



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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FCC Announces Narrow Waiver of “Widespread Recruitment” EEO Requirement When Rehiring Staff Laid Off Due to COVID-19

In an [Order](#) released earlier this week, the Media Bureau announced a limited waiver of the “widespread requirement”/“broad outreach” requirements of the Commission’s Equal Employment Opportunity (EEO) rules in light of the COVID-19 pandemic. Specifically, the Order allows broadcast licensees (and MVPDs) to re-hire certain full-time employees without first conducting widespread requirement or engaging in broad outreach efforts. (As broadcasters know, the Commission’s EEO rules ordinarily require broadcast stations employing five or more full-time employees to engage in broad recruitment outreach for all full-time job vacancies.)

Note, however, that the limited waiver applies only to the rehiring of those employees who (1) were released due to circumstances related to the ongoing COVID-19 pandemic, (2) in situations where the broadcast licensee re-hires the employee within nine months after the date he or she was laid off.

The Media Bureau in the Order explained its rationale for the limited waiver:

“Due to challenging economic conditions directly resulting from the COVID-19 pandemic, including significant layoffs and workforce reductions in the media industry, the Bureau has determined that good cause exists to relieve broadcast licensees and MVPDs from EEO recruitment requirements in [these] limited circumstances Given the unique importance of broadcasters and MVPDs in providing access to breaking news and critical information relating to the pandemic, the public interest, convenience, and necessity would be best served by encouraging these entities to maintain, or quickly resume, normal operations. Facilitating the expeditious re-hiring of full-time employees laid off as a result of the pandemic to job vacancies created by the pandemic supports this important goal.”

Broadcasters who have specific questions regarding the Order’s impact on their hiring (or, in this case, rehiring) practices should contact legal counsel for further information.

FCC Issues \$48 Million Civil Penalty Against Sinclair, Settles Investigations

The FCC announced yesterday the entry of a Consent Decree with Sinclair Broadcasting Group requiring payment of a \$48 million civil penalty and adherence to a compliance plan to resolve three open investigations. The fine is the largest ever issued by the Commission.

The text of the Consent Decree is not available as of this writing, but, based on the [News Release](#) announcing the settlement, the Consent Decree closes the Commission’s investigation of the company’s disclosures of information to the Commission during the proposed acquisition of Tribune Media stations in 2017. In July 2018, the Commission unanimously [decided](#) not to approve the Sinclair/Tribune transaction and designated the matter for hearing by an administrative law judge, finding “substantial and material questions of fact” existed regarding whether Sinclair “engaged in misrepresentation and/or lack of candor in its applications.” The Sinclair/Tribune transaction was thereafter terminated, and Nexstar ultimately acquired Tribune, subject to certain divestitures.

According to the News Release, the Consent Decree also closes two other pending investigations—one into whether the company had complied with the good faith negotiation rules applicable to retransmission consent and the other involving sponsorship identification obligations. Sinclair will retain its FCC licenses.

This action is timely as it comes at the beginning of a new television license renewal cycle. Resolution of the pending investigations opens the door for the company’s license renewals and also its participation in mergers and acquisitions opportunities.

As of this writing, details of the compliance plan are not yet available.

Broadcaster to Pay \$100,000 to Commission for Violating Retrans Consent “Good Faith” Provisions

A broadcaster has admitted that it did not negotiate retransmission consent in “good faith,” agreed to pay a \$100,000 civil penalty, and agreed to implement a three-year compliance plan to ensure similar violations do not happen again, according to an [Order and Consent Decree](#) (“Consent Decree”) released by the Commission last week. The Consent Decree partially settles an FCC investigation that we first wrote about back in November. As you may recall, at that time the Media Bureau issued a [Memorandum Opinion and Order](#) (the “November Order”) that found that several broadcast licensees failed to negotiate with DirecTV and AT&T (together, “AT&T”) in “good faith” for consent to carry the signals of some 20 television stations, in violation of the Commission’s rules. We believe the November Order marked the first time that the Commission found a broadcaster (or, in this case, a group of broadcasters) had failed to negotiate retrans consent in good faith; the Consent Decree, we believe, marks the first time a broadcaster will pay a penalty for violations of the good faith rules.

Background. Under the Communications Act of 1934, as amended, broadcasters and multichannel video programming distributors (“MVPDs”) are required to negotiate retransmission consent in good faith. The Commission’s “good faith” rules implementing that statutory mandate are effectively split into two sets of standards—a set of objective, *per se* standards, the violation of any of which automatically constitutes a violation of the “good faith” requirement; and a second set of subjective standards, which permit the Commission to consider many different facts (the so-called “totality of the circumstances” test) to determine whether there has been a violation of the overarching “good faith” requirement. Any MVPD or broadcaster who believes that the other party to a retransmission consent negotiation has violated either (or both) of the foregoing standards may file a complaint with the Commission.

As you may recall, that’s what AT&T did in this instance, filing a complaint with the Commission back in June 2019 that alleged that 18 licensees in nine station groups, among other things, violated several *per se* requirements for a negotiating entity, including by (1) refusing to negotiate regarding retransmission consent; (2) failing to agree to meet at reasonable times and locations and acting in a manner that unduly or unreasonably delayed the course of negotiations; and (3) refusing to respond to retransmission consent proposals and explain the entity’s reasons for rejecting any such proposals. The Bureau in the November Order found that the broadcasters did, in fact, violate all three of those *per se* good faith negotiating standards. According to the November Order, the broadcasters were negotiating jointly, and all of them were represented in negotiations by the same individual.

The Consent Decree. The Consent Decree resolves the matter with respect to one of the broadcasters at issue in the November Order, Howard Stirk Holdings, LLC (“HSH”). (It appears some of the other broadcasters that were the subject of the November Order sought review of the Commission’s Order, and the matter remains pending with respect to them.) The Consent Decree does not go into great detail regarding HSH’s conduct, but, in the Consent Decree, HSH admits that its actions violated the good faith negotiation requirements of the FCC’s rules.

As part of the Consent Decree, HSH must develop, implement and then maintain a specific three-year compliance plan that is “designed to ensure future compliance with the Retransmission

Consent Rules,” as well as with the terms and conditions set forth in the Decree itself. And, as mentioned, HSH agreed to pay a \$100,000 penalty, which is to be paid in four \$25,000 installments over the next six months.

Although the facts as we understand them from the November Order appeared to be unique, the Consent Decree nevertheless serves as an important reminder of the “good faith” obligations that broadcasters (and, of course, MVPDs, too) must meet when negotiating retransmission consent agreements—and of the potential consequences for failing to do so.

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