Virginia Association of Broadcasters Legal Review

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Legal Memorandum

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REMINDER NUMBER ONE: FY 2019 Regulatory Fees Due Next Week! Fees Must be Paid on or Before September 24, 2019

The deadline by which broadcasters must pay their fiscal year ("FY") 2019 regulatory fees is **11:59 p.m. Eastern Time on Tuesday, September 24, 2019**. Broadcasters must use the Commission's automated filing and payment system, called Fee Filer, which is currently operable and able to receive regulatory fee payments.

As we previously reported, the FCC's FY 2019 regulatory fees Report and Order ("Order") (1) sets regulatory fees for radio stations that, although higher than FY 2018 fees, are lower than the FCC initially proposed for radio stations back in May; and (2) uses a new methodology for calculating full-service television stations' regulatory fees for FY 2019. All told, the FCC will collect $339,000,000 from regulatees, which represents slightly more than a 5 percent **increase** in regulatory fees over last year. The allocation to the Media Bureau (including radio, television, cable, and DBS) is about $121.8 million, which is a slightly less than 36% of the total amount.

Change in Methodology for Television Broadcast Stations. You'll recall that the FCC adopted a new methodology last year for how regulatory fees would be assessed for full-power broadcast television stations in 2019 and beyond. No longer will the FCC calculate television stations' regulatory fees based on the market they serve (as defined by DMA); instead, the FCC's new methodology bases calculations on the actual population served by the station's noise limited service contour ("NLSC"), instead of DMAs.

In order to facilitate the transition to the new fee structure, the FY 2019 regulatory fees take into account both DMA size and the actual population covered by the station, based on the station's NLSC. As such, the FCC's FY 2019 fees for full-power television stations are calculated on an average of (1) the fee that would be assessed using the DMA methodology; and (2) the fee that would be assessed using the actual-population methodology (which is calculated using the population covered by the station's projected NLSC, multiplied by a factor of $.007224).

TV stations can find their FY 2019 regulatory fee in the Order's Appendix J.

Here are a few other quick reminders regarding payment of FY 2019 reg fees:

- Payments by check will not be accepted; all payments must be made by wire transfer or online via ACH (Automated Clearing House) payment, or credit card. Other forms of payment will be rejected.

- The FCC will impose a late payment penalty of 25% of any unpaid amount of regulatory fees owed—to be assessed on the first day following the deadline for paying the FY 2019 fees.

- The maximum amount that can be charged on a credit card for transactions with federal agencies—including the FCC—is $24,999.99. Attempted transactions for amounts greater than $24,999.99 will be rejected. This limit applies to single payments, divided payments, and to combined payments of more than one bill. <u>Thus, broadcasters who need to pay an amount greater than $24,999.99 will need to use debit cards (Visa or MasterCard) or make payment by ACH or wire transfer</u>.

- The FCC exempts regulated entities from paying regulatory fees when their total fee obligation is considered "*de minimis*." The *de minimis* threshold is currently $1,000.

Additional resources regarding payment methods and procedures are available at http://www.fcc.gov/regfees, where the FCC has compiled several Fact Sheets and Websites that contain helpful fee and payment information.

A Timely Cautionary Tale: FCC Revokes Broadcaster's License for Failure to Pay Regulatory Fees

Remember how we just mentioned that timely payment of regulatory fees is critical? The Media Bureau proved just how seriously it takes reg fee payments in a Revocation Order released last week (the "Order"), in which the Bureau revoked an Alabama broadcaster's license for its "failure to pay the Station's regulatory fees for a number of fiscal years" and also reminded all broadcasters that "failure to pay any regulatory fee, related interest or penalties, or any portion thereof is grounds for revocation."

The broadcaster at issue in the Order accrued delinquent regulatory fees spanning across nine years, from FY 2008 to FY 2016. And, for each year's delinquent amounts, the FCC—as it is required by law to do—assessed a penalty equal to "25 percent of the amount of the fee that was not paid in a timely manner."

After several attempts by the Commission to collect those outstanding amounts, the Media Bureau and the Office of Managing Director jointly issued an Order to Pay or to Show Cause requiring the broadcaster to either pay its delinquent fees or explain why the fees were inapplicable or should be waived or deferred. The broadcaster claimed that it was unable to pay the fees because the Internal Revenue Service, since 1987, had allegedly withheld a sizeable refund owed to the broadcaster's president and his wife. The Bureau rejected the broadcaster's explanation, finding that the broadcaster's tax-refund claims were unsubstantiated, and that the broadcaster had failed to provide any documentary evidence that it was financially unable to pay the outstanding regulatory fee debt. Accordingly, the Order not only revoked the broadcaster's license, but further noted that the revocation did not relieve the broadcaster "of its obligation to pay any debt, including any regulatory fee, or any other financial obligation that is owed or may in the future be owed to the Commission."

Suffice it to say that, although we didn't need a reminder regarding the importance of paying regulatory fees on time, we now have it!

REMINDER NUMBER TWO: One Week Until EAS "Form Three" Due; Stations Must File Form Three On or Before September 23, 2019

Broadcasters have one more week, until **September 23, 2019**, to file the third and final report—called Form Three—associated with last month's nationwide test of the Emergency Alert System ("EAS").

Form Three is the report on which stations 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.

Commission to Consider Further Notice of Proposed Rulemaking Targeted at Modernizing Local Public Notice Procedures for Applications

The FCC's next target in its ongoing Modernization of Media Regulation Initiative appears to be Section 73.3580 of the Commission's rules—the agency's current local public notice procedures. We expect the FCC to adopt a Further Notice of Proposed Rulemaking at its open meeting on September 26th that would propose and seek comment on multiple changes to the current local public notice procedures, which are triggered upon the filing of certain broadcast applications. The FCC released a Draft of the proposed Further Notice (the "Draft Notice") earlier this month.

The Draft Notice follows on a Notice of Proposed Rulemaking ("NPRM") the Commission adopted in 2017 that, among other things, sought general comment on whether to update Section 73.3580. The Draft Notice aims to modernize, standardize, and simplify the local notice procedures.

As broadcasters are no doubt aware, the FCC's current local public notice rules—originally adopted more than 50 years ago—often fail to harmonize with many of the Commission's other, more up-to-date rules. For example, several aspects of the local public notice rules still direct the public to local broadcasters' studios to review copies of FCC applications despite the reality that broadcasters are no longer required to maintain a main studio, must file their applications electronically, and maintain their public inspection files online. To address such disconnects created by the current, outdated requirements of the local public notice rules, the Draft Notice, among other things, proposes to:

- replace the requirement that notice of the filing of certain applications be published in a newspaper with a requirement that written public notice be posted online, in most cases continuously for a minimum of 30 days on a publicly accessible website with a link to the application;

- simplify and standardize the public notice requirements for on-air announcements, including by eliminating pre-filing announcements for license renewal applications, making uniform the schedule, content, and timing of on-air announcements, and by replacing the requirement to provide detailed application descriptions with directions on how to review applications in FCC databases; and

- clarify certain local public notice obligations, such as those pertaining to international broadcast stations and low-power FM stations.

In light of the foregoing proposals, the Draft Notice seeks comment on, among other things:

- whether some or all applicants should have different types of public notice obligations;
- whether the proposals would be more effective at informing the public of applications and less costly to applicants than the current local notice procedures;
- whether the proposed online publication requirement may feasibly be implemented on applicant-affiliated websites, or whether any third-party websites would be as or more effective (and, if so, what types of third-party websites would provide adequate and accessible notice for applicants);
- the appropriate duration that notice should be posted online and whether the length of online posting should be different for applicants without an affiliated website on which to post;
- whether non-commercial educational stations should be exempted from the proposed online posting requirement and instead continue to be required solely to provide on-air announcements;
- whether license renewal application pre-filing announcements remain necessary.

Importantly, at this stage the Draft Notice is just that—a draft. This means that changes to the form and substance of the proposals may still occur prior to the Commission's September 26th open meeting. We will monitor the Draft Notice and provide an update after the Commission's meeting on the 26th.

FCC Proposes $272,000 Fine Against CBS for Distribution and Broadcast of Program Containing Unauthorized EAS Tone Transmissions

In a Notice of Apparent Liability ("Notice") released last week, the FCC proposed a fine of $272,000 against CBS Corporation and several of its subsidiaries for "apparently willfully and repeatedly" violating the FCC's Emergency Alert System ("EAS") rules by transmitting or causing the transmission of EAS codes and tones, or recordings or simulations of the tones, in the absence of an actual emergency, an authorized EAS test, or a qualified PSA.

The Notice serves as a helpful reminder to all broadcasters that there are only a handful of permitted uses of EAS tones—and that all other uses are flatly prohibited.

The Notice concerned unauthorized uses of EAS tones during a well-known broadcast television program called "Young Sheldon," which used a modified version of the tones to dramatically convey "a life-threatening emergency and how surviving a tornado changed family relationships." Specifically, the program at issue modified the standard EAS tones by (i) altering the audio level of the sound so that the tones were heard behind the program dialogue and (ii) shortening the length of the EAS "Attention Signal" to 3.4 seconds (from the standard eight-second duration).

Although CBS argued that those modifications changed the tones to a degree sufficient to save its "dramatic" use of the tones from running afoul of the FCC's EAS rules, the Commission disagreed.

In rejecting CBS's arguments, the FCC explained that any unauthorized use of the EAS tones "undermines the EAS and presents a substantial threat to public safety." For instance, unauthorized uses of the tones can create so-called "alert fatigue," i.e., when the public becomes desensitized to the alerts and more likely to treat a real alert as just another test or other non-emergency use. The FCC also noted that unauthorized uses of the tones can result in false activations of the EAS that can spread false information or lock out other, legitimate activations of the EAS. Accordingly, the Commission determined that, notwithstanding CBS's "dramatic" modifications of the tones, the rules' strict prohibition on using the EAS tones or a "simulation thereof" in any unauthorized manner rendered CBS liable in this instance.

So, how did the FCC get to its $272,000 figure? In assessing a penalty for the EAS violations, the Commission initially applied the base forfeiture amount of $8,000 per EAS violation, which, when applied across the licensee's multiple program broadcasts and distributions, totaled a base forfeiture amount of $136,000. However, the Commission ultimately *doubled* the proposed forfeiture amount based largely on the fact that the program reached a "considerable" audience, therefore increasing "the extent and gravity of the violations."

CBS has 30 days from the Notice's release date to either pay the fine or file a statement seeking a reduction or cancellation of the proposed forfeiture amount. We'll keep you posted.

FCC Issues Penalties, Enters Into Consent Decrees After Finding Purported Violations of Children's TV Rules

As we've previously reported, several (but not all) of the FCC's revised Children's Television Programming Rules take effect today, September 16th, 2019. One thing that will not be changing, to be sure, is the Commission's focus on ensuring broadcasters' compliance with their Kid Vid obligations. Two recent Orders in which the Commission levied penalties of more than $30,000 and $109,000, respectively, for purported violations of the rules are evidence of that.

In the first Order, the Commission reviewed a single broadcast station's Kid Vid compliance dating back to 2009 and uncovered indications that the licensee had at times failed to air the requisite amount of "Core Programming" (i.e., programming that serves the educational and informational needs of children and which satisfies the requirements under the Children's Television Act and corresponding Commission rules). The Commission's review also determined that the licensee's quarterly Kid TV reports contained inaccurate information (preventing the FCC from verifying the station's compliance), as it found that the licensee had at times preempted Core Programming for programming that was aired solely for the purpose of fundraising. Although the licensee admitted that it had made clerical errors in some reports and had preempted some of its Core Programming, the licensee contended that it had otherwise met the informational and educational needs of children through other, "supplemental" Core Programming. The Commission rejected that argument; the parties ultimately entered into a $30,700 consent decree.

In the second Order, the Commission's review focused on two broadcast stations' Kid Vid compliance over a longer time period—from 2003 to the present for one station and from 1998 to the present for the other. The Commission determined that, between the two stations, there were: "numerous" failures to satisfy the Core Programming requirements; a "significant number" of quarterly reports which omitted or provided incorrect information; failures to report Core Programming deficiencies in the stations' license renewal applications; one station's failure to timely file multiple reports; and one station's failure to provide program guide publishers with required information.

The licensee argued that many of the identified Core Programming deficiencies stemmed from preemptions caused by network sporting events, but the Commission determined that much of the preempted programming was not adequately rescheduled. Additionally, the Commission rejected the licensee's argument that it relied on networks and syndicated programmers to provide the required information to publishers of program guides; the Commission reminded broadcasters on whom the regulatory onus falls, stating that "[t]he obligation to comply with th[e] rule is on the licensee, not a station's network or syndicator from which a station obtains its programming."

At bottom, the Orders are a helpful reminder, as certain revised Children's Television Programming rules take effect, that the Commission takes compliance seriously—and that non-compliance can be a costly proposition.

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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