December 7, 2020

Legal Memorandum

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# January 1, 2021: FCC’s Video/Audio Description Requirements Expand to DMAs 61–70

It’s official: the FCC’s recently adopted expansion of its video/audio description requirements will begin taking effect at the start of the new year, with the requirements initially extending to DMAs 61 through 70 on January 1, 2021. The expansion will then continue at a rate of 10 additional DMAs per year—on January 1st of 2022, 2023, and 2024—until DMAs 61 through 100 are all covered. (For those of you scratching your head at the term “audio description,” recall that the FCC recently formally replaced the term “video description” with “audio description” in all of its rules. We therefore only use the term “audio description” throughout the remainder of this memorandum.)

*Background*. “Audio description” is the term given for the audio-narrated descriptions of important visual elements in a television program inserted into natural pauses between a program’s dialogue. The audio description rules apply to all television stations, including low power television stations, subject to any exceptions and exemptions that are otherwise applicable. Among the key provisions of the rules, the Commission currently requires certain television broadcast stations—those affiliated with the top-four commercial television broadcast networks and located in the top 60 television markets—to provide 50 hours of audio-described programming per calendar quarter during prime time or on children’s programming, as well as an additional 37.5 hours of audio-described programming per calendar quarter at any time between 6 a.m. and midnight.

As we have recently written, in late October the Commission released a [Report and Order](https://docs.fcc.gov/public/attachments/FCC-20-155A1.pdf) (the “Order”) that, among other things, extends the foregoing requirements to DMAs 61 through 100 at a rate of 10 DMAs per year. The Commission recently announced the effective date for the rule expansion, locking in the January 1, 2021, date on which the requirements will begin to apply to DMAs 61 through 70.

*DMAs Affected on January 1, 2021.* Under the terms of the Order, on January 1, 2021, the audio description requirements will be extended for the first time to the following DMAs:

* Knoxville (DMA 61)
* Dayton (DMA 63)
* Lexington (DMA 64)
* Tucson (Sierra Vista) (DMA 65)
* Honolulu (DMA 66)
* Green Bay-Appleton (DMA 67)
* Des Moines-Ames (DMA 68)
* Roanoke-Lynchburg (DMA 69)
* Spokane (DMA 70)
* Ft. Myers-Naples (DMA 53)

Those of you reading closely may be wondering: (1) why isn’t DMA 62 (Little Rock-Pine Bluff) listed, and (2) why is DMA 53 (Ft. Myers-Naples) listed? Well, the Order also updated the relevant Nielsen data triggering applicability of the audio description rule requirements—the prior version of the rules were based on 2015 Nielsen data, whereas the new version of the rules are based on 2020 Nielsen data. In 2015, Little Rock-Pine Bluff was ranked DMA 56, and therefore has already been (and, under the expansion, will continue to be) subject to the audio description requirements. And Ft. Myers-Naples was ranked DMA 62 in 2015, meaning that it has been exempt under the “old” requirements despite increasing in DMA rank over the years since 2015.

Generally speaking, it is our understanding that the Big 4 networks as well as syndicated children’s programming providers already build audio description into their programming so that stations can simply pass it through without having to interrupt the workflow at the local level to add audio description to qualifying programs.

Accordingly, commercial stations operating in the Roanoke-Lynchburg market and affiliated with one of the top-four commercial television broadcast networks may wish to reach out to their communications counsel soon to ensure compliance by January 1, 2021.

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# [January 4, 2021: Effective Date for Majority of New All-Digital AM Broadcasting Rules](#_FCC_Proposes_Additional)

The FCC has announced that the vast majority of its recently adopted rules permitting broadcasters to ***voluntarily*** transition to all-digital AM operations will take effect on January 4, 2021. Although **several other related rules must undergo additional regulatory approval before AM broadcasters will be able to officially begin transitioning to all-digital operations**,broadcasters may wish to begin considering the costs and benefits of voluntarily transitioning so that they can be “ahead of the curve” when the new rules take effect. The new rules were adopted in a late-October [Report and Order](https://docs.fcc.gov/public/attachments/FCC-20-154A1.pdf) (the “Order”), with the stated intent of “improving and modernizing the AM radio service and thereby help[ing to] ensure the future of this important service.”

As we’ve previously written, the new rules will permit AM broadcasters to voluntarily transition to all-digital broadcasting—that is, each AM broadcaster will be able to determine for itself whether or not to transition to all-digital broadcasting. Some of the potential benefits to transitioning are: reaching more listeners with better audio quality, and therefore having the opportunity to increase format choices (for example, music programming may become more viable for AM stations); improving power usage and spectrum efficiency; providing more reliable signals; and possibly enabling future multicasting of separate AM audio sub-channels. On the other hand, some consumers may be unable to receive new “all-digital” AM signals (because consumers have not yet universally acquired the devices necessary to receive these signals); accordingly, each AM broadcaster must consider how much “consumer disruption” may occur as a result of the transition and whether that disruption is likely to result in an acceptable loss of revenue for the station.

The rules set to take effect on January 4, 2021, will establish operational and technical requirements governing all-digital operations, such as power and emissions limits. Any broadcasters seeking to transition to all digital AM operations must review those rules carefully to ensure technical compliance. Additionally, the new rules require any all-digital AM stations to participate in the Emergency Alert System (“EAS”)—just as all other broadcast stations are required to do—and to provide compliant notice both to the FCC and the station’s listeners when the station intends to transition to all-digital operation. These new notice provisions must undergo additional regulatory approval—through the Office of Management and Budget (“OMB”)—prior to taking effect. This additional step means that although broadcasters can currently begin preparing to transition to all-digital AM operation they will likely be unable to actually do so until OMB approves the new notice provisions to take effect several months from now.

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# [January 19, 2021:](#_Slow_Transition_to) Supreme Court to Hear Argument over FCC’s Latest Attempt to Relax Media Ownership Rules

On Tuesday, January 19, 2021, the United States Supreme Court will hear oral argument on the dual bids by the NAB and FCC to allow the FCC’s relaxed media ownership rules to take effect. There will be one hour of oral argument allotted for the consolidated cases (*FCC v. Prometheus Radio Project* and *NAB v. Prometheus Radio Project*), in which the Supreme Court will consider whether it was appropriate for the Third Circuit Court of Appeals to block the FCC’s latest attempt to relax its local media ownership rules.

Over the past several weeks, multiple parties have filed briefs in the consolidated cases, including the opening briefs of [NAB](http://www.supremecourt.gov/DocketPDF/19/19-1231/160867/20201116162325678_NAB%20v.%20Prometheus%20--%20Opening%20Brief.pdf) and the [FCC](http://www.supremecourt.gov/DocketPDF/19/19-1231/160888/20201116173943173_19-1231tsUnitedStates.pdf), and amicus curiae (or “friend of the court”) briefs by parties supporting the NAB and FCC’s positions, including the [Four Network Affiliates Associations](http://www.supremecourt.gov/DocketPDF/19/19-1231/161570/20201123150647329_19-1231.19-1241%20Amici%20Curiae%20Brief.pdf). The arguments made in the opening briefs provide a likely roadmap for the oral arguments we can expect the FCC and NAB to make before the Supreme Court Justices on January 19th.

The NAB and FCC’s opening briefs share several common threads, including arguments that the underlying Third Circuit decision impermissibly discounts the FCC’s agency-level expertise in dealing with broadcast regulations and that the Third Circuit has repeatedly prevented necessary updates to the FCC’s ownership rules by retaining jurisdiction over the FCC’s Quadrennial Review proceedings for more than 15 years. However, likely for strategic reasons, the two briefs also differ in several important areas; the differing approaches may inform the analytical approach the Court might employ when deciding the case.

In particular, the FCC’s opening brief relies heavily on the administrative law principle that courts should defer to federal agencies’ decision-making whenever it is reasonable to do so (given that agencies generally have a significant amount of experience dealing with the particular industries or areas being regulated). However, several current Justices on the United States Supreme Court have questioned the extent to which that administrative law principle of “deference” should continue to apply going forward. And, although the extremely long history of decisions underlying Prometheus’s argument make the dispute anything but a “typical” administrative law case, the Court’s concept of “agency deference” could come into play in the decisional process.

NAB’s brief largely focuses on the fact that the FCC’s decision-making process was both mandated and circumscribed by Congress. Accordingly, the brief contends that the Third Circuit’s opinion—which overturned the FCC’s most recent Quadrennial Review rulemaking decisions based on factors nowhere mentioned in the governing congressional statute—was legally infirm no matter how much deference the FCC decision is owed as a matter of administrative law. The NAB also takes a firmer position regarding the Third Circuit’s 15+ years of retained jurisdiction over the FCC’s Quadrennial Review proceedings, arguing that “the Third Circuit has repeatedly overstepped its authority by retaining jurisdiction” over the proceedings.

Rounding out the recent filings, several amicus briefs—including one filed by the Four Network Affiliates Associations—highlighted for the Court the real-world implications for local broadcasters, and the viewing public they serve, of being required to operate under decades-old, anachronistic ownership rules that no longer reflect today’s vibrant, highly competitive media marketplace.

Response briefs are due in several weeks, with final briefs due in early January 2021.

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# FCC Proposes $20,000 Fine for Television Broadcaster’s Failure to Comply with Children’s Commercial Time Limits

According to a recent [Notice of Apparent Liability for Forfeiture](https://docs.fcc.gov/public/attachments/DA-20-1390A1.pdf) (the “NAL”), $20,000 is the price a Maryland TV licensee may have to pay for airing commercials for “Hot Wheels Super Ultimate Garage” play sets during eight broadcasts of the “Team Hot Wheels” television program. The NAL represents the first notable FCC enforcement action relating to commercial time limits in children’s television programming in several years and is an important reminder of regulatory requirements during the license renewal cycle.

*Background*. The Children’s Television Act of 1990 both mandates that television broadcasters air educational and informational (“E/I”) programming for children and limits the amount of commercial matter that is permitted in programming primarily directed to children ages 12 and under (“12 & Under Programming”). The commercial limits on children’s programing apply to all programming that is primarily directed toward children 12 years of age or younger (i.e., regardless whether that programming qualifies as “core programming” under the children’s television programming rules).

Television stations must limit the amount of “commercial matter” in 12 & Under Programming to no more than 10½ minutes per hour on weekends (i.e., Saturday and Sunday) and 12 minutes per hour on weekdays. “Commercial matter” is defined as “air time sold for purposes of selling a product or service and promotions of television programs or video programming services other than children’s or other age-appropriate programming appearing on the same channel or promotions for children’s educational and informational programming on any channel.” Generally speaking, “commercial matter” therefore includes (1) products and services for sale, and/or (2) impermissible program promos.

As an outgrowth of the foregoing principles, the FCC’s policies also prohibit “program length commercials” and “host selling.” The Commission defines a “program length children’s commercial” as a program associated with a product (or service) during which commercials for that product (or service) are aired. A program that falls within this definition is treated as a commercial in its entirety. In turn, the Commission’s “host selling” policy prohibits the broadcast of commercials containing “program hosts” within or adjacent to those shows. “Program hosts” include any person or character appearing in a children’s program.

While simple on their face, the commercial time limits rules can become complicated in application, making it critically important that stations understand the various ways in which problems can arise.

*The NAL*. Problems apparently arose for the Maryland TV licensee targeted by the NAL when the network from which the licensee obtained the relevant programming “inadvertently” placed a commercial for a “Hot Wheels Super Ultimate Garage” play set during the “Team Hot Wheels” program. The NAL therefore determines that the content and placement of the commercial and accompanying program together constituted the broadcast of “program length children’s commercials” on each of the 8 times the “Team Hot Wheels” program was aired. According to the NAL: “in the context of the cognitive abilities of young children, airing a commercial for a ‘Hot Wheels Super Ultimate Garage’ play set during the ‘Team Hot Wheels’ program presents the clear risk for confusion between ‘program content’ and ‘commercial matter’ that this regulation was designed to avoid.”

Because a licensee may not simply rely on a program’s source or producer for compliance with the children’s television rules and policies, the NAL proposes a $20,000 fine for the broadcasts notwithstanding the fact that the relevant material was placed by the network from which the licensee obtained the programming. Additionally, broadcasters should note that the $20,000 proposed fine represents a significant increase to the base fine ($8,000) amount, in part because “of the Commission’s strong policy of treating program-length commercials as extremely serious violations” warranting more stringent fines than “conventional overages.”

The NAL therefore serves as an important reminder that each station is responsible for its compliance with the commercial limits in children’s programming, no matter from where the station receives its programming. Stations therefore would be wise to independently review their programming with regularity to ensure compliance—the Commission takes commercial time limits violations very seriously, especially those resulting from the broadcast of program-length commercials.

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*Tim Nelson, Editor*

[BROOKS, PIERCE, McLENDON,](http://www.brookspierce.com/)

[HUMPHREY & LEONARD, L.L.P.](http://www.brookspierce.com/)

[Mark J. Prak](mailto:mprak@brookspierce.com)   
[Marcus W. Trathen](mailto:mtrathen@brookspierce.com)  
[David Kushner](mailto:dkushner@brookspierce.com)  
[Coe W. Ramsey](mailto:cramsey@brookspierce.com)  
[Stephen Hartzell](mailto:shartzell@brookspierce.com)

[Julia C. Ambrose](mailto:jambrose@brookspierce.com)

[Elizabeth E. Spainhour](mailto:espainhour@brookspierce.com)

[J. Benjamin Davis](mailto:bdavis@brookspierce.com)

[Timothy G. Nelson](mailto:tnelson@brookspierce.com)

[Patrick Cross](mailto:pcross@brookspierce.com)

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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.

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