Regulatory Update for the Broadcast Industry

ohio association of broadcasters

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This publication summarizes various FCC and other regulatory issues for which there was activity during the period from December 1, 2022, to September 8, 2023, unless otherwise indicated.

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Anna Gomez Confirmed for Remaining Vacant FCC Commissioner Seat; Re-nominations for Commissioners Geoffrey Starks and Brendan Carr Remain Pending

For the first time since President Biden took office in January 2021, the Federal Communications Commission has a full complement of five Commissioners.

On September 7, 2023, the Senate voted 55-43 to confirm Anna Gomez to fill the fifth Commissioner seat, which has stood empty for more than two-and-a-half years. The Biden Administration nominated Gomez in May (along with re-nominating current Commissioners Brendan Carr and Geoffrey Starks for new terms), just two months after President Biden's original nominee, Gigi Sohn, voluntarily withdrew from consideration following a contentious confirmation process that sharply divided members of the Senate Commerce Committee.

When the Biden Administration announced the nomination of Gomez, it touted her "extensive experience in domestic and international communications law and policy." Gomez is an accomplished telecommunications attorney with both government and private sector experience. She served at the FCC for 12 years in a number of positions, including senior legal advisor to former FCC Chair William Kennard and deputy chief of the FCC's International Bureau. Gomez also served as the Deputy Administrator of the National Telecommunications and Information Administration from 2009 to 2013. Currently, Gomez is a senior advisor for international information and communications policy in the State Department's Bureau of Cyberspace and Digital Policy. She will be the first Latina to serve on the Commission in more than two decades.

Gomez's confirmation ends the longstanding 2-2 bipartisan deadlock at the Commission, giving Democrats a working majority. Just what that might mean for issues of particular interest to broadcasters—including local media ownership rules and the long-pending 2014 "virtual MVPD" docket—remains to be seen.

The timing for Senate action on the pending re-nominations of Commissioners Carr and Starks currently remains uncertain. Timing considerations are most important for Commissioner Starks, who will be required to vacate his Commissioner seat by January 3, 2024, absent reconfirmation.

FCC Recalibrates Regulatory Fee Methodology to Benefit of Broadcasters; FY 2023 Regulatory Fees Due by September 20, 2023

In August 2023 the FCC finalized the regulatory fee amounts broadcasters will be required to pay for Fiscal Year 2023 and set a payment deadline of **11:59 PM ET on September 20, 2023**. This year marks several important regulatory-fee sea changes for broadcasters, including (1) a change in the FCC's implementation of its fee methodology that results in broadcasters shouldering a lower percentage of the overall annual regulatory fee burden, and (2) the creation of a new, lower payment tier for small radio stations serving populations between 1 and 10,000.

In all, the FCC will collect $390,192,000 from regulatees in FY 2023 fees—approximately $8.2 million more than were assessed in FY 2022. Nonetheless, both radio and television broadcasters should see a *decrease* of approximately 5 to 7% in their FY 2023 regulatory fees as compared to FY 2022.

Media Bureau Allocation. By law, the FCC's regulatory fees must be divided among payors in a way that "take[s] into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities." However, "indirect" FCC costs—i.e., work the FCC performs that is not directly related to a particular category of regulatory fee payor—are typically divided proportionally among all fee payors.

This year, the FCC's allocation to the Media Bureau takes account of sustained advocacy by NAB and others urging the FCC to reexamine its "indirect" fee allocations to ensure broadcasters do not continue to shoulder part of the fee burden for services from which they receive no benefit. As a result, the Commission's allocation to the Media Bureau (which includes fees collected from radio, television, cable, and DBS operators) decreased from 36.1% in FY 2022 to 31.76% in FY 2023.

Television Broadcast Stations. The FCC will continue to calculate fees for full-power televisions stations based on the population covered by the station's contour (rather than the prior calculation method, which was based on Nielsen DMAs and applied from approximately 1995 to 2018). For FY 2023, the Commission adopted the fee factor proposed in the underlying Notice of Proposed Rulemaking (the "NPRM")—$0.007799 per population served—for full-power broadcast television fees. (As a reminder, the fee factor is equal to the revenue amount required from all television fee categories divided by the total population count of all station call signs subject to regulatory fees).

Radio Stations. For FY 2023, the FCC adopted a proposal from the underlying NPRM to create a new, lower fee tier for the smallest AM and FM radio stations—those serving populations between 1 and 10,000. As NAB, all State Broadcaster Associations (including OAB), and others within the broadcast industry have argued, the creation of such a small-radio tier more fairly distributes the burden of regulatory fees across radio broadcasters of all sizes. In previous years, the lowest radio-service population tier the FCC recognized was 25,000 or less. The FCC has now separated that single tier into two: one for populations of 10,001 through 25,000 and another for populations of 10,000 or less. There are no changes to the remaining tiers.

COVID-19 Relief. In the underlying NPRM, the FCC sought comment on whether to continue its COVID-era temporary relief measures for payors experiencing financial hardship caused by the COVID-19 pandemic. NAB and the State Broadcasters Associations argued in favor of extending that relief, with the State Broadcasters Associations further requesting that the FCC make those relief measures permanent. Although the FCC declined to permanently adopt those relief measures as part of its current regulatory fee proceeding, the FCC did extend (i.e., for purposes of FY 2023 regulatory fees) multiple temporary relief measures, including:

- For installment payment of regulatory fee debt, the Commission will continue to offer a nominal interest rate and waive its typical down payment requirement.

- The FCC will continue to partially waive the FCC's "red light" rule by permitting regulatees with outstanding debts owed to the Commission to nonetheless request waivers, reductions, deferrals, and installment payment terms for FY 2023 fees. (Please note, however, that regulatees for whom the red light rule is waived will be required to resolve all currently owed delinquent debt before the Commission issues a decision on their relief request.)

- The FCC will continue to allow payors seeking waiver, deferral, or reduction of their FY 2023 regulatory fees to submit supporting documentation after they submit their initial request, rather than being given only "one shot" to provide documentation sufficient to support their request. This relief is not unlimited, however; such documentation must be submitted before January 31, 2024, for it to be considered with a request, and payors will only be permitted one opportunity to submit such additional documentation.

- The underlying NPRM began the process of permanently codifying the FCC's COVID-era relief of not requiring separate filings for requests for fee waivers, reductions, deferrals, or extended payment terms (i.e., installment payment requests) for financial hardship. The FCC's new rules now permit single submissions requesting any combination (or all) of the foregoing forms of relief. Such requests and all supporting documents must be submitted electronically to regfeerelief@fcc.gov.

Fee Payments Must Now Be Paid in CORES; Fee Filer No Longer Available. As was implemented for FY 2022, regulatory fee payments must be made through the FCC's CORES platform, rather than its historical "Fee Filer" payment platform. (In December 2021, the Commission discontinued use of the Fee Filer system and incorporated its functionality into CORES.)

To use CORES, broadcasters must first register at https://apps2.fcc.gov/fccUserReg/pages/login.htm. If they have not already done so, broadcasters must also take steps to associate their existing FCC Registration Number ("FRN") to their FCC user name. More information regarding the registration process is available in via the FCC's online tutorials, such as those available here: https://www.fcc.gov/licensing-databases/fcc-registration-system-cores/commission-registration-system-video-tutorials.

EAS Nationwide Test Scheduled for October 4, 2023; **All Broadcast Stations Must Participate**

In early August, the FCC and FEMA announced that the next nationwide EAS test is scheduled for **Wednesday, October 4, 2023, at 2:20 p.m. ET**. All broadcasters are required to: participate in the October 4 nationwide test; timely amend their prior 2023 Form One filings (if necessary); and timely file the remaining, required Form Two and Form Three reports associated with the nationwide test.

Nationwide Test Scheduled for October 4. The 2023 nationwide EAS test ("NPT") will be conducted at 2:20 p.m. ET on October 4. (The backup date, if needed, is October 11.) Stations should mark their calendars, ensure that EAS gear is functioning, assign responsibility for the filing of nationwide EAS test reports (the first of which was due earlier this year, on February 28), and review (and update, as warranted) the FCC's EAS Operating Handbook (more on that below).

FEMA will disseminate the EAS message using Common Alerting Protocol ("CAP") formatting, in both English and Spanish, via the Integrated Public Alert and Warning System ("IPAWS"). The test message audio and text have been designed to be identical "to the greatest extent possible," and will read as follows: "This is a nationwide test of the Emergency Alert System, issued by the Federal Emergency Management Agency, covering the United States from 14:20 to 14:50 hours ET. This is only a test. No action is required by the public."

To begin preparing now for the October 4 test, stations are encouraged to take the following steps:

- Review the station's state EAS plan;
- Ensure that a copy of the 2023 version of the FCC's EAS Operating Handbook (currently available: https://www.fcc.gov/file/24607/download) is located at normal duty positions or EAS equipment locations and is immediately available to operators;
- Review the EAS Operating Handbook to become familiar with and prepare for the actions that will need to be taken upon receipt of the test alert;
- Ensure that the station's EAS equipment operates in compliance with the FCC's EAS rules;
- Upgrade, as needed, EAS equipment software and firmware to the most recent version;
- Complete and file any updates to the station's previously filed EAS "Form One" by September 15; and
- Manually synchronize EAS equipment clocks to the official time provided by NIST (the National Institute of Standards and Technology), if the station's equipment does not automatically synchronize to an Internet time source.

As a reminder: **all broadcast stations are required to participate in the EAS**. The FCC's EAS rules no longer recognize "non-participating" status for stations. Accordingly, all stations must be prepared to participate in the nationwide test on October 4 (or, if the backup date is necessary, on October 11).

Nationwide Test Reporting Requirements: "Form One" Amendments Due on or Before September 15; "Form Two" Due on or Before October 5 (Day After National Test); "Form Three" Due After National Test, on or before November 20. You may recall from past years that there are three (yes, three!) reports that must be filed by each station in connection with a nationwide EAS test. These reports must be filed electronically in the FCC's ETRS (EAS Test Reporting System) by certain deadlines established by the FCC.

As stated above, the first report—called Form One—was due to be filed earlier this year, by February 28. Any updates or corrections to a station's previously filed Form One must be made on or before September 15. This is the report that contains basic information about each station, including its transmitter location, EAS monitoring assignments, and make and model of EAS gear. Changes in a station's circumstances since the last Form One was filed (i.e., on or around February 28) that could necessitate an amendment to your station's prior Form One filing could include changes resulting from assignments of station licenses or transfers of control, updates to EAS equipment or software, or changes due to any authorized revisions of the State EAS Plan.

The second report—called Form Two—will be due by 11:59 p.m. on October 5. Form Three will be due by November 20. Both Forms Two and Three will first become available in ETRS on October 4, 2023.

Media Bureau Announces Filing Procedures and Requirements for November 2023 LPFM Filing Window; LPFM and FM Translator Application Filing Freeze Began September 1, 2023

The FCC has announced and is now in the process of preparing for the forthcoming year-end filing window for new low-power FM ("LPFM") station construction permits. The window will be open from 12:01 am ET on Wednesday, November 1, 2023, to 6:00 pm ET on November 8, 2023, and will be the first LPFM filing window in approximately 10 years. Because Commission rules generally prohibit a full-power broadcast licensee (or a party with an attributable interest in a full-power broadcast station) from holding an LPFM station authorization, most current broadcasters will want to take note of the coming window not for purposes of applying for a new LPFM station, but instead primarily to ensure that no to-be-filed LPFM applications present potential interference concerns with their existing station(s).

Additionally, and to prepare for the November window, the FCC implemented a freeze on LPFM and FM translator minor modification applications, which began on September 1, 2023. The freeze will continue "until the close of the" LPFM new station filing window.

Background. The FCC first established the LPFM service in 2000 as a secondary non-commercial educational broadcasting service with relatively low-power authorizations (maxing out at 100 watts effective radiated power at 100 feet antenna height above average terrain). The Commission's goal was to enable LPFM stations to serve very localized communities or underrepresented groups therein. Accordingly, those who may apply for, license, and operate an LPFM station are limited to non-profit educational organizations who will use the station to advance an educational program, governmental and non-governmental entities that will provide public safety radio services (e.g., localized traffic and weather information), and qualifying tribal applicants. Applicants must also qualify as "local" under the relevant FCC rules, such as—for example—by maintaining a local chapter, branch, headquarter, or campus within a defined distance from the proposed transmitter site.

The last LPFM new station filing window was in 2013, and resulted in approximately 2,800 applications for new LPFM facilities. Since that time, the FCC has adopted new rules and procedures governing LPFM application filings and selection amongst competing applications, as well as updated technical rules designed to increase flexibility in LPFM transmitter siting.

The Forthcoming LPFM New Station Filing Window. As mentioned above, the FCC has indicated that the coming filing window for new LPFM stations will be open for approximately one week—from 12:01 am ET November 1st to 6:00 pm ET November 8—during which potential applicants may file for a new LPFM construction permit via the recently revised FCC Form 2100, Schedule 318. The Notice makes clear that applicants should "carefully review" the filing procedures and requirements set out in the Notice and the relevant FCC rules, as the number of applications and amendments most applicants will be permitted to file will be extremely limited.

If you have concerns with how the window might impact your existing broadcast authorizations, we strongly encourage you to contact communications counsel.

FCC Provides Limited Continuing Authorization to Existing Qualifying FM6 / Franken FM Stations

In late July 2023 the FCC took long-anticipated action regarding so-called FM6 or "Franken FM" stations—that is, analog FM radio stations programmed by channel 6 TV licensees and receivable by the public at 87.75 MHz. In its Fifth Report and Order (the "Order") in the relevant proceeding, the FCC granted existing qualifying channel 6 LPTV licensees the ability to continue broadcasting analog signals at 87.75 MHz, subject to various conditions and continuing obligations. The Order largely bases its decision on the public interest service provided by such legacy "FM6" licensees; yet the Order also declines to permit *new* FM6 stations in light of a lack of record evidence regarding potential interference that could be caused if new FM6 stations were to be authorized.

Background. FM6 / Franken FM stations have been around since nearly the inception of the low power television ("LPTV") service in 1982. Because the lower end of the FM radio band (88.1 MHz to 107.9 MHz) is directly adjacent to the upper end of the Channel 6 TV band (82 MHz to 88 MHz), since the 1980s some channel 6 LPTV stations have used a portion of their licensed spectrum to provide radio programming receivable at 87.7 and 87.75 MHz. However, the government-mandated transition from analog to digital television transmission—which in relevant part established a July 13, 2021, deadline by which LPTV licensees were required to cease all analog operations—raised the issue whether the FCC should (and, under the relevant provisions of the Communications Act, could) authorize digital LPTV stations to provide analog FM radio-type service.

The FCC began examining these issues in a 2014 Further Notice of Proposed Rulemaking. However, the issue languished for the better part of a decade, including as the 2021 LPTV digital transition deadline approached. In light of that looming digital transition deadline, over the coming years 13 legacy FM6 stations filed—and the Media Bureau granted—STA requests for those stations to transition to ATSC 3.0 for video operations while maintaining a separate analog FM radio transmitter on 87.7 MHz. As a result, in 2022 the FCC issued a Further Notice of Proposed Rulemaking with the goal of rendering a final decision on the continued viability of FM6 stations, both those currently operating pursuant to STA and potential future FM6 licensees.

The Order's Decisions on FM6 Operations. Relying in large part on the relatively unique public interest service provided by existing FM6 stations, the Order concluded that continued FM6 operations should be permitted on 87.75 MHz for existing, qualifying facilities, subject to various conditions to ensure continued public interest service and prevent the possibility of harmful interference to primary FCC licensees. In particular, the Order cited "the length of time that certain FM6 LPTV stations have been operating and efforts they undertook to convert to digital operations to limit consumer impact," and concludes that permitting continued existing FM6 operations will preserve the delivery of "programming (especially public safety and emergency information) that viewers have come to rely on." In this regard, the Order further explained that FM6 listenership and community presence have been developed over decades for existing stations, and that many FM6 stations provide programming "intended to support historically underserved populations" and "niche music audiences."

As noted above, the Order placed various conditions on the remaining FM6 LPTV licensees, in light of the fact that the provision of analog radio service must, under the Communications Act, be "ancillary or supplementary" to the primary digital television programming provided by the FM6 LPTV stations. In the words of the Order: "The rules we adopt ensure that FM6 LPTV stations are first and foremost LPTV stations and that their video programming stream is prioritized over any audio stream." Further, under the rules adopted in the Order, FM6 licensees are further limited to specified technical parameters, and all FM6 operations are prohibited from interfering with any other licensed or primary spectrum user.

The Order also declines to permit new entrants to FM6 operations, given the FCC's conclusion that the public interest analysis regarding the 13 existing qualified FM6 licensees does not apply with equal force to the authorization of new FM6 facilities. Among other things, the Order explained that new FM6 entrants would not have an established history of providing public interest radio service to a specific community served by the 87.75 MHz frequency, nor would new FM6 entrants have years of demonstrated operation at 87.75 MHz without any meaningful evidence of interference caused to other licensees.

ATSC 3.0 Transition Moves Forward with R&O on Rules Governing Hosting, Content, and Technical Standards, as Well as Additional FNPRM

In late June 2023, the FCC issued a Third Report and Order and Fourth Further Notice of Proposed Rulemaking (the "R&O" and "FNPRM," respectively) updating and clarifying certain rules governing broadcasters' voluntary transition to the ATSC 3.0 (also called "NextGen TV") broadcast standard. The R&O modified several rules related to the hosting of programming streams and extends two rules that govern certain content and technical standards. The FNPRM seeks further comment on whether the FCC can or should require that standard essential patents for ATSC 3.0 be licensed on reasonable and non-discriminatory terms; comments are due by September 15th, with reply comments due by October 16th.

Background. As a reminder, the new ATSC 3.0 standard is not backward-compatible with existing television sets and receivers, so a viewer that currently watches broadcast programming in the legacy ATSC 1.0 standard will not be able to view 3.0 signals without additional or upgraded equipment. To ensure that those viewers do not lose access to ATSC 1.0-formatted programming during the NextGen TV transition, the Commission has required broadcasters to continue to make their programming available in both ATSC 1.0 and 3.0 formats. At a minimum, broadcasters transitioning to 3.0 must continue to offer their *primary* programming stream in ATSC 1.0 to viewers in their community of license. Because no additional spectrum is available to facilitate the transition to the ATSC 3.0 standard, broadcasters within a DMA must work together through hosting arrangements to ensure that 1.0 programming remains available while 3.0 broadcasts are launched.

FCC rules have for some time addressed the hosting of a station's primary stream. Those rules require a station's ATSC 1.0 program stream to be a simulcast of its 3.0 program stream, and to be "substantially similar" to the 3.0 stream—that is, both streams must contain the same programming, apart from features based on the enhanced capabilities of 3.0 (e.g., hyper-localized weather, interactive emergency alerts, etc.), targeted advertisements, promotions for upcoming programs, enhanced formats made possible by 3.0 technology (e.g., 4K or HDR), and the like. Such hosted streams are treated as temporary second channels of the originating station (not the host station). Of course, stations often broadcast more than a single programming stream—many air one or more multicast channels as well. FCC rules did not address the hosting of multicast streams, until the FCC's action in June 2023.

New Licensing Rules. The R&O adopted several rules for hosting both simulcast and non-simulcast multicast streams:

- Simulcast Multicast streams are those multicast streams that are simulcast in both 1.0 and 3.0. In the case of such streams, a station transitioning to the NextGen TV broadcast standard may now modify its license to include the simulcast multicast stream(s) being hosted on another station. The rule applies whether or not the station is broadcasting the 1.0 or 3.0 multicast stream on its own channel, and whether or not the multicast stream is hosted together with the station's primary stream on the primary simulcast host or on a different simulcast host.

- Non-Simulcast 1.0 Multicast streams are those multicast streams that a transitioning station broadcasting its primary stream in 3.0 wishes to broadcast via a host station in 1.0. Under the Commission's new rules, the 3.0 station may modify its license to include the hosted multicast stream(s). Note, however, that this rule applies only to a station broadcasting in ATSC 3.0 on its own channel, not to a station broadcasting in 3.0 on a host channel.

Notably, the FCC declined to permit so-called "lateral hosting," wherein a NextGen TV station still broadcasting in 1.0 and serving as a 1.0 host would move some of its own 1.0 multicast channels to another host station in the market in order to facilitate the hosting needs of other transitioning stations.

As with the FCC rules for primary streams, hosted multicast streams will be treated as temporary channels of the originating station, not the host station, and will not result in ownership attribution for the licensee of the host station. There are several benefits to these new rules. Most notably, they provide clarity and greater certainty for transitioning broadcasters, many of whom have been relying on special temporary authority to facilitate the types of multicast hosting arrangements authorized by the R&O. Additionally, these clarifications will allow noncommercial educational (NCE) stations to host commercial multicast channels. Prior to the R&O, there was concern that such hosting would violate the prohibition on NCE stations using or offering their facilities for commercial programming. Under the new rules, the NCE host station's facilities would not be exclusively utilized by the NCE station, but instead shared by both stations operating pursuant to their own licenses.

Limitations. The R&O's new licensing allowances are largely designed to facilitate the transition to ATSC 3.0 while maximizing the continued availability of ATSC 1.0 programming to the viewing public and balancing the rights of other participants in the market. To that end, the R&O established several limitations on multicast hosting arrangements, including:

- Capacity: A station broadcasting in ATSC 3.0 cannot license multicast streams via hosting agreements with other stations beyond what the transitioning station could broadcast if it had continued operating its own facility in 1.0.
- Coverage: As with simulcast primary streams, 1.0 multicast streams must be hosted by a host station in the same DMA, and they must cover the originating station's entire community of license. ATSC 3.0 multicast streams must only be hosted by a station in the same DMA.
- Children's Programming: In order to count toward the originating station's children's programming requirements, a hosted multicast stream must cover at least 95% of the population served by the originating station pre-transition.

Extending Substantially Similar Rule and A/322 Standard. In addition to establishing new multicast hosting rules, the R&O extended two rules originally set to sunset this year. First, the R&O extended the "substantially similar" rule discussed above—originally scheduled to sunset in July 2023—for another four years, through July 17, 2027. Second, the A/322 standard—a physical layer protocol, which "defines the waveforms that ATSC 3.0 signals may take"—was originally set to sunset in March 2023, but also has been extended through July 17, 2027. In each case, the FCC will initiate a review of the rules one year prior to expiration to determine whether they should be extended "based on marketplace conditions at the time."

FCC Proposes "All-In" Price Disclosures for Cable and Satellite Operators

Also in late June 2023, the FCC released a Notice of Proposed Rulemaking ("Notice") seeking comments on its proposal to require cable operators and direct broadcast satellite ("DBS") providers to specify the "all-in" price—that is, the total cost—for video service in their promotional materials and on subscribers' bills. The FCC reasoned that such a rule would "give consumers a transparent and accurate reflection of their subscription payment obligations and eliminate unexpected fees," thereby helping consumers to make informed choices about their video service. The comment window on the proceeding has now closed.

Background. The "all-in" proposed rule is rooted in the legislative and regulatory commitment to provide greater transparency in subscribers' bills for the purchase of video services. In 2019, Congress passed the Television Viewer Protection Act of 2019 ("TVPA"), which, among other things, sought to address the unexpected and confusing fees that consumers often face when purchasing a video programming service—including things such as broadcast TV or regional sports programming surcharges. The TVPA revised the Communications Act of 1934 to add enhanced consumer protections, such as requiring multichannel video programming distributors ("MVPDs") to include in electronic bills an itemized statement breaking down the total amount charged for the video service and the amount of all related taxes, administrative fees, equipment fees, and other charges; the termination date of the service contract; and the termination date of any applicable promotional discount.

Despite these statutory protections, the Notice suggested that further steps are necessary to effectively advance Congress's goal of protecting consumers who purchase video services. The Notice referred to comments of Consumer Reports which stated that "below-the-line fees" (still) make up the bulk of costs that are added to advertised rates and MVPD subscribers' bills. The Notice recognized that "websites, advertisements, and other promotional materials may advertise a top-line price that does not note prominently the mandatory programming costs that make up the service until the customer signs up for service. For example, those materials use a different font size (often in fine print) and separate from the proclaimed monthly subscription fee amounts extra 'fees' designated by the provider that consumers will also need to pay for video programming that they will receive."

The Notice. For these reasons, the Notice invited comment on its proposal to address the ongoing problem of unexpected fees associated with video programming services by requiring cable operators and DBS providers to aggregate the cost of video programming that they provide as a prominent single line item on subscribers' bills and in any promotional materials. If the proposed rule is implemented, bills for video programming services will be required to clearly reflect the total cost for the service, including charges for items such as broadcast programming and regional sports programming but excluding any taxes or charges unrelated to video programming, such as equipment costs. The Notice also proposed "to explicitly state in [its] rule that cable operators and DBS providers may complement the prominent aggregate cost line item with an itemized explanation of the elements that compose that aggregate cost, so long as the cable operator or DBS provider portrays the video programming-related costs as part of the all-in price for the service."

The Notice asked commenters to address a number of questions related to the proposed "all-in pricing" rule, including:

- Whether the proposal is sufficient to ensure that subscribers receive accurate information about the cost of video service;
- Whether there are alternative ways to ensure transparency in consumer billing;

- Whether the proposal is feasible for cable operators or DBS providers that bundle video programming with other services like broadband Internet service;
- How the FCC should apply its proposal to plans and promotional materials that differ by (among other things) the size of an advertisement, market-specific price differences, and category of subscriber—that is, residential, small business, and enterprise customers; and
- Whether the rule should apply to existing customers with legacy plans.

FTC Releases Long-Anticipated Updates to Endorsement Guides

In July 2023, the Federal Trade Commission (the "FTC") released a July long-expected update of the Guides Concerning the Use of Endorsements and Testimonials in Advertising (often colloquially known as the "Endorsement Guides"), which provide guidance on FTC-compliant use of endorsements and testimonials in advertising. The FTC requires that claims in endorsements be truthful, and prohibits those that are deceptive or unfair. The Endorsement Guides reflect the general principles the FTC uses in evaluating endorsements and include examples illustrating how those principles might be applied in specific circumstances. Although the Guides are not binding rules, the FTC can take action under authority granted by the FTC Act if any endorsement or testimonial (collectively, "endorsements") violates applicable law.

The Guides were last updated over a decade ago in 2009. In light of the rise of social media, digital, and influencer marketing, in 2020 the FTC began reviewing the Guides and sought public comments on the benefits and impact of the Guides. It has now adopted the revised Guides. The revised Guides and the FTC's explanations thereof are quite lengthy (totaling nearly 84 pages of substantive content); the below does not provide a comprehensive treatment of all aspects of the revised Guides, but instead identifies and discusses some of the updates most pertinent to broadcasters.

"Endorsement" Definition. "Endorsements" are broadly defined as any message for a "product" that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser. The revised Guides clarify that tags in social media posts and other forms of communication, including oral statements, "can be" endorsements (but are not necessarily). The definition of "products" was also revised to include brands alongside products, services, companies, and industries.

"Material Connections". Previous iterations of the Guides have focused on the concept of "material connections," and that remains true in the revised Guides. When there is a material connection (as that term is defined in the Guides) between the endorser and the advertiser, such connection must be disclosed in a "clear and conspicuous" manner.

The Guides have been consistent that a "material connection" is any connection between the endorser and the advertiser that the audience wouldn't reasonably expect and that would materially affect the credibility of the endorsement. Material connections can include business, family, or personal relationships. They can also include when an advertiser pays or provides free or discounted products to the endorser, even when the advertiser does not require an endorsement in return. Material connections can also include any other benefits to the endorser, such as the opportunity to appear on television or in other media. (Significantly, the FCC's sponsorship identification rule would also be triggered if any money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by a station or on-air talent for an endorsement—in which case, an FCC rule-compliant sponsorship identification would be required.)

The revised Guides clarify that material connections must be disclosed when a "significant minority" would not understand or expect the connection. For example, a television commercial featuring a celebrity endorsement (that is otherwise truthful and not deceptive) need not disclose that the celebrity was paid for the endorsement because viewers are likely to expect the celebrity was paid for their appearance. A similar example is a podcast host beginning a podcast by reading what is obviously a commercial. Such commercial would not require a disclosure because listeners would likely still expect the podcaster was compensated even without disclosure of the connection.

Although the Guides decline to quantify what constitutes a "significant" minority of an audience, the FTC notes that in other contexts it has determined that "10%—or even lower" can support an FTC finding of sufficient statistical significance.

The FTC also expressed reluctance to provide examples of material connections between advertisers and endorsements on the internet and social media that would not require disclosure. In the example above with the podcast host, the Guides explain that, if that same podcast host mentions the product on social media, the fact that no disclosure was required in the podcast has "no bearing" on whether there has to be a disclosure in the social media post. Put differently, each particular endorsement triggers a "fact-specific" analysis; the circumstances of the social-media mention would need to be evaluated on their own terms.

The nature of the connection must be disclosed sufficiently to allow consumers to evaluate the significance of the connection to the endorsement. However, the disclosure need not necessarily include the complete details of the connection. As described in a new example in the Guides, if an app developer gives a consumer an app for free in exchange for a review, a disclosure that the consumer received the app for free is adequate. To slightly change the facts, if the advertiser also paid the consumer $50, the disclosure would also need to disclose that the consumer was paid in addition to receiving the free app. However, the FTC currently takes the position that specific payment amounts do not need to be disclosed because the FTC is "not convinced" that consumers are generally misled by not knowing how much endorsers are paid for their endorsement.

Finally, the revised Guides add that not all connections are material—some may be too insignificant to materially affect the weight or credibility of the endorsement and would thus not require disclosure. The FTC does not, however, provide examples of immaterial connections because the agency takes the position that whether a connection is immaterial is "such a fact-specific question that it is difficult to devise a useful example." When considering whether disclosure of a connection is required, the focus should be on whether the weight or credibility the audience gives to the endorsement would be materially affected if the audience knew of the connection.

"Clear and Conspicuous" Disclosures. The revised Guides add a definition of "clear and conspicuous" disclosures. A disclosure is clear and conspicuous if it is "difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers."

The Guides explain that if an endorsed product is targeted at a specific group, the FTC will consider members of that group to be "ordinary consumers" in its analysis of whether a disclosure is sufficiently "clear and conspicuous." In new examples, the Guides explain that if an advertisement targets foreign-language speakers who are unable to understand English, an endorsement disclosure in English would not be "clear and conspicuous." Similarly, an endorsement disclosure for a product targeted at senior citizens will be evaluated from the perspective of older consumers, including those with diminished auditory, visual, or cognitive processing abilities.

The FTC further explains that disclosures should be made in the same form as the endorsement itself to be considered "clear and conspicuous." This means that if the endorsement is visual, the disclosure should also be visual; if the endorsement is made through audible means, the disclosure should be made audibly; and any audio-visual endorsement should include an audio-visual disclosure. Visual disclosures should stand out from any other accompanying text or visual elements so that they can be easily read and understood. Audible disclosures should be "delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand." Finally, for endorsements made using an "interactive electronic medium," such as social media or the internet, disclosures should be "unavoidable." As an example, a disclosure on social media is not "clear and conspicuous" if the endorsement is immediately visible in the social media post but you must click "read more" to view the accompanying disclosure.

Additionally, disclosures should be clear and conspicuous on all formats in which consumers may encounter the endorsements. As an example of an inadequate disclosure, the Guides describe a disclosure for a social media advertisement that is clear and conspicuous when viewed on a computer browser, but is not clear and conspicuous on a smartphone.

Liability of Advertisers and Endorsers. The revised Guides explain that advertisers are subject to liability for misleading or unsubstantiated statements in endorsements or for failure to disclose material connections. In fact, advertisers may be liable for deceptive endorsements, even when the endorser isn't liable (for example, if an advertiser creates a television ad including an endorser making a truthful statement, but one that reflects atypical results of using the product.)

A new section addresses the liability of endorsers. An endorser may be liable for representations the endorser knows or should know to be deceptive, such as when the endorser's claim is inconsistent with their personal experience with the endorsed product. This includes when an endorser suggests that they have personally used a product when they have not, or when they have not used the product in the way they say they have. For instance, a new example in the Guides describes a radio advertisement played during commercial breaks in which a well-known DJ talks about how much they enjoy using a particular coffee maker every morning. Because the

DJ's comments communicate that they regularly use the coffee maker, if they actually only used the product once during a demonstration by the manufacturer, the ad would be deceptive, and the DJ could incur liability. (Recall, of course, the recent case of a large media ownership group subject to significant FTC penalties for endorsements by radio personalities that allegedly misrepresented the endorsers' use of the products being endorsed.)

Endorsers may also be liable for failing to disclose unexpected material connections between themselves and an advertiser.

FCC Issues NPRM on Increased FM Digital Power Output

In late August 2023, the FCC issued a Notice of Proposed Rulemaking (the "NPRM") taking action on two pending petitions from NAB, Xperi, and NPR requesting that the FCC (1) make more generous the formula currently used to determine the FM power levels of certain digital stations and (2) provide blanket authorization for digital FM radio stations to use asymmetrical sidebands. Comments on the NPRM are due by September 21; reply comments are due by October 6.

Background. The FCC has authorized hybrid digital audio broadcasts since 2002, allowing stations the option to implement digital broadcasts—transmitted in addition to a station's existing analog signal—via IBOC. Although there are many technical nuances to digital broadcasting, simply put IBOC is a method of transmitting a digital audio signal simultaneously with an AM or FM station's existing analog signal, by transmitting the digital signal via the sidebands of the center, analog frequency. Older receivers continue to receive the analog signal. On the other hand, newer receivers are able to receive both the analog and digital signals, allowing for the receiver to use the digital signal if available, or to make use of the analog signal if the digital signal is unable to be decoded.

Despite the many technological advancements made in digital radio since 2002, the number of receivers on the market that are capable of receiving and transmitting a digital audio signal has quickly outpaced the proportion of broadcast stations that have converted to digital operation. According to the FCC, IBOC digital radio provides increased audio quality for stations that operate in the FM band and allow AM stations to reach a level of quality close to that of analog FM stations.

Digital FM Power Level Restrictions. Although digital audio broadcasts provide an improved experience over their analog counterparts, digital broadcasters must still avoid causing harmful interference to other stations. As a result—and just as with analog broadcast stations—the FCC has imposed power limits on digital radio audio signals. However, it's been approximately twelve years since the FCC adopted the current formula for determining, when necessary, permissible FM digital power levels above the current baseline (-14 dBc).

The NPRM. Citing meaningful commenter support for the underlying Petitions, the NPRM seeks comment on and tentatively concludes that adopting the Petitions' proposed rule changes "would advance the Commission's ongoing commitment to developing terrestrial digital broadcasting with minimal to no adverse effects, including any harmful interference, on existing service."

According to the underlying Petitions, the current formula for calculating permissible digital FM power levels operates under the assumption that a station will utilize symmetrical sidebands to achieve digital coverage—that is, the assumption that a station must increase power both above and below its main frequency in equal amounts. However, according to the Petitions, greater digital coverage can be accomplished by increasing power on only one sideband. Consequently, the Petitions requested blanket authorization for digital FM radio stations to use asymmetrical sidebands without having to first acquire separate or experimental FCC authorization. As a corollary, the Petitions also proposed two alternative formulas for calculating FM power levels: one for symmetrical sidebands and one for asymmetrical sideband usage. According to the Petitions, both proposed formulas are meant to be applied in the same way as the original, but should "better reflect the real-world interference environment in the FM band and the appropriate level of protection that 1st-adjacent stations need from harmful interference."

Despite the NPRM's tentative conclusion that the Petitions' rule changes should be adopted, the NPRM raises several additional issues for comment based on various objections to aspects of the underlying Petition. Most notably, the NPRM solicits comments on multiple aspects of how best to ensure that digital facilities continue to adequately protect legacy analog signals from interference.

Qualifying Low Power TV Stations Afforded Limited Class A Conversion Opportunity; FCC Solicits Comment on Rules to Implement Low Power Protection Act

In March 2023, the FCC initiated a proceeding to implement the recently enacted Low Power Protection Act ("LPPA"), which offers certain low power television ("LPTV") stations a "limited window of opportunity" to apply for primary spectrum-use status as a Class A television station. The proceeding's Notice of Proposed Rulemaking ("NPRM") sought comment on how to implement the window consistent with Congressional direction. The comment window has now closed.

Background. As LPTV broadcasters are no doubt aware, under FCC rules LPTV stations are classified as a secondary service, and therefore may not cause interference to, and must accept interference from, full power television stations as well as certain land mobile radio operations and other primary services. As a result, LPTV stations can be displaced by full power stations, thus rendering LPTV stations' existing service profiles inherently subject to some uncertainty.

The LPPA—enacted in early January 2023—directs the FCC to offer a level of heightened protection to qualifying LPTV stations similar to that previously provided to certain LPTV stations decades ago under the Community Broadcasters Protection Act of 1999 ("CBPA"). Similar to the CBPA, the LPPA directs the FCC to provide eligible LPTV stations with a limited window to apply for a Class A license. Designation as a Class A television station provides primary status, and thus a measure of interference protection not currently afforded to LPTV stations.

Under the LPPA, eligible LPTV stations will have one year from the date on which the Commission's rules take effect to apply for a Class A license. The LPPA further establishes various eligibility criteria, the FCC's proposed implementation of which is the primary subject of the NPRM.

The NPRM and Proposed Eligibility Criteria. The NPRM sought comment on proposed rules to implement the LPPA, including how to define certain terms and how to interpret and apply various Class A eligibility requirements. The NPRM's proposal are too exhaustive to fully catalog here; however, some of the most notable proposals are listed below.

As set forth in the LPPA and proposed by the NPRM, the following core eligibility requirements would apply to LPTV stations seeking to convert to Class A status:

- For the 90-day period prior to the LPPA's enactment (i.e., between October 7, 2022, and January 5, 2023), the station must have satisfied the same requirements applicable to a station that qualified for Class A status under the CBPA, which includes: (1) broadcasting a minimum of 18 hours per day; (2) broadcasting an average of at least 3 hours per week of "locally produced programming"; and (3) compliance with the Commission's requirements applicable to LPTV stations.

- The station must demonstrate that the Class A station for which the license is sought will not cause any harmful interference as specified by certain provisions of the Communications Act and FCC rules.

- The station must show that the LPTV station "operates" in a Designated Market Area ("DMA") with not more than 95,000 television households as of January 5, 2023.

- Additionally, the NPRM would propose to interpret the LPPA to require an eligible LPTV station—from and after the date of its application for a Class A license—to comply with the Commission's operating rules for existing Class A television stations, including various programming and recordkeeping requirements to which LPTV stations are not subject.

As usual, however, the devil is in the details for each of the foregoing requirements. The NPRM therefore sought comment on various pressure points in the above eligibility criteria, including how to define key terms, such as "LPTV," "Locally Produced Programming," "DMA," and "operates." The NPRM also proposed that applicants must comply with the same FCC rules to which current Class A stations are subject beginning on the date on which an eligible LPTV station submits an application for a Class A license. If adopted, this would require LPTV applicants to promptly come into compliance with various rule requirements to which they are not currently subject, including: (1) airing a sufficient number of hours of children's programming as defined by FCC rule; (2) heightened EAS requirements (including operating an EAS encoder and generating required weekly tests ("RWTs")); and (3) complying with the FCC's public inspection file rules, including by timely generating and filing quarterly issues/programs lists and required political file records.

The foregoing is only a high-level summary of some of the most notable points from the NPRM. There are numerous other issues for consideration including, e.g., how to treat LPTV stations holding a current construction permit to modify facilities, whether and how to require local public notice of filings for Class A licenses, and more.

FCC Responds to Broadcast Industry Requests by Creating "Future of TV Initiative" / ATSC 3.0 Taskforce

In response to 2023 advocacy from NAB and various broadcasters, the FCC announced in mid-April that it would be creating a public-private partnership to focus on the ongoing television transition to NextGen TV/ATSC 3.0. Called the "Future of TV Initiative," the group comprising the ATSC 3.0 task force includes representatives from the broadcast and consumer electronics industries, as well as public interest and consumer groups. The task force has three initial specific working groups, focusing on: (1) consumer issues, such as adoption costs; (2) technical aspects of the 3.0 transition itself; and (3) regulatory issues and rules for once the transition is complete.

FCC Proposes Repack or Relocation of Incumbent BAS and Other Licenses in the 12.7-13.25 GHz Band in Favor of New Wireless Deployments; Broadcasters Must Certify to Accuracy of BAS Authorizations in the Band

Following up on an October 2022 Notice of Inquiry, in mid-May 2023 the FCC released an Order and Notice of Proposed Rulemaking (the "Order" and "NPRM") that propose displacing incumbent broadcast operations in the 12.7-13.25 GHz band (the "13 GHz band") in favor of new wireless authorizations. In line with a directive in the May Order, the Wireless Telecommunications Bureau and Media Bureau have now jointly opened a filing window for broadcasters to file certifications regarding their existing BAS operations in the 13 GHz band (similar to the certifications broadcasters had to file several years ago in order to be entitled to incumbent status as part of the ongoing C-band relocation). **Broadcasters are required to file those certifications by November 29, 2023, or risk losing entitlement to reimbursement, relocation, and/or interference protection for their 13 GHz band authorizations,** The NPRM further proposes that incumbent status for all other existing broadcast operations in the 13 GHz band be based on the licensing data currently on file in the FCC's Universal Licensing System ("ULS") (similar to the how interference protection from unlicensed uses is currently afforded to broadcast deployments in the 6 GHz band).

The comment window in the proceeding has now closed.

Background. Over the past 2 to 3 years, the FCC has been exploring "expanded use" of both the 12.2-12.7 GHz band ("12 GHz band") and the 13 GHz band, with particular focus on assessing the viability of allowing wireless broadband providers into the bands. At the same time the FCC issued its Order and NPRM regarding the 13 GHz band, it also took long-awaited action in the 12 GHz proceeding, determining that the 12 GHz band is not suitable for 2-way terrestrial 5G service due to the risk of harmful interference to incumbent satellite users in the band. (The FCC did, however, issue a Further Notice of Proposed Rulemaking in the 12 GHz proceeding, reiterating interest in expanding use in the 12 GHz band and seeking comment on other possible uses of the band, such as opening the band to unlicensed use.)

The 13 GHz Order and NPRM. Turning to the 13 GHz proceeding—and in contrast to the actions taken in the 12 GHz band—the Commission is proposing to repurpose the 13 GHz band for wireless broadband use. In the NPRM, the Commission tentatively concludes that the band is suitable for conversion to use for "next-generation mobile and fixed broadband services," with incumbent users either repacked into a smaller portion of the band or accommodated via a sharing regime. Broadcasters currently make use of the 13 GHz band through both fixed and mobile BAS, as well as certain Part 101 microwaves (such as intercity relays ("ICRs") or studio transmitter links ("STLs")); cable television relay services ("CARS") are also currently deployed in the band.

Under the NPRM's proposal, fixed point-to-point operations would become secondary to new licensees in the band after a transition period, with the expectation that the majority of these incumbents would transition to a smaller segment of the band, alternate bands, or even different media (e.g., fiber). Citing the inherent difficulties of spectrum sharing with mobile BAS and CARS incumbents, the NPRM proposes to repack those licensees into a 25 MHz section of the band. A number of questions remain as to how such a repack would be achieved, including into what portion of the band licensees would be placed, and how and to what extent repacked incumbents would be reimbursed for the move. At this stage, the FCC is still gathering information—including through comments solicited on the NPRM—to determine the most effective way to proceed.

FCC Rescinds COVID-19 Temporary Relief for Political Advertising LUC Calculations

In a May 2023 Public Notice (the "Notice"), the FCC's Media Bureau formally rescinded the prior political advertising "temporary relief" it afforded stations calculating their lowest unit charge ("LUC") during the COVID-19 pandemic. As a result, going forward stations must account for all free time they provide to commercial advertisers when calculating their LUC during relevant political election windows.

As broadcasters know, during the 45-day period before a primary or primary run-off election and during the 60-day period before a general or special election, the rate a station may charge a candidate for a broadcast "use" may not exceed the station's LUC for the same class and amount of time for the same time period. Calculating the LUC for a particular class and amount of time generally must take into account any "bonus spots" or other "value added" benefits given to an advertiser—that is, even spots given for "free" to an advertiser as part of a package must be assigned a monetary value and factored into the LUC calculation.

In March 2020 the Media Bureau provided temporary relief from one aspect of the foregoing requirement, by permitting broadcasters to exclude from LUC calculations free time provided to commercial advertisers in certain specific, qualifying circumstances. Although at that time the Media Bureau stated that it "anticipated" the temporary relief would only be afforded until "more ordinary conditions are restored," no clear expiration date for the temporary relief was set—until now.

Effective as of May 15, 2023, stations may no longer rely on the temporary relief set forth above. As a result, going forward stations must again factor in any free time, including bonus spots, when determining their LUC.

Media Bureau Extends Audible Crawl Waiver to November 26, 2024

In the nick of time, the FCC released a Memorandum Opinion and Order (the "Order") granting an 18-month extension to the existing waiver of the component of the so-called "audible crawl" rule that would require broadcasters to provide audio description of visual, non-textual emergency information in non-newscast programming. The current waiver was set to expire the same day the FCC issued its Order—May 26, 2023. The Order extends the waiver to **November 26, 2024**.

Background. In 2013, the FCC adopted a rule requiring all broadcast stations to provide on a second audio stream aural descriptions of visual emergency information—i.e., "the critical details regarding an emergency and how to respond to the emergency"—presented in non-newscast programming. The rule encompasses both textual information and non-textual information, such as radar maps, tornado routes, etc. Although the requirement to provide audio descriptions of textual emergency information has been in effect since November 30, 2015, the FCC previously extended the compliance deadline to aurally describe **non**-textual emergency information several times, in light of the fact that there has not been any readily available technical solution for compliance. The last such waiver ran for a five-year period ending May 26, 2023.

With the waiver's expiration looming, NAB filed a petition requesting a further two-year extension of the waiver. Several groups filed comments in support of NAB's waiver request, but the American Council of the Blind (the "ACB") and American Foundation for the Blind (the "AFB") filed comments in opposition to a further waiver. Even if the FCC were to grant a waiver, ACB and AFB argued for requiring an interim manual solution.

The Order. While recognizing the critical importance of making emergency information accessible, the FCC's Media Bureau found good cause to continue to waive the requirement to aurally describe non-textual emergency information in non-newscast programming for an additional 18-month period ending November 26, 2024. Given the number of waivers already granted, the Commission declined to extend the waiver for the full 2-year period requested by NAB. However, the Commission determined that it is "undisputed" that no technical solution currently exists and that there is evidence that the broadcast industry has made good faith efforts to achieve the accessible emergency information requirements since the last waiver was granted. The Commission also determined that the record shows that critical details of an emergency are already aurally available in most instances, leading the Commission to decline to require that broadcasters implement an interim manual solution. The Order does, however, "strongly encourage broadcasters to provide the critical details of graphically displayed emergency information through nonautomated means whenever possible during the pendency of this waiver."

To assist the Commission in monitoring the continued need for a waiver and the broadcast industry's efforts to develop a technical solution, the Order requires NAB to submit quarterly status reports to the Commission detailing, among other things, broadcasters' continued need for the waiver; NAB's outreach to the disability community and its efforts to develop best practices to be used by broadcasters to ensure accessibility of emergency information; and efforts to develop automated solutions for complying with the rule.

FCC Proposes Expanding Audio Description Requirements to All DMAs

In March 2023, the FCC adopted a Further Notice of Proposed Rulemaking (the "Notice") proposing to expand to all DMAs the audio description requirements currently applicable to DMAs 1–90. The proposal would utilize the Commission's authority under the Twenty-First Century Communications and Video Accessibility Act of 2010 (the "CVAA") to continue expanding the current audio description requirements at a rate of up to 10 DMAs per year. The comment window has now closed, with nearly all commenters filing in support of such an expansion.

Background. "Audio description" (originally termed "video description") is the term given for the audio-narrated descriptions of important visual elements in a television program inserted into natural pauses between a program's dialogue. The FCC adopted its underlying audio description rules pursuant to the CVAA more than a decade ago. The rules apply to all television stations, including low power television stations, subject to any exceptions and exemptions that are otherwise applicable.

Among the key provisions of the rules is a requirement for certain television broadcast stations to provide specified quarterly amounts of audio-described programming. Under the initial rules, the Commission required television broadcast stations that are both affiliated with the top-four commercial television broadcast networks and located in the top 60 television markets to provide 50 hours of audio-described programming per calendar quarter during primetime or on children's programming, as well as an additional 37.5 hours of audio-described programming per calendar quarter at any time between 6 a.m. and 11:59 p.m. Subsequently, the FCC adopted additional audio description rules expanding the foregoing requirement to DMAs 61–100 at a rate of 10 DMAs per year, currently scheduled to conclude on January 1, 2024. According to the FCC, there have been no requests for exemption from or waiver of the expanded requirements.

The Notice. As explained above, the Notice proposes continuing to expand the current audio description requirements at a rate of 10 DMAs per year until all 210 DMAs are covered. (For those keeping score, under the proposed expansion schedule the current audio description requirements would finally reach Glendive, Montana's DMA 210 in January of 2035!) As of this writing, the FCC has not taken any further action in the proceeding, despite the fact that nearly all commenters supported the proposal.

FCC's Enforcement Bureau Has Kicked off EEO Mid-term Reviews

Now that the last radio and television license renewal application filing deadlines for the current renewal cycle have come and gone, the Commission has begun to turn its attention to conducting its statutorily required EEO midterm reviews. Those mid-term reviews began in June 2023, and will be conducted in a rolling manner based on the four-year anniversaries of the dates on which radio and television stations were due to file their last license renewal application. Additionally, to facilitate the FCC's mid-term review process radio stations with five or more full-time employees must now update information in their online public inspection file ("OPIF") by using new functionality the FCC has enabled.

As stations likely recall, the FCC conducts EEO mid-term reviews at the midpoint of each station's 8-year license term. The FCC's EEO mid-term reviews only apply to television stations in employment units with at least five full-time employees and radio stations with at least eleven full-time employees. Historically, stations would indicate the size of their employment unit on, and attach the station's last two EEO Public File Reports to, a required EEO Mid-Term Report filing called FCC Form 397. However, that form was deregulated in 2019, given that the Commission can gather nearly all necessary mid-term review details from each station's prior filings and OPIF, with one exception: a certification from radio stations with five or more full-time employees as to whether the station has the requisite eleven or more full-time employees to be subject to a mid-term review in the first place.

When will Ohio stations' mid-term reviews occur? For now, Ohio radio and television stations can rest easy, given that the license renewal filing deadlines for those stations equate to a June 1, 2024, midterm review for Ohio radio stations, and a June 1, 2025, midterm review for Ohio television stations. However, when those dates come the Notice indicates that FCC staff will automatically review the station's last two EEO Public File Reports, request any additional information staff deems necessary, and potentially identify any necessary improvements in the station's recruitment practices and/or "take other enforcement action as necessary."

What action must radio stations take between now and June 1, 2024? The Commission now **requires** radio stations belonging to an employment unit with five or more full-time employees to indicate in their OPIF whether their employment unit has eleven or more full-time employees. Specifically, radio stations' OPIFs now contain a yes/no checkbox in the "Settings" section under "Mid-Term Review." Radio stations with at least five full-time employees should therefore: (1) log in to the "station-facing" side of the OPIF using their credentials; (2) click on "Settings" near the top of the screen; (3) click on "EEO Mid-Term Review" at the far right of the list of settings; (4) read the FCC explanation on the "EEO Mid-Term Review" page that loads; and (5) select the appropriate answer to whether the Station Employment Unit has 11 or more full-time employees.

If radio stations with five or more full-time employees fail to update this information prior to uploading their next annual EEO Public File Report, a pop-up notice should appear when the station attempts to upload their annual report to the OPIF; however, licensees still must manually navigate to Settings to complete the certification. Radio stations with five or more full-time employees are encouraged to update this setting at their earliest convenience, and no later than the date on which they must file their next annual EEO Public File Report, otherwise the FCC has indicated that the station "will be contacted by Enforcement Bureau Staff."

Comments Filed in 2022 Quadrennial Review Despite Unresolved 2018 Review

In March 2023 the initial comment window in the 2022 Quadrennial Review proceeding closed, despite the fact that the 2018 Quadrennial Review remains pending and despite a pending NAB request for the agency to pause the 2022 proceeding until the 2018 proceeding is resolved. Relatedly, in April 2023 the FCC petitioned the United States Court of Appeals for the D.C. Circuit to require the FCC to complete its long-pending 2018 review. As of this writing, the D.C. Circuit has not yet taken action on NAB's petition.

In its December 2022 notice announcing the commencement of the 2022 Quadrennial Review, the FCC indicated that the 2022 proceeding will review the same rules that are still under review in the FCC's last, 2018 Quadrennial Review proceeding:

- The Local Radio Ownership Rule
- The Local Television Ownership Rule; and
- The Dual Network Rule.

As part of the 2022 proceeding, the Commission also solicited comments on the media marketplace in general, including ongoing trends or developments (e.g., consolidation, technological innovation, or the emergence of new video or audio options for consumers). The Commission has also teed up questions focusing on the "public interest" requirement of the review process, and querying as to the impact of the FCC's ownership rules on consumers and the relation of the rules to broadcasters' public interest obligations. In addition, the Commission also sought comment on whether it should define or redefine its stated policy goals of competition, localism, and diversity underlying the rules.

As of this writing, it remains to be seen both how and when the FCC will resolve its 2018 review, as well as how it will approach its 2022 review in light of the substantial overlap between the two proceedings.

NAB Files Comments in Opposition to FTC Proposal to Ban Nearly All Non-Compete Clauses in Employment Contracts

In April 2023, NAB filed comments opposing a proposal by the Federal Trade Commission ("FTC") to ban nearly all non-compete clauses in employment contracts. Although NAB's comments focus on the potential effect on broadcast station owners, the FTC's proposal stretches far beyond broadcasters and has thus far drawn significant participation from the public via written comment submissions; as of this writing, the relevant FTC docket reflects more than 26,000 received comments on the proposal.

Background on Non-Compete Clauses. Non-competition clauses typically arise in agreements between employers and workers and prohibit workers from working for a competing employer (or starting a competing business) for a specified period of time and within a specified geographic area after the worker's employment ends. For example, a broadcast station's employment contract with on-air talent may contain a non-competition clause prohibiting them from being employed by a station in the same market for a period of six months after they are no longer employed by their current station.

Such "non-compete" clauses have been around since at least colonial times and are subject to a robust body of state law dictating how broadly such clauses may sweep before becoming unenforceable due to public policy. For instance, in a particular state, the law may allow a non-compete clause barring a station's top sales executive from moving to another station in the same market for one year after the end of his employment, but at the same time may *not* allow a non-compete clause that purports to bar the same top sales executive from moving to a station in *another state* for one year after the end of his employment. Several states outlaw non-compete agreements entirely (or nearly entirely) for all workers, and several more states outlaw non-compete agreements for workers falling into certain categories, such as earnings or profession.

Aside from state law, at times non-compete clauses have also been examined under federal antitrust law. The FTC draws on that federal law "hook" as a basis for its proposal, which it argues fits within jurisdictional grants for the FTC to prevent "unfair methods of competition."

The FTC's Proposal. Relying on various studies and conflicting evidence as to the effect of non-compete clauses on various aspects of the economy, the FTC proposes, among other things, the following new rules relating to non-competition clauses:

(1) Employers would be prohibited from entering into non-compete clauses with workers starting on the rule's compliance date.

(2) Employers would be required to rescind existing non-compete clauses with workers no later than the rule's compliance date.

(3) Employers would be required to notify workers in a specified manner that their non-complete clauses are no longer in effect no later than the rule's compliance date.

(4) Non-compete clauses between the seller and buyer of a business would continue to be enforceable, so long as the party to be restricted by the non-compete clause is an owner, member, or partner holding at least a 25% ownership interest in a business entity.

(5) Non-compete clauses would be defined not merely by label, but instead as *any* contractual provision that "has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."

(6) The proposed rule would be effective 60 days after the final rule is published in the Federal Register, with required compliance within 180 days after such publication.

The FTC's proposal also seeks comment on various alternatives to the proposed rules outlined above, including whether non-compete clauses in various professions, or between employers and senior or highly compensated workers, should be subject to distinct rules.

In response to the FTC's proposal, NAB filed comments in opposition based on multiple rationales, including that the broadcast industry is unlike the industries on which the FTC relies in supporting its proposal and—perhaps most fundamentally—that the FTC does not have sufficient jurisdiction to adopt and implement its proposal.

Although comments have now been submitted to the FTC, there is no specific timeline on when the FTC might issue a decision regarding its proposal, although some sources have suggested that it will take until early 2024 for the FTC to be ready to issue a decision.

FCC Issues Multiple Decisions in White Spaces Proceeding; Some Favor Broadcasters, Others Favor Wireless

It was a mixed bag for broadcasters in a set of April 2023 FCC decisions (the "Decisions") regarding the ongoing proceeding to develop the regulatory framework governing unlicensed operations in television white spaces. Notable wins for broadcasters include: the adoption of an hourly recheck interval for mobile white space devices; the requirement for mobile devices that are unable to successfully contact the white space database to cease operation no later than 120 minutes after the last successful database contact; and rejection of the proposal to allow the database to use terrain-based models to determine which TV channels are available for white space device operation at a particular location. At the same time, the Decisions decline to impose an hourly recheck interval for narrowband white space devices, instead continuing to adhere to a daily recheck requirement.

Background. Since 2008, the Commission has been slowly opening up "vacant" portions of the VHF and UHF broadcast television bands (i.e., "white spaces") for unlicensed operations. Such unlicensed operations are conducted via "white space devices," which generally use those white spaces to provide or facilitate the deployment of wireless services such as broadband. However, because unlicensed white space operations have the potential to cause harmful interference to existing, licensed broadcast operations, the FCC has adopted rules both limiting the scope of permissible unlicensed operations and requiring white space devices to regularly check certain databases to ensure that their operations are taking (or will take) place on a viable, available channel and at a permissible power level.

In 2020, the FCC issued a Report and Order and Further Notice of Proposed Rulemaking (the "Further Notice") soliciting comments on, among other things, how often mobile and narrowband white space devices should be required to recheck the white space database, and whether to allow use of a terrain-based propagation model (such as Longley-Rice) to determine white space channel availability. NAB and other members of the broadcast industry filed comments regarding the Further Notice, supporting an hourly recheck interval for both mobile and narrowband devices, and arguing against use of a terrain-based propagation model due to concerns that such a model would not adequately protect individual TV receivers. Wireless internet and technology interests took positions generally opposing those advanced by broadcasters. And wireless microphone manufacturers went even further than other parties to the proceeding, filing for reconsideration of various aspects of the Report and Order in addition to commenting on the Further Notice's proposals.

The Decisions. As noted above—and most relevant to broadcasters—the Decisions resolve the issues surrounding how frequently database "rechecks" should be required for various categories of white space devices, as well as whether to allow the white space database to use terrain-based modeling.

On the first point, the Decisions explain that to appropriately calibrate database recheck intervals requires balancing the need for wireless microphone operators to be able to quickly deploy in breaking news and other exigent circumstances, while at the same time ensuring that white space devices don't needlessly clog bandwidth and suffer battery drain due to required rechecks that occur more often than actually necessary to prevent harmful interference. With that balance in mind, the Decisions take differing approaches to mobile and narrowband white space devices.

For mobile devices, the Decisions require an hourly recheck interval, based largely on the fact that such devices are technically similar to fixed devices (which also have an hourly recheck requirement). The Decisions also make clear that mobile devices will be subject to the additional database recheck requirements applicable to fixed white space devices, including the requirement to cease operation no later than 120 minutes after the last successful database contact and the requirement to adjust the device's use of TV channels in accordance with wireless microphone scheduling information provided by the white space database for the two-hour period beginning when the device last contacted the database.

For narrowband devices (which operate across narrower channel bandwidths than other fixed and personal/portable white space devices), the Decisions decline to require an hourly recheck interval and instead continue to require only daily rechecks. According to the Decisions, concerns over impact to battery life and resulting potential size increases to accommodate larger batteries in narrowband devices (which are typically extremely small, such as in the case of internal or external sensors) outweigh the low likelihood that interference would meaningfully increase absent hourly rechecks. It wasn't all bad news for broadcasters on narrowband devices, though—the Decisions expressly remove the existing 24-hour grace period during which a narrowband device could continue operating after being unable to contact the white space database. In the words of the FCC: "we are modifying the rules to require narrowband white space devices to successfully contact a database at least once every 24-hours or cease operating until such time at it does communicate with a database and obtains an up-to-date available channel list."

Finally, regarding potential use of terrain-based modeling for the white space database, the Decisions decline to authorize the use of such models as this time. Although the Decisions leave the door open to potential future use of terrain-based modeling, as things currently stand "the record does not adequately address broadcaster concerns that terrain-based models are not an appropriate method of determining white space channel availability and that their use could result in harmful interference to TV."

Study of Television Ownership Diversity Released

The FCC's Office of Economics and Analytics has released a Working Paper (the "Paper") examining the ownership diversity of commercial full-power television stations. The Paper reviewed ownership data collected by the FCC to identify trends in the number and size of stations owned by women and racial and ethnic minorities.

Changes in Female and Minority Ownership. The Paper indicates that since 2013, there has been a decrease in the number of stations owned by women, Asians, and American Indians/Alaska Natives. In the same period the number of Black/African American-owned and Hispanic/Latino-owned stations has increased. However, the proportion of women and minority-owned stations remained well below each group's share of the U.S. population (in 2019, women made up 50% of the population but owned 9% of stations; Black/African American individuals made up 13% of the population but owned 2% of stations).

Additionally, women and racial or ethnic minorities tend to own stations in smaller markets compared to similar stations owned by men, white individuals, or non-Hispanic/Latino individuals respectively (or stations with no majority interest). For example, although nearly 60% of television stations owned by women were Big 4 stations (compared to 43% of stations owned by men), female-owned Big 4 stations had less than 1/3 the market size on average than male-owned Big 4 stations.

Share of Advertising Revenue. The Paper determined that stations owned by women and minorities earned less advertising revenue on average than stations owned by men, white, and non-Hispanic/Latino individuals respectively. However, when controlling for other factors like market size, network affiliation, station age, and whether there was a 2019 election in the market, the differences in average advertising revenue became statistically insignificant. For that reason, the Paper did not find that an owner's gender, race, or ethnicity had an effect on advertising revenue independent from other control variables.

FCC Releases 2022 Communications Marketplace Report

In late 2022, the FCC released its 2022 Communications Marketplace Report (the "Report") evaluating competition to deliver voice, video, audio, and data services among broadcast stations, multichannel video programming distributors (MVPDs), online video distributors (OVDs), telecommunications, mobile services, satellite communications providers, internet service providers, and other communications service providers. The Report—which the Commission is statutorily required to prepare every two years—describes the market trends and changes within each of these service areas, and discusses the Commission's role in promoting competition among providers.

Video Marketplace. As in past years, the Report conceptualizes the video marketplace as populated by three primary categories of participants competing for consumers of video content: traditional MVPDs, OVDs (including virtual MVPDS, or vMVPDs), and broadcast television stations. Of these, the Report notes that OVDs have seen the largest increase in market share in recent years, while MVPDs have seen subscription rates steadily decline and broadcast stations have remained comparatively steady.

According to the Report, traditional MVPDs lost around 6.7 million subscribers from the end of 2020 to the end of 2021. By comparison, subscription-based OVDs saw an increase of 42.3 million subscribers over the same period. Moreover, in 2021 around 80% of households were consuming "free" ad-supported OVD services. Virtual MVPD platforms have also been steadily increasing, with around 4.5 million additional subscribers added from 2021 to 2022.

The Report notes that broadcast television stations' revenues come largely from two sources: advertising and retransmission consent agreements with MVPDs, with advertising revenue accounting for approximately 60% of revenue earned by all stations and retransmission consent revenue encompassing the remaining 40% of revenue. Although advertising revenues have remained largely static in recent years, its share of total gross broadcast revenue has fallen from 69% in 2017 to approximately 60% in 2021, per the Report. During the same period, retransmission consent revenue increased 42%, with an estimated $4.2 billion of that revenue in 2021 being paid in "reverse retrans" from broadcasters to broadcast networks with which the stations are affiliated.

Many U.S. households consume video content through more than one of these services, though the comparative consumption amounts for each have changed dramatically. At the end of 2021, 15% of households watched over-the-air television, and 80% of those also subscribed to an OVD; 27% of households watched only OVDs (up from 9% in 2018), while 57% of households subscribed to cable in addition to other services (down from 76% in 2018). Similarly, advertising revenue also shifted largely in favor of online providers: from 2019 to 2021, broadcasters captured $9.7 billion of local advertising revenue, whereas online local advertising revenue grew to $65 billion. During the same period, online national advertising revenue increased by more than $7 billion, while similar revenue for broadcast stations and cable networks fell by $1.1 billion and $3.5 billion, respectively.

Audio Marketplace. As in past years, the Report conceptualizes the audio marketplace as primarily composed of three categories: traditional terrestrial broadcast radio stations (AM, FM, and low power FM), satellite radio, and online audio providers. Terrestrial radio continues to dominate the audio marketplace, but online providers have seen significant market share increases in recent years. From 2018 to 2022, the number of radio stations has remained relatively steady (with the exception of AM and LPFM stations, each of which have decreased by slightly more than 100 stations during that period), although the Report notes that many traditional radio providers have increasingly begun offering programming online as well.

As in past years, the primary source of revenue for broadcast radio remains advertising. Such revenues remained flat between 2010 and 2019 before dropping significantly—by approximately $4.1 billion—in 2020, largely due to the COVID-19 pandemic. Revenues recovered in 2021, but remain below their height, which occurred prior to the 2008 financial crisis. In comparison, broadcasters' online radio offerings have seen more steady revenue growth—up 13.1% from 2010 to 2019.

Online audio providers are based on both subscription as well as ad-supported models, though there has been a shift toward more subscription-based offerings in recent years. The online audio market has also seen an explosion in podcasts. Other audio providers have been increasingly expanding into podcasting, which the Report notes is likely results in part from the fact that podcasting offers providers a way to differentiate themselves from others in a marketplace where music content is widely available from a large number of providers. The share of the population who reported having recently listened to a podcast grew from 17% in 2015 to 41% in 2021, with advertising revenue from podcasts reaching $1.4 billion in the U.S. in 2021.

AM/FM radio is still the largest player amongst the three categories of audio providers, though online providers continue to increase their market share. For example, from 2020 to 2022, adults who listened to AM/FM radio in the car fell from 81% to 73%, while those who reported ever having listened to online audio in the car through a cell phone increased from 45% to 49%. According to the Report, the prevalence of smart speakers also continues to rise, with approximately 35% of Americans aged 18 years and older owning at least one smart speaker in 2022; the aggregate share of time listening to audio programming through a smart speaker increasing by a whopping 400% from 2017 to 2022.

Commissioner Carr's Concurrence. Notably—and as he did with the last Communications Marketplace Report in 2020—Commissioner Brendan Carr wrote a separate statement approving in part and concurring in part in the Report. According to Commissioner Carr, the 2022 Report should "have gone further in recognizing the converged market for connectivity," including specifically that "the Commission's decades-old approach of viewing different technologies—including mobile, fixed, satellite, and broadcast offerings—as competing in distinct and separate markets no longer matches the way that Americans consume these services."

Bipartisan and Bicameral AM Radio For Every Vehicle Act Continues to Gather Steam; Ford Commits to AM in 2024 Models

As advocacy efforts to preserve AM radio's place in the vehicle dashboard continue to mount, May 2023 saw the introduction of the AM Radio for Every Vehicle Act of 2023 (the "Act"). Since that time, the legislation has continued to gather steam; as of this writing, there are 149 congressional and 33 senatorial cosponsors. The Act was initially introduced by a bipartisan and bicameral group of legislators, including Senators Ed Markey (D-MA), Ted Cruz (R-TX), Tammy Baldwin (D-WI), Deb Fischer (R-NE), Ben Ray Lujan (D-NM), and J.D. Vance (R-OH), and Representatives Josh Gottheimer (D-NJ), Tom Kean Jr. (R-NJ), Rob Menendez (D-NJ), Bruce Westerman (R-AR), and Marie Gluesenkamp Perez (D-WA).

If enacted, the Act would require, within one year of its enactment, the Secretary of Transportation (the "Secretary") to issue a rule requiring:

- All motor vehicles manufactured or imported to the United States to have installed as "standard equipment" a device that can receive AM radio signals (digital and analog) and play AM content; and
- Conspicuous, dashboard access to AM broadcast stations.

Additionally, if enacted, during the interim period between enactment and the effective date of the Secretary's rule all motor vehicles manufactured in or imported to the United States that do not include an AM radio would be required to have clear and conspicuous labeling informing consumers that the vehicles do not include a device that can receive AM signals and play content from AM broadcasts.

The Act would further require the Comptroller General to study, assess, and report on whether there exists an alternative communication system for delivering EAS alerts issued via IPAWS that is as reliable and resilient as AM broadcast stations, and whether any such alternative system is capable of ensuring that a national alert would reach at least 90% of the United States population in a time of crisis, including at night.

Within a week of the Act's introduction, Ford announced that it would retain AM radio in all of its 2024 vehicles and issue a software update to existing electric vehicles without current AM capability.

Radio Performance Tax Legislation: AMFA and LRFA Again Go Head to Head

The same performance tax bill from the last U.S. congressional session—the American Music Fairness Act (the "AMFA")—has been introduced in the current Congress, along with the reintroduction of broadcasters' legislative rejoinder, the Local Radio Freedom Act ("LRFA"). As you likely recall, the American Music Fairness Act aims to impose a new sound recording performance royalty on over-the air broadcasting. The Local Radio Freedom Act aims to maintain the long-standing status quo by protecting broadcasters from the music industry's repeated attempts to have radio stations pay an additional royalty for the performance of sound recordings (on top of what stations already pay to songwriters through performing rights organizations ("PROs") such as BMI, ASCAP, GMR, and SESAC for performance of the underlying musical works).

The American Music Fairness Act. In February 2023, the American Music Fairness Act ("AMFA" or "Act") was reintroduced in the Senate (as S.253), along with a companion bill in the House (as H.R.791). As in years past, battle lines are again being quickly drawn regarding the AMFA, with SoundExchange and others from the music industry issuing press releases in support, and NAB and others from the broadcast industry issuing public statements denouncing the legislation. NAB in particular was quick to state that the bill is "one-sided" and would "destroy [the relationship built between local radio stations and performers] with a new government-imposed performance fee that is simply untenable for local radio."

The Local Radio Freedom Act. On the heels of the reintroduction of the AMFA, the Local Radio Freedom Act was again introduced in both the House (H.Con.Res.13) and the Senate (S.Con.Res.5). As of this writing, the House version of the LRFA enjoys support from a bipartisan contingent of 190 cosponsors of the House of Representatives (including thirteen Ohio Representatives), and the Senate version enjoys support from 23 cosponsors.

What Comes Next? Currently, there is no indication that a majority of Congress will quickly coalesce around either the AMFA or the LRFA, although, clearly, the LRFA has significantly more support at this time. The AMFA (which has a total of four Senate and five House sponsors as of this writing) must go through various congressional committees before continuing to move forward, though broadcasters must continue to seek additional congressional support for the LRFA sufficient to garner a House majority and effectively block the AMFA.

FCC Spectrum Auction Authority Lapses for First Time in 30 Years; No Solution Currently Appears Forthcoming

In March 2023, the FCC's spectrum auction authority expired for the first time in three decades. Industry members, FCC Chair Rosenworcel, and Members of Congress are all currently lobbying for a reinstatement of the FCC's spectrum auction authority; however, as of this writing a path forward is not currently clear.

Although many of us may take the FCC's various spectrum auctions as a given, the FCC has not always had the power to conduct such auctions. In 1993, Congress authorized the FCC to use competitive bidding (i.e., auctions) to grant licenses for rights to use specific frequencies for commercial wireless communications. That authority was originally set to expire in 1998, but Congress extended the authority several times since. The last meaningful extension was for a 10-year period beginning in 2012; several subsequent short-term extensions were granted in late 2022. Although those short-term extensions were designed to give Congress sufficient time to agree on a longer-term extension of the FCC's spectrum auction authority, those efforts ultimately proved unfruitful. Now, without the pressure of an impending expiration date (given that the FCC's authority has already expired), it is unclear how quickly Congress will work to restore the FCC's authority.

January 6, 2023 Effective Date Announced for FCC Transition to Nielsen Local TV Station Information Report for DMA Carriage Determinations

You may recall that in November 2022 the FCC adopted a Report and Order updating several FCC rules to reference a new Nielsen publication—the Local TV Station Information Report—in place of two now-retired ones. The Commission announced a January 6, 2023, effective date for those rules. Since the Household Estimates publication is no longer in use, the TV Station Information Report is now the only publication necessary to determine a station's DMA.

New EAS Operating Handbook Available

The **2023** version of the EAS Operating Handbook (the "Handbook") is now available on the FCC's EAS Test Reporting System ("ETRS") website. The last version of the Handbook was issued in 2021.

FCC rules require that all stations keep a copy of the Handbook "at normal duty positions or EAS equipment locations when an operator is required to be on duty" and that the Handbook "be immediately available to staff responsible for authenticating messages and initiating actions." Accordingly, broadcasters should use the following link to access and download the latest, 2023 EAS Operating Handbook: https://www.fcc.gov/file/24607/download. Although the core content of the 2023 Handbook appears largely to mirror that of the 2021 version, the latest version reflects recent FCC changes in terminology for the nationwide test ("NPT") and presidential / national emergency message ("EAN") such that broadcasters will want to carefully review the latest version of the Handbook. As with prior versions, the 2023 Handbook is presented in an editable format such that stations can—and should—fill in relevant blank areas with the station's specific EAS procedures.

New FEC Digital Political Ad Disclosure Requirements Will Affect 2024 Election Cycle

Although stations should already be well-versed in the FCC's rules regarding political file recordkeeping and on-air political advertising disclosures, a recent Federal Election Commission ("FEC") decision warrants attention for digital political ads.

Recent election cycles have seen a steady increase in the number of broadcast stations capitalizing on digital political advertising—indeed, industry estimates suggest that spending on digital political advertising more than doubled just in the two years between 2020 and 2022. Following the 2022 general election, the FEC finally concluded a proceeding that it had begun several years ago: to take another look at its stance on digital political disclosures (which hadn't been revised since 2006) and provide guidance that better fits the ways in which political advertising has changed on the internet. In doing so, on December 1, 2022, the FEC adopted a new final rule governing Internet Communication Disclaimers (the "Final Rule") to provide entities that pay to place digital political advertisements—including on digital platforms operated by broadcasters—with a more suitable FEC regulatory framework. Previously, only political advertisements in broadcast or print media were held to strict disclosure requirements identifying who paid for any given ad. The Final Rule applies similar requirements to certain digital or internet-based political advertisements as well. The Final Rule is now in effect.

What the FEC's New Political Sponsorship Disclosure Rules Require. In general, there are three main categories into which a political advertisement may fall for the purposes of this rule, and each is identified by who authorized and paid for the advertisement. First, political advertisements paid for by a candidate, authorized committee of a candidate, or an agent of either must disclose that the communication was financed by "the authorized political committee." Second, if the advertisement is paid for by a third party and has been authorized by the candidate, an authorized committee of the candidate, or an agent of either, the sponsorship disclosure must identify who paid for the ad and state which individual or entity authorized the ad. Finally, if the ad is neither paid for nor authorized by the candidate, an authorized committee of the candidate, or an agent of either, the sponsorship disclosure must provide the full name and permanent street address, phone number, or website address of the entity that paid for the ad, as well as state that it was not authorized by any candidate or candidate's committee. In every instance, the required sponsorship disclosure "must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity" of the person or entity that paid for the political message. Digital political ads that contain text and/or graphic components ***must*** include a written sponsorship disclosure, regardless of whether there are audio components as well.

The specific requirements for digital political advertisements vary based on the format of the ad; an overview of the criteria is below:

- If a political advertisement contains text or graphic components, the required written disclaimer must be included in a way that allows it to be viewed without the viewer having to take any action (such as clicking a link or hovering over a digital component).

- The text must be of a size large enough that it is easily readable, taking into consideration the color contrast between the background and the text. A good rule of thumb is that the letters should be at least as large as the majority of other text in the communication and the color contrast should be equal to or greater than that between the background and the largest text in the ad to satisfy this requirement. (These requirements obviously differ from the FCC's four-percent-of-screen-height political sponsorship ID requirement for television ads.)

- For ads that are wholly contained in a video, the sponsorship disclosure must be visible for at least four (4) seconds and it must appear within the video without requiring action from the viewer to prompt its display. (These requirements are similar to the FCC's four-second on-screen requirement for political sponsorship identification.)

- If the ad has only an audio component and no video, the sponsorship disclosure must be included within the audio of the ad itself.

Impact on Broadcasters. As with other FEC requirements, the new digital disclosure requirements for online political ads are unlikely to have much practical impact on broadcasters. Generally, the FEC's jurisdiction extends only to federal political candidates and other entities engaged in federal electoral activities; compliance with the FEC's rules is generally not the responsibility of broadcast stations that run political ads (whether on the broadcast platform or on a digital platform). That said, broadcasters may nonetheless wish to familiarize themselves with the new requirements because they may become the subject of all-too-familiar "cease and desist" letters from lawyers seeking to convince stations to stop airing certain political ads favoring or opposing candidates for public office.

FCC Application Fee Increases Now in Effect

In a December 2022 Order, the FCC announced adjustments to the Schedule of Fees which will increase the fees broadcasters must pay for application processing and other FCC filings. The new, 2023 application fee schedule took effect in March 2023, although the FCC subsequently had to issue a correction for several AM application fees.

The updated schedule reflects a moderate increase in fees that will accompany a range of applications and other filings. For example, commercial FM and AM radio stations will see fees to request special temporary authority increase from $210 to $235 (for FM) and from $290 to $325 (for AM). Full power and Class A TV stations seeking a minor modification construction permit will see an increase from $1,335 to $1,490. And fees for all commercial stations' biennial ownership reports (which will be due in the last quarter of 2023) will increase from $85 to $95. This represents an increase of approximately 11.6% for most FCC application fees in light of recent changes in the Consumer Price Index.

Audio Division Filings Must Now Use 2020 Decennial Census Data

By Public Notice (the "Notice"), the Commission announced that, effective April 1, 2023, petitioners and applicants submitting filings to the Audio Division—i.e., radio broadcasters—must use 2020 Census data when determining a particular community's population, the population served, and overlap of service areas to communities and Urbanized Areas. The Notice comes in light of the U.S. Census Bureau's official release of the most recent 2020 decennial census block, population, and cartographic boundary data.

Notably, the required use of 2020 Census data also has a practical effect on how applications proposing a new or modified radio allotment must address the Commission's "urbanized area service presumption." Put succinctly, a definitional change to the term "Urbanized Area" in the 2020 Census is now at odds with the FCC definition for the same term, so radio broadcasters can no longer simply rely on the Census Bureau categorization of "Urban Areas" for purposes of the FCC's urbanized service area presumption. Instead, radio broadcasters must now carefully review the 2020 Census Population Data to determine whether a particular community triggers the FCC's urbanized area service presumption.

The Public Notice further makes clear that it only applies to the Audio Division, and that the "Video Division will issue a separate Public Notice at a later date to announce the use of 2020 Census data for television station filings."

Updated Tower Construction Guidance Following Northern Long-Eared Bat Classification as "Endangered"

In a Public Notice, the FCC announced that, effective March 31, 2023, the northern long-eared bat will be reclassified from "threatened" to an "endangered species" under the Endangered Species Act ("ESA"). In light of this reclassification, the Public Notice advises applicants for tower construction projects that they must engage in the consultation process as laid out in Section 7 of the ESA and can no longer rely on the streamlined framework that was previously applicable when the bat was classified as "threatened."

Background. Under the ESA, it is prohibited to "take" a species listed as endangered or threatened. A "take" is defined broadly and includes the harassment, harming, wounding, killing, or capturing of a listed species. An "incidental take" occurs when a taking is incidental to an otherwise lawful activity. In other words, a lawful activity (such as tower construction) could result in an incidental take if such activity results in harm to a listed species.

When a federal agency carries out or authorizes a project that may affect a listed species or its critical habitat, the agency must consult with the U.S. Fish & Wildlife Service (the "Service") under Section 7 of the ESA, (a "Section 7 Consultation"). If the agency determines that the project is not likely to adversely affect the species or its habitat, the agency must submit an informal consultation request for the Service's concurrence or non-concurrence with the agency's determination. If the agency determines that the project is likely to adversely affect the species or if the Service does not concur with the agency's determination in the informal consultation process, the agency must request formal consultation, after which the Service will prepare a biological opinion to analyze the effects of the proposed action; the opinion may also include conservation recommendations to minimize any take of the species.

During the period when the long-eared bat was classified solely as "threatened," a streamlined Section 7 consultation process was often permitted for tower applicants. However, with the long-eared bat's reclassification as "endangered" that streamlined process will no longer be available.

The Takeaway. As of this writing, applicants for tower construction that may affect the long-eared bat or its critical habitat must engage in a full Section 7 Consultation. Additionally, tower project applicants must re-initiate consultation with the Service for any project that (1) was proposed or was in pre-construction status as of March 31, 2023, and (2) relied on the previously permissible streamlined Section 7 consultation process.

OAB members should carefully review the requirements for tower construction projects, as the long-eared bat's range includes Ohio and is further protected as an endangered species under Ohio state law. More information about the long-eared bat—including its habitat range—may be found here.

FCC Establishes Space Bureau and Office of International Affairs

Over the first few months of 2023 the FCC began the process of reorganizing the International Bureau into two new entities: a Space Bureau and an Office of International Affairs. As a result of the reorganization, the International Bureau ("IB") has now been "eliminated" as it has historically existed, with most IB sections relevant to broadcasters being transferred over to the newly minted Space Bureau.

The New Space Bureau. Since 1994, the IB has had the responsibility of licensing and/or registering satellites that transmit and/or receive data within the borders of the United States, including broadcasters' satellite uplink and downlink dishes in various bands, including the C-band and Ku-band. However, under the new allocation of resources and responsibilities, the Space Bureau will focus on dealing with policy and licensing matters that concern satellite communications and other "in-space activities" the Commission oversees. The new Space Bureau is divided into three divisions—the Satellite Programs and Policy Division, the Satellite Licensing Division, and the Earth Station Licensing Division. This division of resources is designed to absorb the responsibilities and powers currently entrusted to the International Bureau's Satellite Division and all of its branches.

The New Office of International Affairs. The Office of International Affairs will focus on issues that involve dealing with foreign and international regulatory authorities, a major function of which will include overseeing and coordinating the Commission's participation in international organizations and conferences, cross-border negotiations, and efforts to set international standards. To facilitate these goals, the Office is divided into a Telecommunications and Analysis Division and a Global Strategy and Negotiation Division. The Office of International Affairs will also be tasked with handling licensing for international telecommunications facilities and services, submarine cables, and advising the Commission on foreign ownership issues.

What Practical Effects Will This Have on Broadcasters? As noted above, broadcasters' earth station registrations and licenses (i.e., authorizations for downlink and uplink dishes) fall under the jurisdiction of the new Space Bureau. Accordingly, broadcasters should at least be prepared for forthcoming changes in terminology and location of various FCC resources (e.g., the current International Bureau Filing System ("IBFS") is in the process of being renamed the International Communications Filing System ("ICFS") and relocated as part of the reorganization). The reorganization may also ultimately result in substantive changes, although it is currently too early to determine any such potential changes with certainty, particularly given that it will likely take some time for all of the announced changes to take effect as a practical matter.

Ohio Sports Wagering Advertising Attracting the Attention of Regulators

As you may recall, the Ohio Casino Control Commission ("OCCC")—the state regulatory agency that governs sports wagering activities and services in the State of Ohio—has expressed concern about and disappointment with a large portion of the sports wagering "prelaunch" advertisements.

Sports wagering operators are responsible for compliance with the OCCC's advertising rules, and broadcasters have very limited risk. Generally, the OCCC's regulatory jurisdiction only extends to persons and entities that are involved in gambling services industries. However, stations are in a position to "help" their sports wagering advertising partners in two ways: First, broadcasters can steer sportsbook advertisers away from programming and dayparts aimed at audiences under the age of 21. In doing so, stations can help advertisers honor the sportsbook operator's obligation not to target underage audiences. Second, when screening ads before airing, broadcasters can check for "responsible gaming" ("RG") disclosures in sportsbook ads, as all gambling advertisements are required to disclose a toll-free gambling helpline.

Additionally, it is important for broadcasters to exercise caution if and when producing spots for sportsbook operators and when permitting station talent to endorse sports wagering services on station-owned assets. While there are no prohibitions on writing copy or producing spots for, or lending talent voices to, sportsbook advertisers, doing so changes the risk calculus because the station itself is involved in the creation of the messaging.

First, if a station produces a sportsbook spot and fails to include an RG disclosure, the advertiser may blame the production team when the OCCC takes unfavorable action against the sportsbook operator. As with any advertiser for whom a station produces advertising, the station will be well-served to obtain approval of the final product in writing from the advertising client prior to broadcast; and, of course, no broadcast station should ever purport to give an advertiser legal advice about the necessity, substance, or format of product/service-specific on-air disclosures.

Second, if station talent are asked to endorse a particular sportsbook operator's products and services, FCC and FTC disclosure requirements may come into play. Not only might the FCC's sponsorship identification rule require a "paid for by" or "sponsored by" tag, but the FTC's endorsement guidelines may also be triggered and may require the talent to have actually used the sportsbook services and disclose any non-obvious "material connection" between the sportsbook operator and the talent. Whether and to what extent the FCC's or FTC's regulations will be triggered will depend on the nature and format of the promotional messaging, and there are too many permutations to cover in this Regulatory Update; we encourage stations to contact legal counsel when facing these types of opportunities.

If you have any questions regarding this material, please feel free to contact any of the attorneys listed below.

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