



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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Revised Children’s TV Rules to Take Effect on Staggered Timeline; Quarterly Filing Requirement Remains in Place for Now

The FCC recently announced that several of its revised Children’s Television Programming Rules (the “Rules”) will take effect soon—on September 16, 2019. We discuss which Rules will be taking effect on that date below.

Note that not all of the revised Kid TV Rules are taking effect at that time. That’s because, as we recently reported, some of the Rules require approval from the Office of Management and Budget (“OMB”) before they can take effect. We expect at least several months to pass before OMB takes any action regarding those Rules.

With the Rules taking effect on a staggered basis, broadcasters will want to pay careful attention to the date on which each particular Rule takes effect. Of course, we'll keep you posted with reminders as to the Rules' various effective dates.

We will be providing a thorough guide to the new Children's Television Rules soon. In the meantime, here's a non-comprehensive list of several of the most significant Rules and the date on which each is set to take effect.

Rules Set to Take Effect on September 16, 2019:

- New definition of "Core Programming," which definition includes modified hour requirements, expanded qualifying broadcast times (i.e., broadcasters can "count" children's programming that begins as early as 6 a.m.), and permissive use of short-form and non-regularly scheduled programming.
- Permissive (rather than mandatory) broadcasting on multicast streams; i.e., elimination of the requirement that broadcasters air three hours of children's programming on each multicast channel.
- Greater preemption flexibility, including exemptions for certain live programming produced locally by the station.

Rules Still Awaiting OMB Approval (No Effective Date Set as of August 23rd):

- Requirement to file Children's Television Reports annually (rather than quarterly).
- Elimination of the requirement to provide age-group information to program guide publishers.
- Requirement to provide new, particularized on-air preemption notifications.
- Elimination of the requirement for *noncommercial* stations to air an "E/I" indicator during Core Programming.

FCC Guidance Expected Soon. The staggered implementation of the various Rules may cause some confusion, as certain Rules that appear to impact one another are set to take effect on different dates. For example, broadcasters will have greater preemption flexibility thanks to the new Rules as of September 16, 2019, but the related obligation for broadcasters to provide new, particularized on-air preemption notifications will still be undergoing OMB review and, therefore, will not yet have taken effect.

We expect the FCC to help clarify this and other related issues soon. FCC staff has informally advised guidance will be released within the next several weeks addressing the new Rules, including, we expect, how broadcasters should deal with these staggered implementation dates.

We will let you know as soon as we hear anything on that front. For now, critically, broadcasters should prepare to file their Third Quarter Children’s Television Programming Reports as usual, no later than October 10, 2019.

October 15: Initial Filing Deadline for Repack-Related Reimbursement of LPTV Stations, TV Translators, FM and LPFM Stations, and FM Translators

The FCC recently announced the initial filing deadline for reimbursement submissions by LPTV stations, TV translators, FM stations, low-power FM stations, and FM translators (collectively referred to herein as “Affected Stations”) that have been affected by the post-incentive auction repack. As set out more fully below, a recent FCC [Public Notice](#) explains that Affected Stations must file such reimbursement submissions by **11:59 PM on October 15, 2019**, and they must do so using the newly revised FCC Form 2100, Schedule 399, in order to ensure timely reimbursement. (Stations will also provide their banking information to the Commission using FCC Form 1876, if they haven’t already done so.)

In addition, the Commission [announced](#) that it will host a webinar on the repacking reimbursement process for Affected Stations from 11 a.m. to noon ET on August 28, 2019. According to the FCC, the webinar will be accessible [here](#).

As broadcasters may recall, earlier this year the Commission adopted a repack reimbursement process for Affected Stations; a 2018 law required the Commission to adopt such a process. Implementation of the Commission’s adopted process has been slowed, however, because the Office of Management and Budget (“OMB”) had to approve the Commission’s revisions to the repack reimbursement form (which revisions were needed to account for the addition of the Affected Stations) before the process could take effect. OMB has now formally approved the reimbursement form, and the form is currently accessible via the Commission’s Licensing and Management System (“LMS”).

When completing the form, Affected Stations will need to provide (1) a certification demonstrating that they meet certain eligibility criteria; (2) information regarding their existing broadcasting equipment and estimated and/or actual costs eligible for reimbursement; and (3) any relevant and/or required documentation. Additionally, broadcasters seeking reimbursement related to their Affected Stations will be required to provide and verify financial information via the FCC’s CORES database in order to ensure timely reimbursement.

Because the required information and certifications vary depending on the type of broadcast service at issue and each station’s particular circumstances, this memorandum does not provide a comprehensive overview of all reimbursement requirements.

Accordingly, prior to the initial reimbursement filing deadline on October 15, broadcasters will want to carefully review the FCC’s detailed instructions regarding the reimbursement requirements provided in two recently issued Public Notices, which are available [here](#) and [here](#);

broadcasters may wish to consult with communications counsel as well to ensure that the Commission’s reimbursement procedures are accurately and timely followed.

EAS “Form Three” Due On or Before September 23, 2019

Broadcasters have one more month, until **September 23, 2019**, to file the third and final report—called Form Three—associated with the August 7 [nationwide test of the Emergency Alert System](#) (“EAS”).

Stations will recall that three forms must be completed and filed in connection with the nationwide EAS Test—Form One, Form Two, and Form Three, respectively. Form One, designed to prepare for the test, was due in early July; Form Two, the “day of” report designed to provide the FCC and FEMA with a quick “snapshot” of the nationwide test, was due on August 7.

Form Three is the report on which stations will provide detailed post-test data and describe any issues with receipt or retransmission of the nationwide test. We heard of several issues associated with the test back on August 7, and it’s quite possible some broadcasters may have a good bit of information to share on Form Three regarding their difficulties with the nationwide test. On that note, accurately and comprehensively completing Form Three is essential so that the FCC and FEMA can identify and correct problems with the EAS.

Form Three (like Forms One and Two) must be filed using the FCC’s ETRS ([EAS Test Reporting System](#)). Again, it must be filed no later than September 23.

More EAS News: LPFM Station Receives Notice of Violation for Apparent EAS Deficiencies

While we’re on the subject of the EAS, we want to bring your attention to a recent [Notice of Violation](#) (the “Notice”) issued by the FCC that provides stations with a timely reminder that the FCC is serious about and actively enforces its EAS rules. According to the Notice, during a recent inspection of an LPFM station in central California an agent of the FCC’s Enforcement Bureau uncovered what appeared to be two violations of the Commission’s EAS rules. The station allegedly did not have available either (1) an EAS station log or (2) an EAS operating handbook.

As broadcasters will recall, all stations are required both (1) to maintain a station log documenting, among other things, each EAS test and activation that is received or initiated by the station and any failures to receive a test or activation; and (2) to retain a copy of the FCC’s EAS Operating Handbook at normal duty positions or EAS equipment locations such that it is “immediately available” to relevant staff. For the station at issue in the Notice, the FCC has provided twenty days from the issuance of the Notice to fully explain: each alleged violation; any actions taken by the station to correct each violation and preclude recurrence; and a timeline for completing any pending corrective actions.

Stations looking for a refresher on their EAS obligations can find most of the relevant requirements in [Part 11 of the FCC’s Rules](#). The wide-ranging EAS rules include station documentation requirements (such as those that were the subject of the Notice), required capabilities of station equipment, and required formatting of EAS alerts themselves, among other things. Broadcasters may wish to take the time to review the relevant requirements in order to ensure adequate preparation in case of emergencies—and to avoid receiving the kind of action with which the station cited in the Notice is now dealing.

Forfeiture Order Calls Out Licensee’s “Shenanigans” and Offers Reminders Regarding Importance of Following Commission Instructions

Citing multiple flawed filings and failures to follow Commission instructions, the Enforcement Bureau recently issued a [Forfeiture Order](#) (the “Order”) affirming a \$25,000 penalty against a Pennsylvania church (the “Licensee”) for lighting, painting, and notice deficiencies related to its radio antenna structures. In so doing, the Commission emphasized that the Licensee failed to adequately respond to or address the identified deficiencies with its antenna structures, despite multiple filings by the Licensee in response to Bureau’s underlying, 2016 Notice of Apparent Liability (the “2016 Notice”).

The relevant deficiencies date back to 2016, when the Enforcement Bureau discovered that the Licensee had failed to light and repaint its antenna structures as often as necessary to maintain good visibility, and that the Licensee had failed to notify the FAA of a lighting outage. Despite multiple warnings from the FCC and the Licensee’s promise to fix the maintenance issues, the Licensee failed to bring the antenna structures into compliance and the Bureau ultimately issued the 2016 Notice in response to the continued deficiencies.

Although the Licensee responded multiple times and in multiple ways to the Notice, things only got worse—those responses were described by the FCC in the Order as “procedurally deficient shenanigans” which missed the deadline to respond, directed multiple correspondence to the wrong federal offices, and ultimately, failed to adequately respond at all to the Notice. Accordingly, the Enforcement Bureau affirmed the Notice’s proposed penalty of \$25,000.

Broadcasters should take away at least two lessons from the foregoing information. First, antenna marking and maintenance requirements implicate both important public safety concerns and continuing obligations for broadcasters; accordingly, it may be worthwhile to create and adhere to a schedule for verifying compliance. Second, carefully following Commission instructions and requirements is of a paramount importance, and failing to do risks losing any opportunity you may have to affect the outcome of a Commission decision.

FCC Seeks Comments on Whether to Examine Current Closed Captioning Rules; Immediate Focus on Viability of “Automatic Speech Recognition”

The FCC recently issued a [Public Notice](#) (the “Notice”) seeking comment on a [petition](#) filed by a coalition of consumer and academic organizations that asks the Commission to examine

its current Closed Captioning Rules (the “Petition”). The Petition requests a thorough review of the Commission’s current Closed Captioning Rules in general, but it specifically targets so-called “automatic speech recognition” (“ASR”) for immediate review and potential disqualification as a viable captioning option.

Comments on the Petition are due by September 13, 2019, and reply comments will be due on or before September 30, 2019.

Background. The last significant Commission rulemaking regarding closed captioning came in 2014, when the FCC issued its “[Closed Captioning Quality Order](#)” (the “Order”) and acknowledged that there existed “widespread frustration among the viewing public with inconsistencies in caption quality.” In that Order, the Commission adopted its current closed captioning quality standards, which require that captions “convey the aural content of video programming . . . to the same extent that the audio track conveys such content to individuals who are able to hear” and are “accurate, synchronous, complete, and appropriately placed.” The Commission subsequently issued an order in 2016 that primarily allocated responsibility for captioning compliance among the various entities in the programming production chain, but since that date the Commission has not taken any further regulatory action regarding the quality standards it adopted five years ago.

The Petition aims to again spur the Commission to action, arguing that the current quality standards and attendant rules do not lead to consistent and effective captioning results. Accordingly, at a high level, the Petition asks the Commission to (1) initiate a notice of inquiry to help build a “robust record” regarding the current state of closed captioning for live video programming (and just how available captioning is for such programming); (2) use the resulting record to craft rules designed to guarantee programming is accessible for Americans who are deaf or hard of hearing; and (3) issue a declaratory ruling and/or expedited rule change to address whether broadcasters can comply with the closed captioning rules through the use of automatic speech recognition (as the rules exist today, ASR is neither expressly permitted nor prohibited as a viable closed captioning option).

Automatic Speech Recognition. Although broadcasters will likely want to weigh in on each of the issues teed up in the Petition, the mere possibility that the FCC could issue a declaratory ruling disqualifying ASR as a viable closed captioning compliance mechanism will likely be the most immediate focus for commenters. On that issue, the Petition argues that many of the current captioning requirements impliedly contemplate human captioners and therefore may not accommodate ASR use (since it is entirely automated) in their current form. For instance, one of the “captioning best practices” set forth in the rules requires any real-time captioner to perform “frequent and regular self-evaluations,” something the Petition suggests ASR technology may be unable to do.

The Petition further notes that, regardless, many current ASR techniques suffer from quality issues that may render those techniques unsuitable for compliant captioning. Accordingly, the Petition asks the Commission to either clarify whether the current rules accommodate ASR or—on an expedited basis—adopt rule changes that simultaneously can accommodate ASR and ensure a baseline captioning quality level for such technology.

It's not clear what additional steps (if any) the Commission plans to take regarding the Petition. However, the fact that the Commission is seeking comment regarding the Petition at all likely means that those who choose to weigh in will have their voices heard.

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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