VIRGINIA ASSOCIATION OF BROADCASTERS

LEGAL REVIEW

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Legal Memorandum

"Eye on FCC Enforcement" Edition

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FCC Largely Adopts Prior Proposed Fine of $512,228 Per Station for Violations of Good Faith Retransmission Consent Negotiating Standards

In a recent significant Forfeiture Order (the "Order"), issued by the three current FCC Commissioners and Acting FCC Chairwoman Rosenworcel, the FCC formally imposed a per-

station fine of $512,228 against all but one of 18 television broadcast stations for violating the FCC's good faith retransmission consent negotiation standards. The Order follows up on a late-2020 Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture (the "NAL"), which affirmed the underlying "good faith" violations. When combined, the fines set forth in the Order total just shy of **$9 million**.

Background. As with prior decisions in the proceeding, much of the Order is difficult to decipher because the public version is heavily redacted to protect confidential information. At a broad level, it appears that the station licensees (the "Licensees") were: (1) each members of one of eight station groups; (2) jointly negotiating retransmission consent for their collective 18 stations with AT&T and DIRECTV ("AT&T"); and (3) all represented in negotiations by the same individual. The manner in which the negotiations (or lack thereof) unfolded caused AT&T to file a complaint with the FCC alleging that the Licensees had violated three of the Commission's *per se* good faith retransmission consent negotiating standards by refusing to negotiate, unreasonably delaying negotiations, and failing to respond to proposals. The Complaint also alleged that the "totality of the circumstances" surrounding the Licensees' conduct through their negotiator separately proved a breach of the Commission's good faith retransmission consent negotiating standards.

Upon considering the Complaint and the undisputed facts and communications in the record, the Media Bureau—and later, the full Commission, in its first time both considering a good faith complaint and finding a *per se* good faith violation—determined that the Licensees had indeed violated the *per se* standards. As support, the decisions pointed to the fact that, among other things, the Licensees' negotiator failed to submit even a single offer or proposal that could have resulted in carriage of the Licensees' stations, even if accepted unchanged by AT&T.

After the initial Media Bureau decision, one Licensee entered into a settlement with the Commission to admit liability and pay a civil penalty. All other Licensees challenged the Media Bureau's determination, and later challenged the Commission's NAL—which proposed what was then the statutory maximum penalty of $512,228 per station—thus giving rise to the Order.

The Order. As noted above, the Order resolves the Licensees' challenges to the NAL. Although the Licensees all conceded that the facts are "undisputed," the Licensees challenged the NAL regarding both its determination that the actions of the Licensees' negotiator constituted legal violations and the NAL's proposed fine of $512,228 per station. One Licensee also presented an alternative argument specific to its station: that "in the event the Commission is not persuaded to cancel or reduce the proposed forfeiture based on the arguments raised in the [Licensees'] NAL Response, the Commission [should] consider reducing the proposed penalty with respect to its Station based on its history of compliance and inability to pay."

The Order flatly rejects nearly all of the Licensees' arguments (save for the lone Licensee's argument for a reduced forfeiture amount on the basis of inability to pay). Instead, in the words of the Order:

> We find that Defendants willfully and repeatedly violated the [Communications] Act and the Commission's rules by refusing to negotiate for retransmission consent with AT&T, unreasonably delaying such negotiations, and failing to respond to AT&T's retransmission consent proposals. . . . Every Negotiating Entity, in a joint negotiation or otherwise, has an independent obligation to abide by the good faith negotiation standards, which includes participating actively in negotiations within

> a reasonable time frame and responding fully to all of the material terms of carriage proposals from counterparties. Defendants, through their agent, failed to do so.

The Order similarly rejects the majority of the Licensees' arguments for a forfeiture cancellation or reduction, including (among others) the Licensees' arguments that: (1) "the amount is disproportionately punitive given the novelty of the good faith rules' application here;" (2) in assessing the forfeiture amount the FCC "should not have considered [the Licensees'] conduct a continuing violation but rather should have calculated the penalty by counting only the specifically identified instances" where their joint negotiator "failed to negotiate;" and (3) the COVID-19 pandemic warrants a reduced forfeiture amount.

As for the lone Licensee who argued for a forfeiture reduction due to inability to pay, the Order determines that imposing the full $512,228 fine amount would create a financial hardship for the Licensee, based on supporting financial documentation provided by the Licensee. As a result, the Order reduces the fine to $30,000—an amount no greater than 8% of the Licensee's average gross revenues across the past three fiscal years. However, in the same breath the Order makes clear that the Licensee should not consider itself immune from a heftier fine for subsequent violations: "we . . . warn [the Licensee] that we may impose significantly higher penalties—regardless of its financial circumstances—if the forfeiture imposed here does not serve as a sufficient deterrent or if future violations evidence a pattern of deliberate disregard for the Act or the Commission's rules."

Failure to Timely Upload Issues/Programs Lists Costing Some TV Licensees $9,000 and Up (Plus a Few Non-Monetary Admonishments)

A collection of recent FCC Media Bureau releases have run the gamut from simply admonishing several stations (admonishments: 1, 2, 3) to proposing fines ranging from $9,000, to $15,000, to $20,000, for various television licensees' failures to timely upload quarterly Issues/Programs Lists throughout the license term. Across the releases, the relevant factors seemingly affecting whether and the extent to which stations are fined for the belated uploads appears to be the interplay between (1) the number of untimely lists at issue, and (2) the length of delay in uploading each of the untimely lists.

For example, each admonishment addresses approximately 12 untimely lists. However, in each case the relevant licensee uploaded no greater than 2 lists "more than one year late," with the rest of the 12 untimely lists being uploaded "between one day and one month late." In such circumstances—at least at this point in the current renewal cycle—the Media Bureau has "determined that an admonition is appropriate," albeit with a stern warning that the Bureau does "not rule out more severe sanctions for similar violations of this nature in the future."

Turning to the proposed fines (the "NALs"), as compared to the facts underlying the admonishments each NAL addresses circumstances in which the relevant licensee both failed to timely upload a greater number of lists overall and uploaded a significantly greater number of lists "more than one year late." On the latter point, the licensees targeted by the NALs uploaded 9 (across two stations), 12, and 17 lists "more than one year late," respectively. And, as for the total number of untimely lists, the total came to 16 (across two stations), 16, and 21 for the respective licensees.

Unauthorized EAS Tone Transmission Could Cost Programmer $20,000

A national programmer (the "Programmer") is facing a proposed $20,000 fine (the "NAL") for its unauthorized 1.83-second transmission of the EAS tones as part of a sports documentary program. The substantial fine for such a fleeting transmission reinforces just how seriously the FCC takes all such violations—to quote the NAL, "[u]nauthorized use of the EAS Tones . . . undermines the EAS and presents a substantial threat to public safety."

As broadcasters are well aware, the EAS is a public warning system that requires broadcasters and others to supply their communications capability to the President of the United States to address the American public during a national emergency. Federal, state, and local authorities may also use the EAS to deliver important emergency information. Accordingly, and because notifications to the public of EAS activations are delivered aurally by tones specifically defined by Commission rules and which contain embedded data elements concerning the accompanying alert, unauthorized use of the EAS tones is prohibited in order to avoid potential false activations of the EAS (which could spread false information or lock out legitimate activations of the EAS), listener fatigue (i.e., public desensitization to the alerts), and general undermining of EAS reliability.

The only times the EAS tones may be transmitted are in the case of actual emergencies, authorized tests of the EAS, or particular public service announcements that specifically qualify for the use of the EAS tones. According to the NAL (and the Programmer's own admission), in the case of the Programmer the EAS tones were transmitted when none of the foregoing circumstances applied and, instead, "for storytelling purposes" to present "a dramatic recreation of an actual severe weather event." Although the Programmer argued that the EAS tones were only transmitted for 1.83 seconds and contained no embedded data elements, the NAL determines that those circumstances do not change the fact that the programmer "violated the rule in this instance."

The NAL further concludes that the typical $8,000 base forfeiture amount for such EAS violations is insufficient to address the Programmer's particular violation. Accordingly, the NAL proposes to increase the fine amount by $12,000—bringing the total proposed fine to $20,000—largely based on the fact that the program was made widely available to "vast audiences" of millions, and that in 2015 the Programmer was previously fined for a separate unauthorized use of the EAS tones.

FCC Admonishment Order Addresses Level of Licensee Diligence Expected When Facing Technical Issues with FCC Filing Systems

Broadcasters should take note of a recent FCC Order (the "Order") addressing the amount of diligence the FCC expects a licensee to demonstrate when faced with a persistent technical issue with one of the FCC's filings systems. In particular, the Order admonishes an Indiana FM translator licensee (the "Station" or "Licensee") for failing to timely file a license renewal

application for the Station, even though the delay was due to technical issues with the FCC's Licensing and Management System ("LMS") that made it impossible for the Station to timely file.

As broadcasters are well aware, timely complying with FCC filing deadlines is an unavoidable aspect of station operation, whether in the form of quarterly filings such as issues/programs lists, rolling filings such as political file recordkeeping materials, or "major filings" such as those related to a station's license renewal (which renewals for main station licenses generally occur only once every eight years). When a station misses such a deadline, the FCC's rules authorize the Commission to impose a fine for the mistake, generally within a range of several thousand dollars. During the current license renewal cycle, the FCC has generally proposed a fine amount of approximately $1,500 for belated renewal filings for FM translator stations.

Notably—and as the Order makes clear—the FCC's rules place on each broadcaster the responsibility to keep track of their license expiration dates and timely file their renewal applications. However, as we are all aware (and as many of us have experienced first-hand!), sometimes the FCC's filing systems are unavailable on a filing deadline due to maintenance or a technical issue. The question then typically arises: how should a station proceed under such a circumstance? On that question, the Order appears to at least provide guidance as to what a station should **not** do.

In the case of the Station targeted by the Order, the Station was required to file an application to renew its broadcast license by April 1, 2020, given that the Station's current broadcast license was set to expire on August 1, 2020. However, due to a technical issue with the FCC systems, LMS showed an incorrect expiration date of July 9, 202**1**. Although the foregoing issue might initially seem like a ministerial error in LMS, it actually prevented the Station from timely filing its renewal application given that LMS only permits a station to file a renewal application when the station's license expiration date (as listed in LMS) is within the next six months. The Station discovered the issue when it initially attempted to file its license renewal application in February 2020, and immediately informed FCC staff of the error. FCC staff promptly responded and told the Station that the error had been resolved. Unfortunately, in reality the expiration date in LMS was not remedied at that time, and, in July 2020, the Station received a notification that its renewal application was past due despite the fact that LMS was still preventing the Station from accessing or electronically filing the application. The Station again contacted FCC staff about the error, reiterating that the expiration date shown was incorrect. After a bit of back-and-forth between the Station and FCC staff, the issue was appropriately resolved and the Station promptly filed its renewal application.

Despite the persistent technical issues experienced by the Station, the Order faults the Licensee for failing "until July of 2020 to address the continuing technical issues it was facing with LMS," and for seemingly not making any attempt "to file the Application between February 2020—when it first alerted the [FCC] staff of the LMS error—and the April 1 filing deadline." As a result, the Order ultimately concludes that "the failure to timely file the renewal application was due to [the] Licensee's own lack of diligence." Although the Order does at least cancel the $1,500 fine the FCC had initially proposed for the late filing, the Order nonetheless admonishes the Station for its "lack of diligence."

In sum, the Order appears to make clear that technical issues with the FCC's filing systems are insufficient, standing alone, to relieve broadcasters of their duty to timely file all required

documentation with the FCC. Instead, continued diligence and correspondence with FCC staff until a technical issue is finally resolved is advisable.

FCC Issues Two Notices of Violation Regarding FM Translators' Apparent Violations of FCC Technical Rules

An FM translator licensee (the "Licensee") was the recent recipient of two Notices of Violation (the "NOVs") (1, 2) relating to two of its California translators. According to the NOVs, an FCC agent stationed in the Enforcement Bureau's Los Angeles field office observed apparent violations by the Licensee of several of the FCC's technical rules, including those relating to "unattended operation," "station identification," and "rebroadcasts" of primary station content.

The first rule at issue in the NOVs requires FM translators operating without a designated person in attendance to "be equipped with suitable automatic circuits which will place [the translator] in a nonradiating condition in the absence of a signal on the input channel." According to the NOVs, the FCC agent observed the two translators continuing to transmit even after the translators lost audio programming.

The second rule requires FM translators to be identified by one of two methods, either: (1) by arranging a "firm agreement" with the primary station whose signal is being rebroadcast to identify the translator station by call sign and location; or (2) by transmitting the call sign in international Morse code at least once each hour (subject to certain standards). In the case of the two translators targeted by the NOVs, the FCC agent observed that neither of the foregoing identification methods was satisfied, given that the translators' designated primary station was off the air and that the agent did not observe either translator transmitting its call sign in Morse code at least once each hour.

The third rule requires each FM translator licensee, before his or her FM translator begins to rebroadcast the programming of another station, to obtain consent from the primary station whose programs are proposed to be retransmitted. According to the NOVs, at the time of the field agent's observation of the FM translators, the primary station associated with each translator in the FCC's records "was not operating and therefore could not be the source of the programming broadcast" on the translators.

The Licensee now has a designated time period in which to provide a written response to the NOVs. Accordingly, the facts set out above may ultimately change as a result of the Licensee's response.

Second Round of 2021 EEO Audits Announced Responses Due by September 20, 2021

Approximately 151 radio stations, 20 TV stations, and their corresponding employment units will be part of the FCC's second equal employment opportunity ("EEO") audit of 2021, according to a recently issued Public Notice (the "Notice"). The Commission has already begun

mailing audit letters to the selected stations, who must upload their audit responses to their online public inspection files ("OPIF") by **September 20, 2021**.

Per the Commission's EEO Rules, each year approximately five percent of all radio and television stations are randomly selected for EEO Audits. And although audit letters are issued to individual stations, it's important to note that the audit applies to any and all stations in the identified station's "employment unit." Generally, any commonly owned stations in the same market that share at least one common employee are part of the same employment unit for FCC EEO reporting and audit purposes.

The form EEO audit letter attached to the Notice describes the specific data requested by the Commission, procedures for responding, special circumstances for time-brokered stations, as well as limited exceptions pursuant to which broadcasters may be relieved of the requirement to submit a full audit response. The data requested in the audit letter is extensive, and stations identified in the audit will need to act promptly to respond. As with any government audit, consultation with counsel is advisable.

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