Hardy, Carey, Chautin & Balkin, LLP
ATTORNEYS AT LAW

Broadcast Newsletter

www.hardycarey.com DECEMBER 2016

IN THIS ISSUE:

MAY YOU HAVE THE VERY BEST NEW YEAR

It has been our privilege to represent many of you in 2016, and we sincerely wish you abundant success in the year to come. Happy New Year!

FCC RESET BEGINS JANUARY 20TH

As readers may recall from last month's newsletter, we predicted a 2-1 Republican majority at the FCC after President-Elect Trump's inauguration. In the days after that prediction, we then cringed to read what appeared to be a resignation holdout by Chairman Wheeler in hopes of a Senate confirmation of Commissioner Rosenworcel for a new term at the FCC, the result of which would have likely ended in a 2-2 stalemate at the FCC until such time as a new Republican commissioner could be approved next summer. Our prediction was clearly in jeopardy.

But, alas, the Senate didn't take the bait, recessing for the holidays without voting on Commissioner Rosenworcel's pending nomination, and effectively ending her tenure at the end of 2016. Then, Chairman Wheeler announced at the December FCC open meeting that he would resign effective upon President Trump's inauguration Voila! Our 2-1 prediction had prevailed. In the interest of full disclosure, we specifically disclaim any special ability to consult on political matters, or any clairvoyance skill. In other words, we were lucky.

With that in mind, we think that the interim 2-1 Republican majority, probably led by Interim Chairman Ajit Pai, will not sit idly by, but instead will move forward on several fronts. We've already seen Commissioners Pai and O'Reilly make various official statements suggesting that the FCC's new net neutrality rules could take a hit after the inauguration. If anyone knows the specific regulations that have been adopted in the past three years on 3-2 party-line vote, and the impact of those new regulations, it would be the two Commissioners who were in the minority. They are now poised to hit the proverbial "reset" button.

Can Broadcasters Now Exclusively Recruit Online Under FCC EEO Rules?

By now, you may have overheard, read or concluded that the FCC has done away with its 13-year policy of finding exclusive online recruiting for broadcaster position vacancies insufficient to satisfy the EEO broad outreach requirement. If so, you would be wrong. But your confusion would be understandable.

Much has now been written about a petition for rulemaking recently filed at the FCC seeking relief from this antiquated FCC EEO policy, especially in light of the FCC's complete embrace of the internet in other contexts for serving the public interest (can you say "online public file?"). When such petitions are filed, everyone gets excited about the prospect of regulatory relief, and some make presumptions that a policy or rule is no longer effective. Resist that temptation. Nothing has changed – yet. But do support the petition, because we are probably still a long way off from seeing a meaningful relaxation from the current policy.

Here's how the process works. Folks file petitions for rulemaking at the FCC all the time. The FCC is not bound to taken any action on those petitions. But if they do, the normal first step is to publish a notice seeking comment on the proposed rule revision. That's what the FCC has done here, in what is perhaps an agency acknowledgment that it is time to review this policy (ok, that might be wishful thinking, but it was worth suggesting). We encourage you to read the petition and the FCC's public notice, and then file comments by the January 30, 2017 deadline in support of the relief requested. If the FCC hears from enough commenters, or if they believe that the comments filed have merit, the normal administrative next step is to issue their own Notice of Proposed Rulemaking, inviting a new round of comments to their tentative conclusions on how to change the policy. After that, the FCC could issue an order modifying the rule or policy. As you can see, the wheels of an administrative agency are made to move slowly.

We believe, like many of our clients, that the most effective way to recruit for broadcast vacancies is through online sources, which have the best chance of reaching a broad segment of the population accessing those sources for jobs. We also believe that the FCC could – on its own – change its policy to match with the reality of job hunting today. And we encourage the FCC to take the shorter path to regulatory relief in this instance by reviewing the comments filed in response to the petition and then issuing a decision to recognize exclusively online recruiting for broadcast vacancies as a legitimate way to achieve broad outreach. Maybe it could be part of an FCC New Year's Resolution. Maybe.

TV Auction Stage Four (Sigh)

Yes, it's true. The Stage Three Forward Auction lasted less than a day, failed to meet the final stage test, and catapulted the TV Incentive Auction to Stage Four. Broadcasters are now participating in the reverse auction portion of Stage Four, which has a clearing target of 84 Mhz – 24 Mhz, or four TV channels, less than the Stage Three clearing target of 108 Mhz.

Reverse auction rounds in Stage Four, which began December 13, 2016, have initially been only one hour each, and the FCC kept a 3-rounds-per-day pace until Friday, December 23rd, when only two rounds were conducted. Bidding was then suspended until January 3, 2017, when the FCC will resume activity with three one-hour stages per day. We're on round 23 now, and by January 7th, the reverse auction will have completed round 34.

If the FCC keeps that pace, the Stage Four reverse auction will finish sometime during the second or third week of January, with the Stage Four Forward Auction kicking off at the end of January 2017. If the final stage rule is not met, the FCC will reset everything and Stage Five will commence. In its originally announced possible band plans, the next band plan would have a 78 Mhz clearing target, followed by another at 72 Mhz. Which one the FCC chooses is their choice, though thus far, they have only moved to the next possible band plan and clearing target.

Many auction prognosticators previously predicted that supply would meet demand at the 84 Mhz clearing target (where TV would thereafter exist on channels 2-36), though some have recently questioned the likelihood of that occurring given new information that wireless bidders in the forward auction may only be willing to pay $20 billion for the repurposed spectrum.

While the auction trudges along, much is happening behind the scenes, in anticipation of the auction's end. The FCC has reminded TV stations to confirm that its address information is correct in FCC databases. It has also asked all stations to update their FRN information in the new CORES system, noting that there is a new feature that must be activated for stations to receive auction funds from the FCC. There is even a YouTube webinar on how to navigate the new features. Those funds can come from successful participation in the auction or by way of reimbursement for the expenses of some stations having to change channels during a post-auction repack of the TV spectrum, so all stations should complete the information requested. The final repack rules have not yet been published -- we're waiting for that as well.

Anti-collusion rules remain in effect. Be sure who you're talking to, and if it is another broadcaster, be very careful to avoid disclosing auction status or bidding strategy. Also be cautious with public statements about your station.

Music Licensing Deadlines and Developments

If this is not already on your calendar, mark it down now. All stations streaming a signal on the internet must file their statement of use and make minimum payments of $500 per channel to SoundExchange no later than January 31, 2017. This is an annual requirement, so last year's filing doesn't count. You must file and pay again. Tackle this early to avoid a rush and mistakes.

A number of other developments on the music licensing front have recently been in the headlines. We'll summarize the three big ones here.

First, noncommercial stations that owe no more than the $500 annual minimum fee to SoundExchange for streaming no longer have to report all of the sound recordings that they stream, or the number of persons listening to each sound recording. Instead, those stations – like their commercial counterparts paying no more than the same minimum fee – can simply report sound recordings for two weeks per calendar quarter and the number of overall aggregate tuning hours in a particular reporting period. You can thank the Copyright Royalty Judges, who found the heavier reporting for noncommercial stations was not warranted. A summary of noncommercial station reporting and payment obligations can be found here.

Second, the National Association of Broadcasters reached agreements with Sony Music Entertainment and the Warner Music Group on streaming waivers. Certain opt-in requirements may apply, as this NAB web page will explain. These agreements allow radio broadcasters to continue bringing Sony and Warner artists to listeners online without risking copyright liability. While opting in to these waivers does not excuse stations from having to pay SoundExchange for streaming online, they do help stations comply with various statutory obligations for streaming online (the more arcane of which many stations often neglect).

Finally, the Radio Music Licensing Committee filed a lawsuit against an aggressive new performance rights organization named Global Music Rights (GMR) that has been sending threatening letters to stations demanding licenses and payments for alleged GMR-represented songs played on stations. GMR responded with its own lawsuit. While they are bickering, the two parties agreed to an interim license agreement, and GMR has stated that it will not initiate any copyright litigation against a station before January 31, 2017 (previously, it was January 1, 2017).

GMR claims to represent certain country, pop and rap artists, as you can see in their website list of artists. Commercial stations playing songs from those artists may want to consider entering into the interim license agreement by January 31, 2017 but, apparently, stations have to contact GMR to find out what the monthly fee will be and the interim license is only good through September 30, 2017. Some of this is obviously a disclosure game so GMR can get station information and admissions that their music is being played. Stations that do not sign a license agreement by January 31, 2017 would have to stop playing GMR music to avoid copyright infringement liability.

We're exhausted with these pesky music licensing issues, aren't you? But don't fret, we'll help you navigate these tricky waters. Email or call us with your questions.

Ownership Reporting Relief (Sort Of)

December 1, 2017 is now the date for all broadcast stations to file their next biennial ownership reports. For commercial stations, that deadline has been known for a while. But, now, that's also the next ownership report deadline for all noncommercial stations that, until recently, were still filing biennial reports every two years on the anniversary date of their renewal application filing deadline.

The relief for NCE stations from continuing to file on the old schedule comes by way of a suspension notice. Specifically, the FCC just announced that noncommercial stations that were scheduled to file reports as of February 1st, April 1st, June 1st, August 1st and October 1st can simply wait until the December 1, 2017 deadline to file their biennial ownership report. The FCC's announcement is consistent with its early 2016 order migrating noncommercial stations to the same biennial report filing deadline as commercial stations.

That early 2016 order also announced that a new form in the Licensing Management System (LMS) would be used for the December 2017 reports, though that form is not yet available. We do not hold out much hope that the new form will automatically load information from earlier filed ownership reports, which means there will be plenty of data to be inputted. We do hope that the FCC makes the new LMS form available as soon as possible so that stations can have plenty of time to work on reports. The earliest that 2017 biennial reports can be filed is October 1, 2017.

One final note. If your NCE station filed a biennial ownership report in 2016 on the old schedule, it will have the "privilege" of filing a new report on December 1, 2017.

Dates To Remember

January 10, 2017

TV, Class A, AM & FM Stations (commercial & noncommercial): complete 4th quarter 2016 issues/program reports. **TV & Class A** stations post the report to your online public file. **AM & FM Stations** place in your public file (if already moved online, place in online public file).

TV & Class A stations (commercial only): complete and electronically file via LMS the FCC Form 398 Children's TV Programming Report for 4th Quarter 2016. Your report should be automatically linked by the 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.

Class A TV Stations Only: complete and post to your online public file certification of ongoing Class A eligibility.

January 30, 2017

Deadline for filing comments in support of petition for rulemaking seeking to allow exclusive online recruitment for position vacancies under the FCC's EEO rules

January 31, 2017

All stations streaming a signal on the internet must file their statement of use and make a minimum payment of $500 per channel to SoundExchange

February 1, 2017

AM & FM Stations in Kansas, Nebraska and Oklahoma: if five (5) full-time station employment unit employee threshold is met, complete EEO public file report and post same in public file as well as post on station website. **If station employment unit has 11 or more full-time employees**, also prepare **and** electronically file mid-term EEO Form 397 and place copy of filed report in public inspection file. **NCE Stations Only**: the Form 323-E ownership report that would have been due on this date has been suspended until December 1, 2017.

AM & FM Stations in Arkansas, Louisiana, Mississippi, New Jersey and New York: If five (5) full-time station employment unit employee threshold is met, complete EEO public file report and place same in public file as well as post on station website.

February 1, 2017 (cont'd)

TV & Class A Stations in Arkansas, Louisiana, Mississippi, New Jersey and New York, if five (5) full-time station employment unit employee threshold is met, complete EEO public file report and post same in online public file as well as on station website **and** prepare **and** electronically file mid-term EEO Form 397. **NCE Stations Only**: the Form 323-E ownership report that would have been due on this date has been suspended until December 1, 2017.

TV & CLASS A STATIONS IN KANSAS, NEBRASKA, AND OKLAHOMA: IF FIVE (5) FULL-TIME STATION EMPLOYMENT UNIT EMPLOYEE THRESHOLD IS MET, COMPLETE EEO PUBLIC FILE REPORT AND POST SAME IN ONLINE PUBLIC FILE AND STATION WEBSITE**.**

For more info, contact Joe Chautin or Mark Balkin.

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