrics, the FCC would be required to make a determination as to whether the Bill (once enacted) has had a net positive, net negative, or indeterminate impact on consumers and the marketplace. The Bill would require the FCC to recommend specific policies for Congress to improve the marketplace if the agency finds a net negative impact.

- Leave in place the ability of local broadcasters to elect "must-carry" from cable and satellite providers in their local markets (i.e., no change in existing law on this narrow point).

- Preempt federal, state, and local authority to regulate rates of cable services. This provision would take effect 42 months after enactment of the Bill into law.

We will be closely monitoring the Modern Television Act and will keep you updated on developments related to it.

Children's TV Rules Sent to OMB for Approval; Effective Date Still Uncertain

We're keeping a close eye on the revised Children's Television Programming Rules (the "Rules") as they make their way through the regulatory approval and implementation process. Although we don't yet know when the Rules will become effective, several of the Rules are now one step closer to taking effect.

Many of the Rules must be reviewed and approved by the Office of Management and Budget ("OMB"), including (1) the new annual (rather than quarterly) reporting and record retention requirements; (2) the new requirement that broadcasters provide on-air notification of rescheduling information regarding preempted programs; and (3) the removal of the requirements that (a) broadcasters publicize the existence and location of their Children's TV reports and submit to program guides the intended age group for children's programming, and (b) non-commercial broadcasters label qualifying programs with the E/I symbol. These Rules have now been sent to OMB.

Note that there is an opportunity for public comment on the OMB approval process. In this case, the comment period runs until October 6, 2019. Given that timeline, broadcasters should expect that the Rules will not take effect before their Third Quarter Children's Programming Reports are due (October 10, 2019), and television stations should prepare to timely submit that filing in the normal course of operations. We'll keep monitoring the status of the OMB approval process and will let you know as soon as the Rules have been formally approved.

Commission Proposes $233,000 Fine for Broadcaster's Violations of Sponsorship ID Rules and Terms of Prior Consent Decree

A proposed fine of $233,000 is serving as a reminder to broadcasters of the potentially costly consequences that can result from violating the Commission's sponsorship identification requirements. The Commission proposed the fine in a Notice of Apparent Liability (the "Notice") released this week, alleging that the radio licensee named in the Notice violated the sponsorship ID rules, as well as the terms of a prior consent decree.

The licensee named in the Notice entered into a 2016 consent decree with the FCC, in which it admitted that 178 of its broadcasts had violated the sponsorship identification laws and agreed to pay a $540,000 fine and implement a compliance plan to help avoid future violations. As part of the consent decree, the licensee was required (for a three-year period, from January 2016 to January 2019) to report to the FCC any subsequent noncompliance with the sponsorship identification rules within 15 calendar days of discovering such noncompliance.

According to the Notice, during that three-year period, the licensee discovered 26 violations of the sponsorship ID rules across seven of its stations. In addition, the Notice alleges that the licensee failed to timely report many of the violations; 13 of the violations were not reported until nearly eight months after they had occurred.

As broadcasters are aware, the sponsorship ID laws require stations to clearly identify on-air the sponsor of broadcast or programming material whenever any valuable consideration is paid or promised in exchange for such material. The policy underlying the requirements is that listeners and viewers are entitled to know who seeks to persuade them.

When a broadcaster fails to satisfy those requirements, the FCC sets a base forfeiture of $4,000 for each such violation. However, it's important to note that the final forfeiture amount can easily climb much higher. In this case, for example, the FCC's Enforcement Bureau in its discretion adjusted the fines for the sponsorship ID violations upward—doubling them to $8,000 per instance due to the licensee's "prior history of violating the sponsorship identification rules and other FCC rules." The Commission also proposed a $25,000 fine stemming from the licensee's alleged violation of the terms of the 2016 consent decree. The licensee has thirty days from release of the Notice to either pay the proposed fine, or to seek to have the fine canceled or reduced.

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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