Virginia Association of Broadcasters Legal Review

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March 26, 2020

Legal Memorandum

In this issue, please find information about

Headlines:

FCC Provides Guidance on the Effect of Providing Free Advertising Time on LUC/LUR During COVID-19 Pandemic

In a Public Notice (the "Notice") released late Thursday, March 25, the FCC announced a temporary policy relating to lowest unit charge ("LUC" or "LUR") obligations of stations that are airing (or will air) political candidate advertising during an LUC window during the COVID-19 pandemic. In short, **in certain specifically defined circumstances explained below**, a station may offer commercial advertisers free ad time without affecting the LUC applicable to political candidates. Read on for **important qualifications on the FCC's guidance**.

As broadcasters know, during the 45-day period before a primary or primary run-off election and during the 60-day period before a general or special election, the rate a station may charge a legally qualified candidate for a broadcast "use" may not exceed the station's LUC for the same class and amount of time for the same time period. Generally, when a station calculates the LUC for a particular class and amount of time, it must take into account any "bonus spots" or other "value added" benefits given to an advertiser; that is, even spots given for "free" to an advertiser as part of a package must be assigned a monetary value and factored into the station's LUC calculation.

As the COVID-19 pandemic spreads, commercial advertisers have begun reducing or cancelling their advertising orders. In response, some broadcast stations are interested in offering free advertising for certain clients, both in order to fill excess inventory and build goodwill. In the Notice, the FCC acknowledges this interest—and the extraordinary circumstances giving rise to the offering of free spots—and attempts to provide some relief for, and guidance to, stations with the LUC conundrum. As such, the FCC explains that:

> Given the current circumstances, the public interest dictates that broadcasters and other regulatees that are subject to [the LUC rules] may exclude the free time that they provide to commercial advertisers when calculating their lowest unit charges, **provided the free time is not associated with an existing commercial contract for paid time or otherwise considered bonus spots**.

We've bolded and underlined the language above to emphasize that there are many situations where the traditional LUC calculation would still require a station to account for free time provided to commercial advertisers. Specifically, bonus spots still must be given a monetary value and factored into the LUC calculation. And, "free" time that is "associated" with an existing advertising contract still must be given a value and factored into the LUC calculation.

To be sure, it is difficult to know at the outset precisely what the FCC means by "not associated with an existing commercial contract," and it is likewise difficult to provide guidance for all possible permutations of station–client advertising relationships. Thus, we recommend that stations approach this issue with a mindset of "reasonableness" and avoid trying to be "too clever" with this temporary relief and guidance. Of course, the Notice may have more or less relevance to your particular station depending on the degree to which your station is experiencing cancellations and reductions in advertising, the classes of time it sells, and the way in which it sells time.

A few final words of caution: the Notice does not provide a specific time period during which qualifying "free time" may be excluded from the LUC calculation; the Notice simply says that it "anticipate[s] that this guidance is applicable only to the current period and not necessarily applicable when more ordinary conditions are restored."

If you have any questions about the Notice, please consider contacting your legal counsel or the Association Hotline.

Media Bureau Announces New Waiver Process for LMA and SSA Stations to Produce Additional News

The Media Bureau released a second Public Notice late Thursday in which it announced a temporary waiver process for television stations subject to Local Marketing Agreements ("LMAs"), Shared Services Agreements ("SSAs"), or similar arrangements in order to provide additional news coverage during the public health emergency related to COVID-19. Specifically, the Notice recognizes that LMA and SSA stations broadcasting expanded news coverage of COVID-19 and information of community concern could potentially violate the FCC's local television ownership rule by exceeding limits on the amount of news one in-market station can provide to another in-market station.

The local television ownership rule currently in effect following the recent Third Circuit multiple ownership decision permits a single entity to directly or indirectly own, operate, or control two television stations licensed in the same DMA (a) if the digital noise limited service contours of the stations do not overlap, *or* (b) at least one of the stations is not ranked among the top four stations in the DMA, *and* at least eight independently owned and operating, full-power commercial and non-commercial television stations would remain post-combination in the DMA in question. Stations in markets where television duopolies are not permitted, either due to the top-four prohibition or the eight independent TV voices requirement, may utilize LMA and SSA arrangements in which one in-market station (the brokering station) provides news and other back-office and technical services to another in-market station (the brokered station). In these LMA and SSA arrangements, the brokering station may not provide more than 15 percent (approximately 25 hours) of the brokered station's programming on a weekly basis. If the stations exceed the 15-percent limit, the brokered station becomes "attributable" to the brokering station for purposes of the local television ownership rule. Such common attribution results in a violation of the local television ownership rule unless the stations do not have overlapping contours, or unless only one of the stations is among the top four in the DMA and there are eight independent TV voices in the market post-combination.

The Commission in the Notice announces that, during the COVID-19 national emergency situation, stations may request temporary waivers of the local television ownership rule in order to permit brokering stations to provide more news coverage to brokered stations than is currently permitted by the local television ownership rule. <u>Simply stated, following grant of such a waiver request, LMA and SSA stations may exceed the 15-percent weekly programming (25 hours per week) limit without running afoul of the FCC's ownership rules.</u>

This relief from the 15-percent rule is not automatic. The Notice makes clear that stations seeking such relief must request it—and receive a grant of the request from the Media Bureau. Such requests may be submitted by email to either David Brown, Deputy Chief, Video Division at david.brown@fcc.gov or Barbara Kreisman, Chief, Video Division at barbara.kreisman@fcc.gov. Email requests should describe how additional coverage would assist in providing community-specific information regarding COVID-19 and how such needs would be better met by allowing for the production of additional news and/or informational programming by the brokering station.

Significantly, temporary waivers to permit expanded news production for a brokered station pursuant to an LMA or SSA, if granted, will be limited to the time period during which COVID-19 remains a national emergency only. The Notice reminds stations that they may be subject to enforcement action for continued expanded program production (more than 15 percent per week) to a brokered station after the COVID-19 national emergency is over.

Stations with questions should contact legal counsel or the Association Hotline.

Tim Nelson, Editor

This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.