Hardy, Carey, Chautin & Balkin, LLP
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IN THIS ISSUE…

NPRM CIRCULATING FOR RADIO ONLINE PUBLIC FILES........ 1

ROAD TRIPS AND AUCTION RULES 1

FCC DENIES EXPERIMENTAL LICENSE FOR RELAXATION OF UNDERWRITING POLICIES 2

NONCOMMERCIAL STREAMING RATES BEING RENEGOTIATED 2

CONTEST RULE CHANGE COMING 4

UNAUTHORIZED EAS MESSAGES SURFACE AGAIN.......................... 4

FCC ISSUES SHOW CAUSE ORDER TO DOWNGRADE CLASS A TV STATION 4

TWO-PERSON CONTROL 5

DATES TO REMEMBER.................. 5

NPRM CIRCULATING FOR RADIO ONLINE PUBLIC FILES

After teasing the issue a few months ago with a somewhat cryptically worded public notice that mentioned online public files for radio stations as an afterthought, the FCC has apparently now decided to expand that inquiry into a full blown notice of proposed rulemaking. The NPRM has not yet been released, but it is an item being circulated among the FCC Commissioners. Usually, that means a release is near, though we note that this item is not on the current version of the FCC's December meeting agenda. There is a small chance that the NPRM could be released without a formal vote if the Chairman and all four Commissioners agree.

We've written before about the earlier public notice, which was primarily directed at deciding whether cable and DBS providers should have to post their political files online. In response to the "side" question of whether the FCC should initiate a rulemaking to decide if online public files for radio stations were needed, the FCC got an earful from stations questioning the purpose and need for radio stations to have online public files. It will be interesting to see if those statements are included in the anticipated NPRM. We note from the NPRM title that online public files for cable and satellite providers is also part of the rulemaking.

ROAD TRIPS AND AUCTION RULES

Although the TV Incentive Auction now won't be happening until early 2016 (at best), the FCC is continuing its march toward the auction. On its blog in the past several days, the FCC announced future road trips to 51 cities located in markets where the FCC thinks it "will need stations to participate in the reverse auction." The field visits will include both town hall meetings and, by request, confidential one-on-one meetings. Broadcasters that cannot make the meetings will apparently have an opportunity for private conference calls and webinars. No word on the exact timing of the trips, but we suspect late winter and early spring 2015 as the likely timing.

The language identifying the cities as being in markets where the FCC "will need" stations to participate strikes us as odd. While everyone knows that broadcaster participation is necessary to ensure a successful auction, the idea that the FCC would "need" participation has a certain "non-voluntary" ring to it. The auction is, after all, designed to be voluntary, with incentives offered to increase and encourage participation. The agency in charge of designing and conducting the auction should be neutral. Rather than "needing" anyone to participate, the approach should be one where the FCC simply provides straightforward information on alternatives and options for participation. A strategy to visit markets that will be key to the auction's success smacks of trying to game the system.

Speaking of auctions, they need rules and the FCC is getting set to put some more of those in place. At its December 11, 2014 monthly meeting, the FCC plans to consider (and probably adopt) a notice of proposed rulemaking seeking comment on the detailed procedures necessary to carry out the incentive auction. These are the specific rules that will govern auction mechanics and bidding, though for this auction, they go a bit further. The notice will apparently include not only proposals on auction design issues such as determination of the initial clearing target and opening bid prices, but also on issues related to the final television channel assignment process (repacking).

And finally, when it comes to repacking, the FCC has now released more software information in response to calls from those trying to conduct their repacking simulations using the FCC's program. NAB has raised concerns about several of those simulations as part of its lawsuit against the FCC.

FCC Denies Experimental License for Relaxation of Underwriting Policies

Nearly two years ago, a noncommercial radio licensee requested experimental authority for a limited relaxation of the FCC's underwriting policies, which prohibit the promotion of for-profit entities on noncommercial stations. The Media Bureau's Audio Division denied the request in May of this year, finding that experimental authorizations were reserved for technical phases of operation and service. It also denied an alternative request for a waiver of its policies, finding that doing so would undermine the statutory and regulatory purposes for noncommercial stations.

Not satisfied, the licensee challenged the decision to the full Commission. A few days ago, the Commissioners turned down the challenge, indicating that the Communications Act's advertising prohibitions gave it no leeway and that any change would have to come from Congress.

We disagree with the FCC's logic. While Congress has prohibited the broadcasting of advertising by NCE licensees, the FCC itself has – over 30+ years – slowly relaxed the definition of what constitutes advertising (or promotion of a for-profit for consideration) through a series of decisions interpreting language aired on NCE broadcast stations. The FCC's position that it has no authority in this arena without Congressional action is a safe one in order to avoid ruling on the request, but it is inconsistent with the FCC's past willingness to interpret specific language or practices as permissible in light of Congress' prohibition. As only one example, years ago, the FCC deemed statements about a for-profit business' longevity as being promotional, but later allowed them as non-promotional. In our humble opinion, the brave licensee asking for a limited relaxation of the FCC's policies to allow such innocuous descriptive phrases like "accredited" or "experienced" should have received a warmer welcome, not a slammed door.

Noncommercial Streaming Rates Being Renegotiated

Every four years, the Copyright Royalty Board ("CRB") is tasked with setting the new rates by which all broadcasters must pay SoundExchange in order to be allowed to continue to stream their broadcasts containing music online. Since the current rate schedule is set to expire at the end of 2015, the CRB has begun the proceedings to set the rates for the next four-year cycle, which would start on Jan. 1, 2016, for commercial and non-commercial webcasters. Each category has its own proceedings. While the commercial rate proceedings are usually more contentious, the noncommercial rate proceedings are of more interest simply because of the different categories of noncommercial webcasters.

At the outset of the proceedings, multiple parties file statements outlining their proposals for rates that would apply to them and similarly situated webcasters. Some are able to reach agreements directly with SoundExchange and avoid having the CRB get involved. Others elect to go through the rate proceeding process to allow the CRB to make a determination of the rates based upon the various proposals. Not surprisingly, there are numerous groups who participate in the proceedings, representing a myriad of different webcasters: Pandora, Sirius XM, College Broadcasters, Inc., National Public Radio (NPR/CPB), and National Religious Broadcasters (NRBNMLC). SoundExchange also participates with its own proposal of rates.

The proposals this year fall into four basic categories: noncommercial educational webcasters (College Broadcasters, Inc.), religious/non-NPR/CPB noncommercial webcasters (NRBNMLC), NPR/CPB noncommercial webcasters (NPR/CPB) and the default noncommercial webcasters (SoundExchange). Only webcasters who meet the eligibility requirements for any of the first three proposals would be allowed to take advantage of those proposals. Any webcaster who is unable to meet those eligibility requirements, or chooses not to, would automatically be under the default noncommercial rates.

The College Broadcasters proposal has already been agreed to by SoundExchange and so it is essentially a done deal. The CBI proposal only applies to noncommercial educational webcasters who are defined as a webcaster that is directly operated by or is affiliated with and officially sanctioned by an educational institution (i.e. high school or college) and the operations of the station are substantially staffed by students of the institution and is not a public broadcasting entity qualified to receive funds from the Corporation for Public Broadcasting. A webcaster that is eligible for this rate would be subject to a minimum fee of $500 with the monthly allowance of 159,140 aggregate tuning hours ("ATH") included with the fee. The departure from prior plans, however, is that these webcasters must take affirmative steps to stay at or below the 159,140 ATH monthly limit. Should the station exceed those limits in a given month, they must pay royalties on the extra hours at the default noncommercial rate. Census reporting is required except that NCE webcasters who stay below 80,000 ATH per month can pay a $100 yearly proxy fee to avoid reporting.

NPR/CPB has also proposed its own plan with flat fees that is available only to NPR affiliated stations and those that are qualified to receive funds from the Corporation for Public Broadcasting.

NRBNMLC's proposal would be available to noncommercial webcasters who are not NPR/CPB affiliated and are not noncommercial educational webcasters student-run stations. For our purposes here, non-commercial webcasters are 501(c)(3) non-profit entities, *regardless of whether the station is licensed as non-commercial by the FCC*. NRBNMLC is proposing an interesting twist on the flat fee model by proposing fees starting at $500 and capping out at $1500 per channel, depending upon monthly usage.

All channels would still owe the $500 minimum fee, but for this cost, the station would get 3,504,000 ATH per year (roughly equivalent to 400 average concurrent users per 24 hours per year). The fee would then increase in $200 per year per channel increments for each additional 876,000 ATH (equivalent to 100 average concurrent users per 24 hours per year), with a cap of $1500 for any given channel. There would be no fees for going over the number of ATH except for the incremental $200 increase. What is not explained in the NRBNMLC proposal is when these payments of $200 are to be made since they are based upon annual ATH usage, rather than monthly. The NRBNMLC proposal also does not address reporting requirements but it is likely that census reporting would apply.

SoundExchange has also offered its own version of the noncommercial webcaster rates which look a lot like the ones from the prior cycle except that the per play fees have increased. There is still the $500 minimum that gets you the 159,140 ATH per month, except that if you exceed this amount, you are required to pay $0.0025 in 2016, $0.0026 in

2017, $0.0027 in 2018, $0.0028 in 2019 and $0.0029 in 2020.

We will chronicle the saga of the commercial rates in next month's newsletter as it is a soap opera unto itself.

Contest Rule Change Coming

Many moons ago (about three years), a broadcaster was fined by the FCC for inadequate notice of the material terms of an on-air contest. That broadcaster thought it was unfair that the contest rules it had posted online were insufficient to satisfy the FCC's contest disclosure rule, which allowed such notice only over-the-air. So the broadcaster decided to petition the FCC for a change in the rule. And three years later, someone at the FCC dusted off that request and wrote a proposed rule change that the FCC Chairman and all four Commissioners support. Wow. Change *can* happen.

The NPRM asks for input on several specific issues related to online contest rule disclosure, but in the end, it appears that disclosing material rules to a station contest will soon become far less onerous than the current rule, which required all material contest terms to be periodically included in on-air announcements. Comments deadlines are not yet set, but we'll include them in our December newsletter.

Unauthorized EAS Messages Surface Again

The FCC has announced a formal inquiry into circumstances surrounding an unauthorized Emergency Alert System (EAS) message transmitted in several states. The incident occurred in late October and involved the erroneous transmission of a national alert message on the syndicated Bobby Bones radio show.

The FCC wants to get to the bottom of it because the alert message had a date/time-stamp for a future date. In a public notice, the FCC has warned that some EAS equipment that did not broadcast the message in October may have queued it for transmission at a future date. The FCC's Public Safety and Homeland Security Bureau has advised all EAS participants to immediately check with their equipment manufacturers to determine if they have this alert in queue for a future date, and if so, to find out what steps to take to eliminate the false alert before it is transmitted.

In connection with the public notice, the Public Safety Bureau also asked for information from EAS participants to better understand the message authentication process for EAS equipment and the impact of falsely transmitted messages.

When all is said and done, we expect the FCC to issue some sizable fines for the false transmissions. The last time this happened, the fines were nearly $2 million. If your station wishes to respond to the FCC's notice, it has until December 5, 2014 to do so.

In a related matter, the FCC is seeking comment through December 30, 2014 on the implementation of its previously adopted voluntary communications best practices to improve the security of the EAS. Any information on barriers, breakthroughs or effectiveness is welcomed.

FCC Issues Show Cause Order To Downgrade Class A TV Station

The FCC has issued a show cause order to the licensee of a Class A television station, requiring the licensee to show why its license should not be downgraded to a LPTV license. A downgrade would mean that the station would no longer have interference protection and would neither be eligible for participation in the incentive auction or protected in a repacking scenario.

This is not the first time the FCC has issued such an order. However, prior orders have involved stations that simply didn't respond to FCC inquiries related to unfiled forms and reports. In the current case, the issue involves a station's extended silent periods as it navigated the digital transition and faced other impediments to operation. In its order, the FCC characterizes those as business decisions. The station had sought special temporary authority for its silent periods. However, against the backdrop of the requirement for Class A stations to operate at least 18 hours per day and air

3 hours per week of locally produced programming, the FCC concluded that the licensee should have notified the FCC of its inability to meet its Class A eligibility requirements and requested a change in station status.

In a statement about obtaining temporary authority that all Class A licensees should pay close attention to, the FCC declares that "the Commission has acknowledged that *in appropriately compelling circumstances involving a temporary inability to comply*, a licensee can apply for an STA to operate at variance with the Class A operational and programming requirements." In the case before it, the licensee's reasons for requesting silent status – awaiting authorization on another channel, and preparing for commencement of digital operations – did not meet the "compelling circumstances" standard for temporary authority.

We believe this proceeding will be a test case regarding the loss or retention of Class A status, and will report on it as developments warrant.

Two-Person Control

Does the death of a key employee – one responsible for completing reports and placing things in the public file -- excuse licensee reporting and public file violations that follow? The answer is no, and the FCC's latest decision levelling an $18,000 fine for public file violations after an employee death reaffirms the Commission's long held policy that the licensee is ultimately responsible, regardless of an employee situation.

Which gets us back to the title of this article. For all FCC actions or requirements, we recommend that at least two persons be trained to properly and timely complete those requirements, and then cross-check each other at appropriate intervals to ensure that the actions are being taken. That way, if a key employee is hospitalized, takes a leave of absence, quits or passes away, the station's required FCC actions are not forgotten, and the station avoids a later monetary forfeiture.

Dates to Remember

December 1 & 16, 2014: **TV, Class A & LPTV Stations in Alaska, American Samoa Guam, Hawaii, Oregon & Washington:** air your post-filing announcements.

December 1, 2014: **Digital TV, Class A & LPTV Stations**: prepare and file Form 317 reporting Ancillary/Supplemental Fees for year ending September 30, 2014.

December 1, 2014: **AM & FM Stations in Alabama, Connecticut, Georgia, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont**: if full-time employee threshold is met, complete EEO public file report and place same in public file as well as post on station website.

TV & Class A Stations in Colorado, Minnesota, Montana, North Dakota, and South Dakota: if full-time employee threshold is met, complete EEO public file report and place same in public file as well as post on station website.

AM & FM Stations in Colorado, Minnesota, Montana, North Dakota, and South Dakota: if full-time employee threshold is met, complete EEO public file report and place same in public file as well as post on station website. **NCE Stations Only**: also file biennial ownership report via Form 323-E.

TV & Class A Stations in Alabama and Georgia: if full-time employee threshold is met, complete EEO public file report and place same in public file as well as post on station website. **NCE Stations Only**: also file biennial ownership report via Form 323-E.

TV & Class A Stations in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont: file your renewal application electronically via Form 303-S. Also file EEO Form 396 with, if applicable, two most recent EEO public file reports. Post current EEO public file report to online public file and post copy on station website, if applicable. **NCE Stations Only**: also file biennial ownership report via Form 323-E.

December 1 & 16, 2014 and January 1 & 16, 2015: TV, Class A & LPTV Stations in New York and New Jersey: air your PRE-filing announcements.

December 1 & 16, 2014; January 1 & 16, 2015 and February 1 & 16, 2015: **TV & Class A Stations in Connecticut, Maine, Massachusetts, New**

Hampshire, Rhode Island and Vermont: air your POST-filing announcements.

AM & FM Stations in Florida, Puerto Rico, Virgin Islands, American Somoa, Guam, Hawaii, Oregon and Washington: if full-time employee threshold is met, complete EEO public file report and post same to online public file as well as on station website.

TV & Class A Stations in Florida, Puerto Rico, Virgin Islands: if full-time employee threshold is met, complete EEO public file report and place same in public file as well as post on station website.

AM & FM Stations in Iowa & Missouri: if full-time employee threshold is met, complete EEO public file report and place same in public file as well as post on station website.

TV & Class A Stations in Iowa & Missouri: if full-time employee threshold is met, complete EEO public file report and place same in public file as well as post on station website.

TV, Class A & LPTV Stations in Alaska, American Samoa Guam, Hawaii, Oregon & Washington:

<u>December 5, 2014</u>: responses due to FCC re inquiry on unauthorized EAS message.

<u>December 23, 2014</u>: TV, Class A & LPTV Stations in Alaska, American Samoa Guam, Hawaii, Oregon & Washington: complete and post to your public file documents relating to pre- and post-filing broadcast renewal announcements.

<u>December 30, 2014</u>: comments due on implementation of EAS security improvements.

<u>January 1, 2015</u>: TV stations intending to claim an exemption from Closed Captioning based on 2014 revenue: verify with accounting department that 2014 revenue did not exceed exemption levels. If not, consult counsel for new captioning obligations.

<u>January 10, 2014</u>: **TV, Class A, AM & FM Stations (commercial and noncommercial**) complete 4th quarter 2014 issues/program reports. TV & Class A Stations post to your online public file. AM & FM Stations place in your public file.

<u>TV & Class A stations (commercial only)</u>: complete and electronically file FCC Form 398 Children's TV Programming Report for 4th Quarter 2014. Link to your report should be made automatically by FCC to your online public file. Also compile and post to online public file records relating to station's compliance with children's programming commercial limits.

<u>Class A Stations only</u>: complete and post to your online public file certification of ongoing Class A eligibility.

<u>January 31, 2015</u>: minimum fees due to SoundExchange for 2015. Renewal of royalty plan may also be required.

For more info, contact Joe Chautin, Mark Balkin, or Elise Stubbe.

Phone 985.629.0777

Fax 985.629.0778

www.hardycarey.com

Hardy, Carey, Chautin & Balkin, LLP
ATTORNEYS AT LAW
1080 West Causeway Approach
Mandeville, Louisiana 70471-3036