



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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FCC Staff Keeping Eye on Broadcasters’ Online Public Inspection Files; Poised to Ratchet Up Enforcement Actions

We’ve recently gotten word that Commission Staff are in the process of carefully reviewing broadcasters’ online public inspection files (“OPIF”) and are on the lookout for: stations that still lack an online public file, dormant online public files, and required items that are missing or have not been timely filed. And, we’re hearing that the Staff’s thus-far relatively lenient approach to penalizing stations for OPIF deficiencies may be changing; Commission enforcement actions, including substantial proposed fines, may soon be ratcheting up.

Remember that because all materials uploaded to the OPIF bear a time- and date-stamp, FCC Staff can easily determine whether required material was uploaded on time. Each document

that is not timely uploaded could, potentially, create a separate basis for the FCC to propose a fine. For instance, in most cases a broadcaster should have 32 quarterly issues/programs lists uploaded across an eight-year license term; theoretically, if all 32 of those issues/programs lists were uploaded late, Staff could find 32 separate OPIF violations. Keep in mind, also, that with respect to political file information, required documentation should generally be uploaded to the OPIF within 24 hours of receipt.

The bottom line? Broadcasters must continue to ensure that they are consistently and timely uploading all required information to the OPIF; Commission Staff are watching.

U.S. Department of Justice Weighs in on RMLC/GMR Litigation

The U.S. Department of Justice weighed in last month in the ongoing antitrust litigation between the Radio Music License Committee (“RMLC”) and Global Music Rights (“GMR”), filing a brief that—unfortunately for broadcasters—essentially seems to side with GMR. We have written frequently about the RMLC/GMR litigation; among other things, GMR alleges that RMLC is an illegal price-fixing “buyers’ cartel; RMLC argues in a motion pending before the court that GMR’s complaint fails to state a price-fixing claim and therefore should be dismissed.

The DOJ’s filing, called a “Statement of Interest” (the “Statement”), weighs in on RMLC’s motion, disagreeing with RMLC’s interpretation of antitrust law and urging the court to reject RMLC’s argument. (In case you’re wondering why or how the DOJ is getting involved, the DOJ cites to a law that permits it to weigh in on any pending case implicating the “interests of the United States.”) RMLC fired back, calling the DOJ’s Statement “puzzling” and arguing that the DOJ fundamentally misunderstands RMLC’s arguments.

So what does all this mean for broadcasters? DOJ’s Statement is arguably an unfortunate setback for RMLC and the radio industry, but, ultimately, the judge in the RMLC/GMR antitrust case will decide whether RMLC’s claim against GMR should be dismissed. There’s no timetable for when the court will decide RMLC’s motion (and, therefore, when the court will address the DOJ’s Statement). Regardless, there’s likely a long way to go until we see final resolution of the case. We will continue to monitor this litigation and let you know of important developments.

Retrans-Related: FCC Considers Updates to Required Notice of “Service Changes” to Account for Last-Minute Carriage Negotiation Deals

The Commission’s latest item in its ongoing Modernization of Media Regulation Initiative looks at updating cable operators’ notice requirements in light of the current state of many retransmission consent negotiations. In a [Notice of Proposed Rulemaking](#) (the “Notice”) adopted last month, the FCC is considering whether (and if so, how) to update its rules regarding the timing of the required notices that cable operators must provide to subscribers (and local franchise authorities) regarding service or rate changes.

Under the Commission’s current rules, cable operators must provide notice of the removal of a channel 30 days prior to the applicable carriage contract’s expiration. As the Notice

recognizes, this 30-day notice requirement is unworkable in situations where negotiations for renewal of a retransmission consent agreement last until just days, or even hours, before the agreement's expiration. In such last-minute circumstances, a balance must be struck between timely providing consumers with relevant information regarding channel/service changes and ensuring that such information is, in fact, accurate—and not, for example, information that turns out to be incorrect about a potential programming disruption. Accordingly, the Notice proposes amending the current rule to clarify—in the case of down-to-the-wire retransmission consent negotiations—that notice to consumers of any programming changes must be given “as soon as possible.” Outside of last-minute circumstances, the 30-day notice requirement would continue to apply, such as when a cable operator has decided in advance to delete or reposition a channel.

The Notice explains that adopting this “as soon as possible” notification requirement could help “make consumer notices more meaningful and accurate, reduce consumer confusion, and ensure that subscribers receive the information they need to make informed choices about their service options.” The Notice tees up several questions on many important facets of the proposed rule change—which bear on how the retransmission consent ecosystem operates—including the following:

- How should “as soon as possible” be defined?
- What event or circumstance would determine when carriage negotiations have “failed,” thus triggering the notification requirement?
- What event, other than a service blackout, could be used to trigger the notice requirement?
- What type of written notice would be reasonable (e.g., would channel slates or newspaper notices be acceptable)?
- How often do carriage negotiations fail without being publicized?
- How do cable operators *currently* comply with the FCC's notice rules when it is unclear whether a particular channel will remain available?

Comments on the Notice are due **February 6, 2020**; reply comments are due **February 21, 2020**.

FCC Extends Reply Comment Deadline on Petition for Reconsideration of Recent Political File Clarification Orders to January 28, 2020

Broadcasters wishing to weigh in on the pending Petition for Reconsideration (the “Recon Petition”) of the Commission's two recent “political clarification” Orders (the “Orders”) have a little more time to do so. The Media Bureau [recently extended the reply comment deadline](#) to January 28, 2020. (Comments were due December 30, 2019.)

You'll recall that over the past several months we have written in detail about the substance of the Commission's Orders, as well as the Recon Petition. Please let us know if you'd like us to resend our memos on these issues—we'd be happy to do so.

Comment Dates Set on Notice that Could Pave the Way for AM Stations to Voluntarily Convert to Digital-Only Operations

Comment and reply comment dates are now set on the Commission's [Notice of Proposed Rulemaking](#) (the "Notice") that asks whether AM broadcasters should be given the opportunity to voluntarily transition to all-digital broadcasting. Comments on the Notice are due **March 9, 2020**; reply comments will be due **April 6, 2020**. The Notice, approved at the Commission's November Open Meeting, marks the latest action taken in furtherance of the FCC's ongoing AM Revitalization proceeding.

You may recall that the Notice tentatively concludes that permitting AM broadcasters to *voluntarily* transition to all-digital broadcasting would benefit AM stations and the listening public. According to the Notice, all-digital broadcasting has the potential to: reach more listeners with better audio quality, and to therefore: increase format choices (for example, music programming would become more viable for AM stations); improve power usage and spectrum efficiency; and provide more reliable signals. However, the Notice also identifies potential drawbacks to permitting voluntary all-digital broadcasting, such as the fact that such operations might cause undue interference to the remaining analog AM stations, or result in a loss of service for analog AM listeners.

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