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

Broadcast Newsletter

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BEST WISHES IN 2024!

Our very best wishes to our clients and newsletter readers in 2024. It is our continued and distinct privilege to assist commercial and noncommercial broadcasters throughout the United States as they serve the public. We look forward to helping you with legal matters in 2024.

FCC MEETS COURT DEADLINE AND ISSUES 3-2 ORDER IN 2018 QUADRENNIAL REVIEW OF BROADCAST OWNERSHIP RULES

On the December 27th court-ordered deadline for doing so, the FCC adopted a Report & Order in the long overdue 2018 Quadrennial Review proceeding. The three Democrat-appointed Commissioners voted in favor, and the two Republican-appointed Commissioners voted against, issuing scathing dissents. The broadcast industry had strongly urged a relaxation of the media ownership rules given the changing media landscape, but to no avail.

In the end, the Order left all current broadcast ownership rules in place, but added some tweaks in how those rules will be interpreted and applied. On the radio side of things, where broadcast groups had sought larger caps on radio station ownership in markets, the Order rejected any relaxation of the caps and left the current local radio ownership limits in place, while codifying the interim contour overlap method as the one to be used going forward to measure ownership limits in unrated markets.

On the television affiliation and ownership side of things, the Order retained the Dual Network Rule (73.658(g)) which prohibits common ownership of two or more affiliates of the Big Four broadcast networks in a market. The Order also expanded that rule to prevent use of LPTV and digital multicast affiliations to circumvent the existing rule.

Finally, the Order adjusts the methodology used under the Local TV Ownership Rule (73.3555(b)(1)(ii)) to determine station ranking in a market, noting that a station's audience share ranking in a DMA will now be calculated based upon "the combined audience share of all free-to-consumer, nonsimulcast multicast programming airing on streams owned, operated, or controlled by [a] station as measured by Nielsen Media Research or by any comparable audience ratings service." This change will make it more difficult to own a second TV station in a market under the rule provision allowing such ownership only if the second station is not ranked in the top four stations in the market.

We believe the Order will likely be challenged in court. To what extent the new rules go into effect will turn on the scope and timing of that legal challenge. The FCC can now turn its attention to the 2022 Quadrennial Review, begun a year ago, but so long as the FCC remains in a 3-2 Democrat majority, a change in the substantive media ownership rules is unlikely.

Children's Television Reporting Up Next in January

By January 31, 2024, commercial full power and Class-A TV stations must prepare and file children's television reports covering all of 2023, and upload children's television commercial limits certifications to their public file for all of 2023. We recommend that stations start early.

Failure to timely file the annual children's television report, or reporting less than the required amount of core children's television programming, can result in delays and fines during license renewal. In the most recent television renewal cycle, we encountered at least 10-12 situations where reports had to be amended, sometimes in the face of substantial pressure from FCC staffers on how programs were reported or whether those programs constituted educational or informational programming directed at children.

Renewal staffers also review every form submitted for such issues, so each time your station prepares and files the report potentially creates a license renewal issue. Significant issues with the filed form have to be referred to the full Commission for action. Indeed, a large number of TV renewal applications from the last cycle remain pending and will be decided (probably in 2024) only after the full Commission determines penalties.

Remember that if your station has not aired the minimum number of hours, other efforts can be documented that may be considered by license renewal staffers in determining whether to refer a station's license renewal to the full Commission for review.

Children's television commercial limits compliance is also an ongoing requirement, but is now documented once annually by stations and uploaded to the station online public file. Stations should conduct detailed reviews of their compliance during 2023 before uploading documents in support. The FCC's rules require that stations limit the amount of "commercial matter" appearing in programs aimed at children 12 years old and younger to 12 minutes per clock hour on weekdays and 10.5 minutes per clock hour on the weekend. The definition of commercial matter includes not only commercial spots, but also (i) website addresses displayed during children's programming and promotional material, unless they comply with a four-part test, (ii) websites that are considered "host-selling" under the Commission's rules, and (iii) program promos, unless they promote (a) children's educational/informational programming, or (b) other age-appropriate programming appearing on the same channel.

Stations should devote adequate resources and personnel to ensuring that all children's television requirements are met on an ongoing basis, and all reports are filed and uploads made on time. The children's television report is currently available in LMS for stations to begin work. We are available to assist in both preparing the reports, or in reviewing draft reports to ensure compliance before they are submitted.

Government Shutdown 3.0?

Congress' continuing resolution to fund the federal government runs out on January 19, and a government shutdown (full or partial) could result unless a new agreement is reached by a Congress that is narrowly divided along party lines and within certain party factions.

In past government shutdowns, the FCC has often continued normal operations for a short period before beginning to halt certain agency functions that can affect broadcast licensee filings or totally remove access to and functionality for online public files. Added to this potential January 2024 government shutdown is an FCC budget that expires February 2.

We will communicate with clients in the event FCC operations are impacted. We encourage stations to make all filings or OPIF uploads due in January as early as possible.

Reinstatement of EEO Form 395-B Appears Imminent

In mid-December, the FCC issued a news release that Commissioner Starks had joined with 27 members of Congress who wrote to the FCC urging reinstatement of collection of broadcast workforce diversity data. On the heels of that release, FCC Chairwoman Rosenworcel began circulation of a proposed Report & Order and Further Rulemaking in the FCC's proceeding considering whether to reinstate the FCC's Form 395-B, suspended over two decades ago. That form previously collected gender and ethnicity information for broadcast station employees.

The FCC's updated rulemaking proceeding about the form considered a wide-ranging number of topics, to include whether or not submitted data using the form should be kept confidential given that it cannot be used for enforcement purposes. Whether the information would be submitted anonymously or just held confidentially by the FCC staff was a specific item on which the FCC sought comment. We note that given the evolution of employment laws in the last two decades, the content and instructions to the April 2000 form version are dated, but the rulemaking considered statutory language that may significantly limit the ability to modify the data being collected or whether the data needs to be station specific. The FCC also contemplated updating racial classifications on the form.

One unknown is whether or to what extent a revised form will need to be approved by the Office of Management and Budget. A footnote in the rulemaking stated that OMB has approved the information collection, subject to the Commission's decision resolving the data confidentiality issues, but also acknowledged that the FCC must consult again with OMB on that and potentially other issues. It will be interesting to see whether there is a consensus of the Commissioners in reinstituting the data collection, what is in the "further rulemaking" and how quickly submission of the data will be required.

Dates to Remember

January 10, 2024

TV, Class A, AM & FM Stations (commercial & noncommercial): deadline to complete and upload to online public file the 4th Quarter 2023 issues/program lists and any foreign sponsorship identification reports.

Class A TV Stations Only: deadline to complete and post to your online public file the 4th Quarter 2023 certification of ongoing Class A eligibility.

Noncommercial Broadcast Stations: deadline to complete and post to your online public file the 4th Quarter 2023 report for any 3rd Party Fundraising conducted during the quarter.

January 30, 2024

All Commercial Full Power and Class A Television Stations – deadline to complete and submit the 2023 children's television report in LMS *and* separately upload children's television commercial limits certifications for all of 2023 in the station online public file.

January 31, 2024

Web Streaming Stations: deadline to remit annual license fee and related statement of account with SoundExchange for the statutory license allowing streaming of sound recordings on the web. Payment can be made on SoundExchange's online filing portal "Licensee Direct."

February 1, 2024

Radio and TV Stations located in New Jersey, New York, Kansas, Nebraska, Oklahoma, Arkansas, Louisiana and Mississippi: if five (5) full time employee threshold is met, prepare EEO public file report covering the period from February 1, 2023 – January 31, 2024, upload it to the station online public inspection file and post it on the station website.

Mid-Term EEO Review for Radio stations located in Arkansas, Louisiana and Mississippi: if station employment unit has **eleven (11) or more full-time employees**, an independent **mid-term EEO review** of your last two EEO public file reports by the FCC will occur in connection with the 2023-24 EEO public file report due August 1, and when uploading the report, indicate that the SEU has 11 or more full-timers using the “Mid-Term Review” tab is the OPIF settings section. If the SEU has **between five and ten full-time employees**, when uploading the 2023-24 report, indicate that the SEU has fewer than 11 full-time employees using the “Mid-Term Review” tab in the OPIF settings section (by doing so, no mid-term review of the SEU will take place).

February 5, 2024

Deadline for C-band transition-affected earth station operators (that did not receive lump-sum reimbursements) to submit reimbursement requests for all costs incurred and paid as of the end of 2023.

For more info, contact Joe Chautin or Mark Balkin.

Phone 985.629.0777

Fax 985.629.0778
www.hardycarey.com

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.

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