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

Broadcast Newsletter

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FCC PROPOSES NEW APPLICATION PRIORITIZATION RULE

In a 3-2 vote, with both Republican-appointed Commissioners objecting, the FCC has approved a Notice of Proposed Rulemaking to implement an application prioritization rule based upon applicants certifying that they air certain amounts of local programming.

The FCC's announced goal with the proposed rule is to incentivize stations to support "local journalism" and provide programming that responds to the needs and interests of the communities they are licensed to serve. Part of the majority's justification for incentivizing local programming with an application prioritization scheme stemmed from its view that an objective of the FCC's 2017 decision eliminating the main studio requirement was increasing local programming, which has not occurred. We recall that the primary purpose of that proceeding was to reduce regulatory burdens on broadcasters in a new technological world where a brick and mortar building was no longer necessary. Nevertheless, the majority criticized the 2017 decision as it proposed application processing priority as a new local programming incentive.

That raises the other interesting aspect of the proposed rule -- it might well be unlikely to incentivize local programming at all. The rule would only apply to "non-routine" or "complex" renewal, assignment and transfer of control applications (though the item asks for whether it should apply to more than those). A "complex" application with a local programming certification would be prioritized over a "complex" application without one. The proposal is somewhat vague on what would make an application "non-routine" but things like petitions to deny, or renewal certifications that report rule violations, would certainly add a non-routine aspect to an application.

Most renewal, assignment and transfer of control applications are routine in nature, so certifying to providing local programming – which would be optional to the applicant anyway – does not seem well-designed to accomplish a boost in local programming. What is clear is that processing of a renewal, assignment or transfer of control application without a local programming certification would only come *after* routine or "complex" applications that do include a programming certification. An increase in processing time for those stations choosing not to provide a local programming certification is therefore practically certain. We've squinted at this long enough to wonder just how "voluntary" the certification really is in the end, and it is worrisome to have no indication of how long it might take to process these important types of applications.

The NPRM asks several questions about how to define local programming, which opens up another pandora's box of issues. Also up for decision is how much local programming would have to be aired before a certification can be made. We certainly see slippery slopes and careful rule interpretations as a trademark of any adopted application processing rule.

The dissenting Republican-appointed Commissioners each noted that the NPRM seems like more of an attack on the 2017 main studio rule elimination, or an oblique attempt to reinstate some part of the rule. After you peruse the NPRM, you might want to see what Commissioners Carr and Simington had to say.

Comment deadlines will follow publication of the NPRM in the Federal Register.

Did Your TV Station Complete Its 2023 Children's Television Reporting?

If your full power or Class A television station did not complete and file a children's television report and upload children's television commercial limits documentation to its online public file by the January 30, 2024 deadline, you need to do so immediately. 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.

Although this is only an annual requirement, stations should devote adequate resources and personnel all year to ensuring that all children's television requirements are being met on an ongoing basis.

EEO Form 395-B Reinstatement Update

Although the Report & Order and Further Rulemaking in the FCC's EEO proceeding considering whether to reinstate the FCC's Form 395-B, is on circulation among the Commissioners, it has not yet been made public, even in draft form. The item is also not included on the FCC's February Open Meeting Agenda. It remains possible that the item could be released outside of a formal meeting.

Once the Report and Order & Further Rulemaking document is issued, we suspect reinstatement of the form will be part of the ordering language, but other EEO matters like additional rule changes may be part of the "further rulemaking" that requests additional comment. We are curious to learn whether, or to what extent, submission of data under any new reporting requirement will be confidential.

The EEO 395-B form previously collected gender and ethnicity information for broadcast station employees but was suspended over two decades ago.

FCC Issues $26,000 EEO Fine

The full Commission recently issued an Order assessing a $26,000 monetary forfeiture for a broadcast licensee's failure to upload an annual EEO public file report to the public files and websites of the stations in a specific station employment unit. The public file upload finally occurred 9 months after the deadline.

While there were aggravating circumstances that increased the amount of the assessed forfeiture (prior EEO reporting violations), the FCC's conclusion that a single late-uploaded/posted EEO public file report supported an overall conclusion that the licensee had not been regularly evaluating its EEO program is notable. Stations that must complete the annual report should be especially vigilant to ensure that the report is timely uploaded to the online public file of every station in the station employment unit and posted to their websites.

FCC Proposes Making Disaster Reporting Mandatory for Broadcasters

In late January, the FCC issued a Notice of Proposed Rulemaking that would make certain disaster reporting mandatory for broadcast stations. Many broadcasters are familiar with the current Disaster Information Reporting System (DIRS) where reports during a disaster on a station's status are optional. The NPRM would make such reporting obligatory. In addition, the NPRM seeks input on whether to make reporting station operational outages mandatory in the FCC's Network Outage reporting System (NORS).

During disasters, communication outages can make it difficult for stations to make such reports, and the FCC seeks comment on this issue as it seeks to adopt what it calls a "simplified" reporting procedure in such circumstances. In an earlier related proceeding, many broadcasters objected to mandating disaster reporting as too burdensome. The FCC asks for further comment on that issue and others, and on whether to make reporting obligations different for large or small broadcasters.

We wonder about how a broadcast station would learn if it was in the geographic area that the FCC considers to be affected by a disaster and thus subject to mandatory reporting. In some instances, that would be obvious, but in many others, including those when stations might only be on the fringe of a disaster zone, it may not be immediately clear if reporting is required.

Sponsorship Identification and Political File Violations Lead to Consent Decree and $500,000 Fine

The FCC's Media Bureau announced a consent decree with a broadcast licensee that includes a $500,000 fine for violations of the FCC's sponsorship identification and political file rules. The action stems from the licensee's repeated failure to air sponsorship identification announcements for multiple episodes of, and numerous advertisements promoting a paid-for political program on multiple stations airing the program over an 18-month period.

In addition, the program contained multiple appearances of legally qualified candidates for public office, and other messages related to political matters of national importance, none of which were reported in the stations' public files.

Dates to Remember

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 February 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.

February 6-8, 2024
FCC Public Safety and Homeland Security Bureau conducting voluntary exercise of Disaster Information Reporting System (DIRS)

April 1, 2024

Radio and TV Stations located in Indiana, Kentucky, Tennessee, Texas, Delaware & Pennsylvania: if five (5) full time employee threshold is met, prepare EEO public file report covering the period from April 1, 2023 – March 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 Indiana, Kentucky and Tennesee: 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 April 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).

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