



Broadcast Newsletter

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MEDIA BUREAU CONTINUES EEO CRACKDOWN

On the next to last day of 2008, the Media Bureau issued six Notices of Apparent Liability to six different licensees totaling \$71,000 for EEO violations. The NALs, ranging in forfeiture amounts from \$7,000 to \$20,000, were issued by the staff as a result of the responses that the licensees provided to FCC audits of their EEO programs. In each case, the licensee was randomly selected for an audit of their EEO program, complete with a review of their EEO public file reports and records documenting hiring.

Five out of the six NALs focused primarily on the incomplete nature of the EEO public file reports, most of which failed to include key required information such as the total number of interviewees for a position or data reflecting which recruitment source referred which interviewees. Even though this would not appear to be a major violation, it actually triggers the violation of no less than three separate rules, each of which have a fine attached them. The incomplete EEO report violates the public file rule because the report is required to be complete when placed in the public file. There is also a violation of the recordkeeping requirement since if the licensee had kept the records as required by the rule, it would have been able to report which sources referred interviewees and the total number of interviewees. Finally, there is a violation of the overall requirement to conduct a self-assessment of the program to ensure that it is meeting the broad outreach requirement. This is a violation because if the licensee had kept the proper documentation that showed where interviewees were coming from, it could evaluate which sources were effective and which were not.

The sixth and most expensive NAL, at \$20,000, was replete with violations of the EEO rules. The licensee there failed to adequately recruit for 39 of its 90 openings because it used only non-public sources such as employee referrals or self-referrals or it used only internet sources, all of which do not satisfy the requirement for broad outreach. The licensee also failed to keep adequate documentation for some of its vacancies, failed to adequately self-assess its program and violated the public file rules by filing incomplete public file reports.

In addition to assessing a forfeiture against the licensee, the Bureau has also imposed an annual reporting requirement starting in 2010 through 2012 that follows the stations even if the current licensee sells them. This means that subsequent licensees during the period from 2010 to 2012 of the stations will be subject to the reporting requirement. Furthermore, if the current or future licensee adds any stations to the station employment unit, those stations will also be subject to the reporting requirement.

The reporting requirement compels the licensees to provide copies of documentation relating to each vacancy filled during the relevant period as well as the most recent public file report and data on interviewees and from which recruitment sources they were referred.

This most recent round of NALs underscores the vital importance of having a good EEO program in place, making sure that all records and documents are kept and conducting appropriate outreach for each vacancy. The FCC typically conducts two audits of broadcast licensees each year, auditing a combined 5% of all broadcast licensees annually. It is critical during such audits that documentation from each full-time vacancy requiring broad outreach be available, since it must be provided to the FCC as part of the response. We continue to recommend to clients that a separate folder be maintained for every full-time vacancy requiring recruitment and that all documentation relating to the hire (advertisements, resumes, interview materials received, applications, etc) be retained there. That file does not belong in the public file, but instead should be maintained separately. In addition to being available for audit responses, the materials there will be helpful as stations prepare annual EEO public file reports.

Under a democratically controlled commission, EEO issues are likely to get much more attention. The statements added by Commissioners Copps and Adelstein to these issued NALs point in that direction. In one instance, the two commissioners asserted that the FCC's lax enforcement of its EEO rules has led to less diversity in broadcasting, suggesting that increased enforcement is headed broadcasters' way soon. The premise of that position is flawed, however, since it does not

consider the audits that the FCC has been doing over the past 5 years, or the fact that the new EEO rules were not made effective until 2003. In our estimation, that flaw will not be an obstacle to more stringent enforcement of the EEO rules. All broadcasters should make renewed efforts in understanding, following and documenting compliance with the EEO rules. Contact your FCC counsel if in doubt.

GENACHOWSKI REPORTED AS FCC CHAIRMAN NOMINEE; COPPS IS ACTING CHAIRMAN FOR NOW

Over the past few weeks, multiple sources have begun to report that Julius Genachowski, a former classmate of President Barack Obama at Harvard Law School, is to be nominated as FCC Chairman.

Genachowski previously worked at the FCC as Chief Counsel for former FCC Chairman Reed Hundt, who was the FCC Chairman under former President Bill Clinton. He is reported as having drafted the new administration's media policy agenda, with focuses on diversified media ownership and affordable internet connections.

Former FCC Chairman Kevin Martin has already resigned from the Commission, and the term of Commissioner Deborah Tate expired at the end of 2008. Currently, there are three FCC Commissioners, two of whom are Democratic appointees and one of whom is a Republican appointee. President Obama has appointed Commissioner Michael Copps as acting chairman until the nomination of Genachowski is confirmed.

DTV TRANSITION DEADLINE MAY MOVE

After information that the government had run out of coupons for DTV converter boxes, President Obama's administration sent a letter to Congress in early January, 2009 suggesting that a delay in the DTV transition date might be necessary. Since then, both the House and the Senate have responded with draft bills that would move the DTV transition deadline to June 2009. In most versions, the transition date change appears to be voluntary,

although in one version of draft legislation, the transition delay was mandatory unless a broadcaster obtained a waiver from the FCC. A vote on a DTV transition delay bill is expected next week in the Senate.

At the time of publication of this newsletter, approximately 25 days remain before the current February 17, 2009 digital television transition deadline arrives. This leaves very little time for Congress to pass a bill delaying the transition, much less for the FCC to actually implement such a delay.

A number of regulatory issues arise if a delay becomes necessary, including the existence or extension of special temporary authority for stations conducting a phased transition to digital-only operations. The major networks and major broadcast organizations have all remained neutral on the transition delay issue, pointing out both the benefits and the drawbacks to a digital transition delay. Television broadcasters should continue to monitor these developments and consult with FCC counsel regarding appropriate steps to be taken in the event legislation is passed and/or implemented.

FCC ISSUES FLURRY OF DECISIONS RELATED TO DIGITAL TELEVISION TRANSITION

In December 2008 and early January, 2009, the FCC took several actions related to the digital television transition. Some of those actions were in response to legislation passed by Congress. Other actions were the culmination or beginning of rulemaking proceedings to address digital television coverage areas.

Analog Nightlight Implementation

At the end of December 2008, in response to legislation passed by Congress, the FCC issued a rulemaking to allow an additional 30 days of full-power analog television broadcasts after the digital television transition in order for stations to broadcast information about the digital transition or natural disaster/emergency information. Because the legislation required the rules to be in effect no later than January 15, 2009, the rulemaking and

comment period were very short. The FCC has now implemented these rules, issuing a list of stations that are authorized to continue analog operations for the limited purposes allowed after the transition. Stations on that list must notify the Commission and seek special temporary authority in order to continue analog "nightlight" operations. Stations not on that list but which meet the interference criteria necessary for continuing an analog broadcast may also seek an STA for analog nightlight operations. In the rules finally adopted, the Commission allowed broadcasters to defray the expense of continued analog operation by allowing commercial sponsorships of the digital transition and/or emergency information broadcasts on the analog signal. Stations electing to conduct analog nightlight operations will have their analog licenses automatically extended for an additional 30 days.

DTV Distributed Transmission System

The FCC has issued a Report and Order adopting rules for DTV broadcasters to use distributed transmission system technology to optimize, and in some cases expand, a station's digital television coverage area. The purpose of these rules is to minimize viewer loss attributed to differences between digital and analog coverage areas, as well as signal strength issues related to topography.

DTS permits stations to deploy several lower powered transmitters through out a station's coverage area that are synchronized on the same channel. DTV receivers then cancel or combine transmissions from the various transmitter sites to produce a single signal. DTS provides fill-in service in areas where terrain or man-made structures block or hinder reception. In addition, DTS provides more uniform signal levels to make mobile and indoor reception more reliable.

Unlike DTV translators, which have secondary status, operate on different channels, and require a separate license in filing within a window where competing applications can arise, DTS has primary status and is thus protected from interference, operates on the same channel, and is added to a station authorization through a simple license modification procedure that is not subject to competing applications.

Under the new rules, a station's DTS service area is defined using a "comparable area" approach which is defined as a station's potential or hypothetical maximum authorized service area under a specified table of distances. In most cases, circles drawn from a station's reference point will equal or exceed a station's currently authorized coverage contour. As an important alternative to the table of distances approach, stations may deploy DTS in an expanded coverage area equal to the maximum geographic coverage area of the largest station within a station's market, provided that no new interference is caused.

Currently, stations seeking DTS service must file the request pursuant to special temporary authority. The FCC will shortly conclude a modification of FCC Form 301 to permit the filing of minor modification applications for DTS service. At that time, stations that have filed for DTS STA authority must then seek a modification of license through the revised Form 301.

The new DTS rules went into effect on January 15, 2009. The modified application form is not expected to become effective until the end of January 2009.

DTV Replacement TV Translator Service

The FCC has released a short notice of proposed rulemaking to adopt rules creating a special class of TV translators for use by full-power digital television stations to replace coverage loss areas caused by the transition from analog to digital-only operations.

In the proposed rulemaking, the FCC tentatively concluded that replacement TV translators will be authorized on channels 2 - 59, and will be given licensing/processing priority over all other TV translator/LPTV applications except displacement applications, with which they will have co-equal priority. Replacement TV translators will still be specified as secondary in nature, and will not be allowed to cause interference to, and must accept interference from, full-power TV stations and certain land mobile operations.

Only full-power TV stations that can demonstrate that a portion of their analog service area will not be

served by their full post-transition digital facilities can seek replacement TV translators. The service area of the translator is limited to the analog loss area it is replacing. The FCC has sought comment on the method for demonstrating loss areas. The FCC also tentatively concluded that replacement TV translator licenses will be associated with the full-power station digital license and will not be separately assignable or transferable apart from the full-power station license. The proposed construction period for replacement TV translator permits is six months, a dramatically shorter period than the normal three years.

Until the rulemaking concludes, the FCC is accepting applications for special temporary authority to authorize replacement translators on an interim basis.

A comment deadline on the replacement TV translator proposed rules has not yet been set.

Digital Closed Captioning Order and NPRM

Portions of a November 2008 FCC closed captioning order will shortly become effective, with others to soon follow. In particular, beginning February 12, 2009, the FCC's Order clarifying that the digital transition does not relieve stations of the obligation to continue to caption programming in a manner than can be decoded by analog TV sets, and that there is no exemption for DTV programming just because it is digital. The Commission's clarification that stations cannot consider their digital channels to be "new" such that they qualify for various captioning exemptions, has also become effective.

Secondly, the Commission has set February 12, 2009 as the deadline for commenting on proposed further changes to the closed captioning rules. Reply comments will be due on February 27, 2009. The Commission is considering modifying its closed captioning exemptions, and in particular, the current exemption from captioning for stations with annual gross revenues of less than \$3,000,000 a calendar year. The Commission seeks comment on whether that threshold should be higher, and whether multiple DTV streams should be considered separately or together for purposes of the gross revenue exemption.

Finally, the FCC's new complaint procedures, records and documentation requirements, and contact information requirements have not yet taken effect. They will not take effect until publication of the approval of the Office of Management and Budget in the Federal Register.

If you have questions regarding your closed captioning requirements in a digital-only world, we recommend that you consult your communications counsel.

PENALTY BOX

FCC Fines NCE Station for Violation of Donor Acknowledgement Rules

In three separate decisions issued in January 2009, the FCC issued Notices of Apparent Liability (NALs) for monetary forfeitures to three entities stemming from complaints filed against those stations in 2005 and 2006. Two of the stations were licensed to colleges in Florida and New York, while the third station fined was licensed to a religious broadcaster in Puerto Rico.

In the two decisions issued against the colleges, underwriting announcements containing openly promotional statements regarding the underwriter were aired several times on the stations in question. In each case, the colleges argued that because they had received no consideration in exchange for the airing of those promotional messages, no violation of the Communications Act had occurred. The Communications Act prohibits non-commercial stations from broadcasting promotional material on behalf of for-profit entities in exchange for remuneration of any kind.

As we have previously written about in this newsletter, the FCC's interpretation of "remuneration" is very broad. For both of the stations involved here, the Commission found that the provision of the program itself to the station was sufficient remuneration to trigger a violation of the rule. The FCC has previously ruled on that exact issue, and reached the same conclusion.

In the third case against the Puerto Rico station,

two underwriting announcements were made on behalf of a furniture store and a vacuum cleaner manufacturer. The station acknowledged that it had received monetary consideration in exchange for airing those announcements. In each case, the underwriters were for-profit entities and the announcements were aired a total of 12 times during a two-month period. The Commission found that the text of the announcement was promotional in nature, therefore triggering a violation of the rule.

In particular, the FCC pointed to language such as "quality craftsmanship" as distinguishing an underwriter's business favorably from that of its competitors. In addition, the FCC found that the language used improperly attempted to induce patronage to the underwriter with its offer of "free estimates," "ten percent discounts," and by urging listeners to "call now." Offering a purchase through financing "without interest" also induced patronage.

In all three of the issued decisions, the FCC took action against the stations because it received complaints. While the Commission did not specify the source of those complaints, typical complainants include listeners as well as competitor stations. Of particular interest in one of the decisions was an FCC statement that in response to a complaint it received, the agency ordered monitoring and recording of station broadcasts on two separate days, approximately one month after the complaint was received. Afterward, the Enforcement Bureau inquired of the licensee concerning the complaint and the recorded broadcasts.

While the Commission is not precluded from carrying out such investigative actions, the actual occurrence of it is quite unusual. Normally, the Commission simply inquires of the licensee after it receives the complaint. At other times, the initial complaint includes recorded material that the Commission then refers to the licensee for comment and response. The separate monitoring and recording conducted by the FCC in this instance may foretell other such independent investigations.

When responding to any FCC inquiry, station licensees should exercise caution to ensure that all information provided is accurate and complete. In

addition, responses should be made within the timeframes the Commission specifies during such inquiries. Licensees are allowed to make arguments in response to the Commission's inquiry.

The forfeitures assessed in these three decisions were not extraordinarily high, with one of them for \$5,000 and the other two for \$2,500 each. In the past, however, forfeitures have exceeded \$15,000.

DATES TO REMEMBER

February 2, 2009

TV & Class A TV Stations in New Jersey and New York: If employee threshold is met, complete annual EEO public file report, place in your public inspection file and post on website, if station has one. In addition, unless exempt or Class A, complete and e-file biennial ownership report on form 323 or 323-E, and place copy in station public file.

TV Stations in Kansas, Nebraska and Oklahoma: If employee threshold is met, complete annual EEO public file report, place in your public file and post on station website, if station has one.

TV & Class A TV Stations in Arkansas, Louisiana and Mississippi: If employee threshold is met, complete and e-file mid-term FCC Form 397 EEO Report, and complete annual EEO public file report and place in your public inspection file and on website if station has one. In addition, unless exempt or Class A, complete and e-file biennial ownership report on form 323 or 323-E, and place copy in station public file.

AM & FM Stations in Arkansas, Louisiana, Mississippi, New Jersey and New York: If employee threshold is met, complete annual EEO public file report, place in your public inspection file and post on station website, if station has one.

AM & FM Stations in Oklahoma, Nebraska and Kansas: If employee threshold is met, complete and electronically file your mid-term EEO review report via Form 397, and complete annual EEO public file report, file in public file and post on station website, if station has one. In addition, unless exempt, complete and electronically file your biennial ownership report via Form 323 or 323-E and place copy in public file.

February 12, 2009

Deadline for filing comments on proposed closed captioning rules changes

February 17, 2009 (midnight)

All Full Power TV Broadcast Stations: Cease all analog transmissions, and continue broadcasting in digital-only; file digital license-to-cover application for post-transition digital facilities if not previously done, unless station has obtained an extension of post-transition digital permit. Continue airing DTV Consumer Education announcements on remaining digital channel through March 31, 2009. **NOTE: If Congress passes DTV transition delay legislation, the transition date may be delayed.**

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Actual resolution of legal issues depends upon many factors, including variations of facts and applicable Federal laws. This publication is not intended to provide legal advice on specific subjects, rather, it seeks to provide insight into legal developments and issues that we feel could be useful to our clients and friends.

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