Regulatory Update for the Broadcast Industry

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This publication summarizes various FCC and other regulatory issues for which there was activity during the period from December 1, 2023, to February 29, 2024, unless otherwise indicated.

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After Long Wait for Five Commissioners, Rosenworcel-Led FCC Pushes Forward with Multiple 3-2 Decisions

Since September 2023, when, for the first time in more than two years, the FCC finally returned to a full set of five Commissioners, current FCC Chair Jessica Rosenworcel has wasted little time moving forward on issues that divide the current Commission. Those "3-2" issues have included several of great importance to broadcasters—including the conclusion of the long-pending 2018 Quadrennial Review, the reinstatement of the EEO Form 395-B filing requirement, and a proposal nominally addressing application processing priorities for broadcasters providing a qualifying amount of local programming, but simultaneously suggesting that the FCC should consider whether the main studio rule should be readopted—as well as others targeting the FCC's role in internet oversight (including reinstatement of the FCC's prior open internet rules and adoption of rules aimed at curbing digital discrimination).

At the same time, the Rosenworcel administration has been noticeably silent regarding a refresh of the long-pending 2014 "virtual MVPD" docket, which would seek to bring internet streaming services under the FCC's regulatory purview and help to even the playing field for broadcasters with carriage on those services.

Although it remains to be seen just how much ground the Rosenworcel administration will cover during her tenure, current sources indicate that in the coming months broadcasters are likely to see FCC action approving zonecasting, adopting a new emergency alert code for "missing and endangered persons," and proposing—if not outright readopting—the FCC's FM radio duplication rule (which was repealed in 2020 under the Pai administration).

After More than 20-Year Hiatus, Divided FCC Reinstates Annual EEO Form 395-B Reporting Requirement; Rejects Broadcaster Calls for Confidentiality

In February 2024, by a 3-2 margin the FCC adopted a Report and Order (the "Order") formally reinstating the requirement for broadcasters with five or more full-time employees to annually file EEO Form 395-B. Despite broadcasters' requests for confidentiality, the Form 395-B for each station employment unit will be available to the public via the Commission's website. In the Order, the FCC claims that making the information public will "ensure maximum accuracy of the submitted data, is consistent with Congress's goal to maximize the utility of the data an agency collects for the benefit of the public, allows [the FCC] to produce the most useful reports possible for the benefit of Congress and the public, and allows for third-party testing of the accuracy of its data analyses."

Most broadcasters with five or more full-time employees will be required to file the report annually, on or before September 30, after the Order takes effect.

Background. Since the 1970s the Commission has administered regulations governing the equal employment opportunity obligations of broadcasters and multi-channel video providers

("MVPDs"). As part of those regulations, from approximately 1970 to 2001 the FCC required broadcasters to regularly file EEO Form 395-B, which collects data regarding the race, ethnicity, and gender composition of broadcaster employment units. However, the FCC suspended the collection of that data in 2001 in response to two decisions by the United States Court of Appeals for the D.C. Circuit, which together found constitutional issues with both the FCC's EEO regulations then in effect and the FCC's use of the data reported on Form 395-B.

First, in *Lutheran Church-Missouri Synod v. FCC*, the D.C. Circuit held that the FCC's then-current EEO regulations unconstitutionally required "stations to grant some degree of preference to minorities in hiring" because the FCC would expressly consider the proportional diversity of a station's employment unit in determining whether to audit or penalize the station. Further, the D.C. Circuit held that "the risk lies not only in attracting the Commission's attention, but also that of third parties," given that a purported lack of proportional employment diversity could "often" be "the impetus . . . for the filing of a petition to deny, which in turn triggers intense EEO review."

The FCC adopted new EEO regulations in response to the *Synod* decision, including by terminating its then-current practice of using EEO Form 395-B data to screen license renewal applications and assess licensee EEO compliance. However, the FCC's new regulations were again quickly challenged in the D.C. Circuit in *MD/DC/DE Broadcasters Association v. FCC*. There, the D.C. Circuit again held that the FCC's EEO rules unconstitutionally placed "official pressure on [broadcasters] to favor minorities in the hiring process." In particular, under the EEO rules then in effect the FCC allowed broadcasters to satisfy the EEO "outreach" requirements *either* by performing a sufficient number of recruitment initiatives / menu options (as broadcasters do today), *or* by reporting the race, sex, and referral source for each job applicant so that the Commission could determine whether the licensee reported a sufficient number of women and minorities to confirm that vacancy "notifications are reaching the entire community." If a broadcaster reported "few or no" applications from women or minorities, the FCC "promised to investigate" the broadcaster. The D.C. Circuit held this to be unconstitutional, declaring that the FCC's rules were "evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them."

In response to the foregoing federal court decisions, the FCC ultimately adopted several new EEO Rules, including those under which broadcasters currently operate, such as the requirements to recruit for all full-time job openings, provide notice of job vacancies to recruitment organizations that request notification, undertake additional measures designed to promote "broad and inclusive outreach," and refrain from discrimination in employment practices. The rules were designed to dictate process rather than outcomes, be "race and gender neutral," and not "pressure employers to favor anyone on the basis of race, ethnicity, or gender." With those goals in mind, in 2004 the FCC also readopted the requirement for broadcasters to annually file Form 395-B; however, the FCC suspended the newly readopted filing until lingering issues could be resolved regarding the data collection, including whether such data should or could be treated as confidential.

Fast forward to 2021, when the FCC—within several months of FCC Chair Rosenworcel assuming her leadership position—issued a Further Notice of Proposed Rulemaking seeking comment on various issues related to the Form 395-B filing requirement, including how to address

the lingering confidentiality concerns. NAB and others within the industry, including all State Broadcaster Associations, filed comments in the proceeding arguing, among other things, that making Form 395-B data public could result in third parties and/or the government pressuring stations to engage in preferential hiring practices. After the comment window closed, the proceeding then lay dormant for multiple years under an evenly divided FCC. However, the September 2023 appointment of current fifth Commissioner, Anna Gomez, ultimately paved the way for the FCC to reinstate the Form.

The Order. Due to the complexities inherent in reinstating a long-dormant filing requirement, as well as the history of legal turmoil surrounding the Commission's EEO rules, the Order is fairly long. Below, this memo summarizes some of the Order's most important aspects.

What are my current obligations regarding Form 395-B? All five Commissioners agreed to the most fundamental aspect of the Order—the reinstatement of the Form as a required annual filing for station employment units with five or more full-time employees. However, the Form must undergo minor revisions and additional regulatory approval before annual filings can commence. Consequently, it is not yet known whether broadcasters will be required to file a Form 395-B in 2024. We will be monitoring the status of the proceeding and will let stations know if a filing is required in 2024.

When will annual Form 395-B filings be due? Once the new rules take effect, the Form will be due by September 30th each year. The Order indicates that the Media Bureau will issue a Public Notice sufficiently in advance of the first filing deadline to "provide broadcasters ample time to put into place whatever data collection processes they require, including, for example, the development of employee surveys and instructions for employees regarding which job classification to report."

What data must be reported in Form 395-B filings? Generally speaking, broadcasters will need to report employees' race, gender, ethnicity, and job categories (as selected from among ten various job categories). Although the Order indicates that the Form will undergo revisions to include non-binary gender options, the data broadcasters must report are generally summarized in the current version of the Form, available here: https://omb.report/icr/202004-3060-047/doc/100723701.

Once the new rules take effect, for the first report broadcasters will be permitted to report the foregoing data from any payroll period in July, August, or September of the relevant year. Going forward, however, broadcasters must continue to report using the same payroll period in each subsequent year.

Where/How will the filing be made? Although the Order specifies that the Form 395-B will be filed "electronically," the Order does not provide any further guidance on how the filing will be accomplished. Presumably, this filing information will be part of the Media Bureau's forthcoming Public Notice containing "instructions about how to submit the filings, prior to the first filing after the Order becomes effective."

Will the FCC be able to use the data stations report against them? The Order states multiple times that the FCC will use each station's Form 395-B only "for purposes of analyzing

industry trends and making reports to Congress." In response to advocacy from the State Broadcast Associations, the Order also strengthens the FCC's current rule statement to this effect, which going forward will state that:

> Data concerning the gender, race and ethnicity of a broadcast station's workforce collected in the [Form 395-B] will be used only for purposes of analyzing industry trends and making reports to Congress. Such data will not be used for the purpose of assessing any aspect of an individual broadcast licensee's or permittee's compliance with the nondiscrimination or equal employment opportunity requirements of Section 73.2080.

Moreover, in the Order the FCC commits to "quickly and summarily dismiss any petition, complaint, or other filing submitted by a third party to the Commission based on Form 395-B employment data." The Order further encourages broadcasters to report to the FCC "any evidence that a third party has misused or attempted to misuse Form 395-B employment data."

Will the FCC keep stations' Form 395-B reports confidential? No. According to the Order's 3-2 majority, each station's Form "will be accessible to the public via the Commission's website." Again according to the Order, making the data publicly available: (1) will increase the likelihood that "erroneous data" will be discovered by third parties and corrected; (2) "is consistent with Congress's goal to maximize the utility of the data an agency collects for the benefit of the public"; (3) will allow the FCC the freedom to analyze and publish the data without having to worry about inadvertently disclosing "identifiable information"; and (4) will allow third-parties to meaningfully review and question FCC analyses conducted with the data.

Notably, this particular aspect of the Order drew vigorous dissents from Commissioners Carr and Simington, with both arguing that the FCC's decision to make the data publicly available amounts to yet another unconstitutional FCC pressure on broadcaster hiring in the vein of the D.C. Circuit's prior decisions in *Synod* and *MD/DC/DE Broadcasters Associations*.

What happens next? As noted above, the Order directs the Media Bureau to issue a future Public Notice announcing the effective date of the filing requirements, as well as the availability of the revised version of the Form and instructions regarding how to submit the first filing. In the meantime, given the prior legal challenges surrounding the EEO Form 395-B and the strong dissents to the Order by Commissioners Carr and Simington, lawsuits may be filed against the Order. (The underlying FCC proceeding will also continue; at the same time the FCC issued the Order, it also released a Second Further Notice of Proposed Rulemaking proposing to reinstate the collection of similar information from MVPDs.)

FCC Finally Resolves 2018 Quadrennial Review; 2022 Quadrennial Review Remains Pending

In late December 2023, the FCC completed its long-awaited and statutorily required 2018 Quadrennial Review of the agency's broadcast multiple ownership rules. The 94-page Report and Order (the "Order") was released one day prior to a deadline imposed on the FCC by the D.C. Circuit Court of Appeals, and it was adopted by a 3-2 majority with approval from the three current

Democratic FCC Commissioners—Chair Rosenworcel, and Commissioners Starks and Gomez—and over vigorous dissents from the two current Republican Commissioners, Carr and Simington.

The primary items addressed by the Order are the Local Radio Ownership Rule, the Local Television Ownership Rule, and the Dual Network Rule. Although across the proceeding's more than four-year pendency NAB and many broadcasters filed comments urging the FCC to relax the current radio and television ownership restrictions, the Order declines to loosen—and, unfortunately, in the case of the Local Television Ownership Rule, actually tightens—the current rules.

On February 23, 2024, several broadcasters filed petitions in various U.S. Circuit Courts of Appeals challenging the Order, which is scheduled to take effect on March 18, 2024.

Meanwhile, the 2022 Quadrennial Review—initiated by the FCC in December 2022—remains pending.

Background. As the phrase "Quadrennial Review" suggests, every four years the Commission is statutorily required to conduct a review of its existing broadcast multiple ownership rules to determine whether they "are necessary in the public interest as a result of competition" and to "repeal or modify any regulation [it] determines to be no longer in the public interest." However, as broadcasters are well aware, the 2018 Review had a fairly complicated history since its initiation in December 2018, leading all the way to the United States Supreme Court and back down to the FCC.

Finally, in September 2023 two catalysts led to the Order. First, the long-standing 2-2 Commissioner deadlock was broken with the confirmation of Anna Gomez to the FCC. Second, the D.C. Circuit Court of Appeals, in response to a legal challenge brought by NAB against the FCC for failing to satisfy the agency's statutory duty to conclude the 2018 Review, ordered the FCC to either render a decision, or justify its delay, by December 27, 2023.

As we now know, the FCC chose to satisfy the Court's directive by issuing a decision in the 2018 Review. The most important aspects of the Order's decisions regarding each ownership rule under consideration are summarized below.

Local Television Ownership Rule. The Local Television Ownership Rule limits the extent to which a single entity may own or control multiple television stations in a single market. The primary focus of the Rule is on ownership of the "Top-Four" stations in the market (which are often affiliated with one of the "Big Four" Networks, ABC, CBS, NBC, and Fox). As the Order summarizes:

> The Local Television Ownership Rule provides that an entity may own up to two television stations in the same Nielsen DMA if: (1) the digital noise limited service contours (NLSCs) of the stations (as determined by Section 73.622(e) of the Commission's rules) do not overlap; or (2) at the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top-four stations in the DMA, based on the most recent all-day (9 a.m.-midnight)

> audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service.

The Order declined to make deregulatory changes to the Local Television Ownership Rule. The FCC rejected calls from broadcasters to define the relevant market for its assessment of the Rule to include numerous proliferating video programming competitors—including, in particular, digital and streaming platforms—and instead determined that the market should be focused on broadcast television stations only, because, according to the Order, "broadcast television remains unique and non-substitutable with other sources of video programming, particularly with respect to fulfilling [the FCC's] traditional public interest objectives of competition . . . localism . . . and viewpoint diversity."

Perhaps most notably—and to the disappointment, generally speaking, of the broadcast industry—the Order expands the scope of the two "Top-Four" station prohibition, purportedly in order to address what the Order calls a "loophole" in FCC rules. The Order establishes a prohibition on certain low power television ("LPTV") and multicast acquisitions of a Top-Four network affiliation from another station in the same market. Currently (i.e., before the 2018 Quadrennial Review Order takes effect), the Local Television Ownership Rule bars an entity with a Top-Four station from acquiring a Top-Four network affiliation from another station (generally without acquiring the station itself) and then placing that network affiliation on **another full-power** station it owns in the same market. However, ceding to sustained advocacy from cable, satellite, and other so-called "public interest" organizations—and over the objection of NAB, the Four Network Affiliates Associations, and the Big Four Networks—the Order revises and expands the language of the Rule to bar the use of low power television stations and multicast streams for similar purposes. Going forward, the relevant Rule language (specifically, a "Note" to the multiple ownership rules) will include the following prohibition:

> Further, an entity will not be permitted through the execution of any agreement (or series of agreements) to acquire a network affiliation, directly or indirectly, if the change in network affiliation would result in the affiliation programming being broadcast from a television facility that is not counted as a station toward the total number of stations an entity is permitted to own under paragraph (b) of this section (e.g., a low power television station, a Class A television station, etc.) or on any television station's video programming stream that is not counted separately as a station toward the total number of stations an entity is permitted to own under paragraph (b) of this section (e.g., non-primary multicast streams) and where the change in affiliation would violate this Note were such television facility counted or such video programming stream counted separately as a station toward the total number of stations an entity is permitted to own for purposes of paragraph (b) of this section.

Notably, this restriction on acquiring a Top-Four network affiliation does not prevent an entity from obtaining two Top-Four stations in a DMA due to what the Order calls "organic growth." Nor does it prevent a network from choosing to move its affiliation between stations in a market. In other words, thus far the FCC has not sought to penalize stations for growing their market share through their own diligence or being selected by a Big Four Network as a chosen

affiliate, including in so-called "short markets" that otherwise would not have a full complement of Big Four Network-affiliated stations.

The Order does, however, note that a broadcaster may not apply "undue direct or indirect influence" on a network to acquire an affiliation that results in a Top-Four duopoly. The Order does *not* define what constitutes undue influence, leaving open questions as to when discussions and negotiations might constitute "undue influence."

Note that Rule changes will only be applied prospectively, meaning network affiliations acquired from an in-market station and placed on an LPTV station or multicast stream as of the date on which the Order took effect may continue to operate, though such grandfathered arrangements will not be transferable or assignable. The Order provides that a broadcaster may seek "case-by-case" Commission consideration when the broadcaster believes the new Rule "should not apply to its plan to place on a low power station or multicast stream an affiliation or affiliated programming acquired from another top-four station in the same market." Similarly, the FCC will conduct a "case-by-case" analysis of any proposal to transfer or assign a combination of Top-Four network affiliations on a single station or a same-market full-power and LPTV station.

Finally, the Order also makes two changes to the metric used to determine in-market ranking—going forward, audience share metrics will consider the Sunday to Saturday, 7AM to 1AM daypart (a change from considering the "all-day (9AM to midnight) audience share"), and ratings data must be averaged over a 12-month period. Also, a station's audience share calculation will now include all "free-to-consumer non-simulcast multicast programming" owned and operated by the station on an aggregated basis, to the extent such streams have measurable audience ratings.

The Local Radio Ownership Rule. As the Order summarizes,

> The Local Radio Ownership Rule allows an entity to own: (1) up to eight commercial radio stations in radio markets with at least 45 radio stations, no more than five of which may be in the same service (AM or FM); (2) up to seven commercial radio stations in radio markets with 30-44 radio stations, no more than four of which may be in the same service (AM or FM); (3) up to six commercial radio stations in radio markets with 15-29 radio stations, no more than four of which may be in the same service (AM or FM); and (4) up to five commercial radio stations in radio markets with 14 or fewer radio stations, no more than three of which may be in the same service (AM or FM), provided that the entity does not own more than 50% of the radio stations in the market unless the combination comprises not more than one AM and one FM station.

NAB and various broadcasters lobbied for the relaxation or removal of the Local Radio Ownership Rule, with some commenters arguing for no limits whatsoever, others arguing for relaxation or recalibration of the various market-size tiers, and others focusing specifically on the so-called AM and FM "subcaps." Common arguments among those in favor or relaxing or removing the Rule focused on the fact that radio broadcasters face increasing competition over

advertising revenue from and loss of market share to other non-broadcast sources like Sirius XM, Spotify, Apple Music, and others.

Despite that advocacy, the FCC retained the Local Radio Ownership Rule at its long-established tiers and numerical limits. The Commission in the Order first defined the "radio listening market" as the relevant market for purposes of the Rule—declining broadcaster requests to expand the relevant market to include other audio sources—based on findings that "within the broader advertising ecosystem, there still remains a distinct broadcast radio advertising market, such that our existing rule promotes competition among local radio stations through competition for advertising dollars, as well as along other dimensions that directly benefit listeners (e.g., quality, choice of offerings, innovation, among others)." The Commission further asserted that current market size tiers and numerical limits on radio station ownership remain in the public interest, declining to reduce or remove restrictions in any market. The Order addressed several suggestions to drop some ownership restrictions—including NAB's proposal to loosen restrictions in the top 75 Nielsen Audio markets, remove all caps on AM station ownership, and remove limitations on both AM and FM station ownership in markets outside the top 75 Nielsen Audio markets—but the Commission indicated that it believes any such reductions in ownership limitations would permit unacceptable consolidation of radio station ownership:

> "[W]e find that the existing rule continues to serve the public interest, that the record does not establish that permitting greater consolidation would benefit either the radio industry or the listening public, and that proposals to loosen the rule would reduce competition among broadcast radio stations to the detriment of listeners."

The Commission also stated that allowing increased consolidation of radio station ownership would result in fewer market entry opportunities for new owners, including minorities and women, and it thus reasoned that maintaining the Rule at current levels will help promote the FCC's goal of increasing minority and female ownership of broadcast radio stations.

In conjunction with declining to repeal or modify the current Local Radio Ownership Rule, the Order also brought some regulatory certainty to multiple ownership showings in smaller radio markets. Specifically, the Order permanently adopted the long-used contour-overlap methodology for determining compliance with ownership limits in areas outside of defined Nielsen Audio markets. The methodology was previously adopted on an interim basis and has been in use for nearly 20 years; accordingly, radio broadcasters should already be accustomed to the approach, which determines appropriate ownership limits based on "the cluster of stations with overlapping signal contours of a given strength."

Other Items. The Order addressed two other subjects worth noting. First, the FCC declined to make any changes to the Dual Network Rule, which "effectively prohibits a merger between the Big Four broadcast networks (specifically, ABC, CBS, Fox, and NBC)." Second, it addressed several diversity issues raised during the Quadrennial Review: whether to expand to other FCC regulatees the cable procurement requirement (under which a cable operator must "encourage minority and female entrepreneurs to conduct business with all parts of its operation") will be removed from the Quadrennial Review proceeding and considered in a new docket, and the Commission declined to adopt two other diversity proposals "for lack of support."

Commissioners Carr and Simington Dissent. As noted above, both Commissioners Carr and Simington forcefully dissented from the Order, for, in Carr's words, maintaining "this outdated set of broadcast radio and television rules" and, in Simington's words, advancing "poor policy and an illegal reading of our statute and rules."

Commissioner Carr took pains to emphasize the drastic media marketplace changes that have occurred since Congress first mandated the Quadrennial Review proceedings:

> "Hulu, Netflix, Disney+, ESPN+, Amazon Prime Video, Sling TV, Apple TV, YouTube, YouTubeTV, Tubi, Vudu, Freevee, Crackle, Pluto TV, NBC News Now, CBS News Streaming Network, CBS Sports HQ, Peacock, The Roku Channel, Paramount+, Max (nee HBO Max), BritBox, DIRECTV Stream, AT&T Now, FuboTV, Pandora, Spotify, SiriusXM, Apple Music, Amazon Music, and other online audio and video streaming services too numerous to quantify or recount have all emerged and fundamentally altered the competitive landscape."

Commissioner Simington similarly focused on the severely heightened competition faced by broadcasters in today's media landscape, arguing that the Quadrennial Review statute "requires that a competitive analysis *drive* the 'repeal or modification' of rules, not sit along in the back seat for the ride."

* * * * *

As of this writing, the pain points at this time appear to be for those broadcasters who may be considering adding a Big Four Network affiliation in the same market to a multicast stream or commonly owned LPTV station in the same market (which is now prohibited, per the Order) or planning to sell such a combination (which may still be possible depending on how the combination was put together). Broadcast advocates are likely to raise the same concerns regarding increased competitive pressures from online platforms and other media market participants, and to continue to push for the relaxation or removal of multiple ownership rules in the ongoing 2022 Quadrennial Review.

Divided Along Party Lines, FCC Adopts Proposal to Prioritize Processing of Some Applications for Stations Providing "Locally Originated" Programming

With a 3-2 vote along party lines, in mid-January 2024 the Commission released a Notice of Proposed Rulemaking (the "Notice") proposing to prioritize processing review of certain types of FCC applications filed by radio and television stations that provide a minimum amount of "locally originated" programming. The Notice frames its "application priority processing" idea as a way to incentivize broadcasters to foster locally produced programming that is responsive to the needs of their communities; the Notice suggests such an incentive is warranted in light of the Commission's elimination of the Main Studio Rule in 2017. (Broadcasters will recall that the Main Studio Rule had required stations to maintain a main studio with both transmission and

production facilities in or near its community of license.) Whether the Notice's proposals would actually have much impact if ultimately adopted is debatable; the two Republican Commissioners appear doubtful, to say the least.

Who Would Be Eligible? The Notice proposes to offer this application processing priority to commercial and noncommercial radio and television broadcast stations that provide an average of three hours per week of "locally originated" (as the Notice proposes to define that term, discussed below) programming. Application processing priority would not be available to radio and television translator or booster stations, which generally originate little or no original programming.

Processing Priority. The Notice proposes that stations who certify that they offer three hours per week of locally originated programming would receive processing priority—but only for certain applications. The Notice proposes priority be given for renewal applications, and applications for transfer or assignment of license (i.e., a broadcast station sale or other ownership change); the Notice invites comment whether other application types, including modification applications, waiver requests, or requests for special temporary authority should also be included. Further, the priority processing would only apply if the application became subject to "a hold, petition to deny, or other pending issue that requires further staff review." Applications with no such challenge—referred to in the Notice as "simple" applications—would still be processed as usual.

With respect to renewal or transfer/assignment of license applications subject to a hold, petition to deny, etc., FCC Staff would first consider those applications where the licensee certified that the station provides locally originated programming, ahead of considering applications with no such certification. In the case of applications involving more than one station (e.g., an application to assign multiple licenses in a single market), the Notice proposes that *all* stations on the application would have to provide locally originated programming in order for the application to receive priority. The Notice affirms that applications not receiving priority "will not be scrutinized or processed differently as a substantive matter than applications with a certification, other than the prioritization proposal discussed above."

What is "Local" Programming? The Notice seeks comment on how best to define "local" programming for purposes of this processing priority. It offers several options, including borrowing from the old Main Studio Rule, which required the maintenance of a main studio either "(1) within the station's community of license; (2) [a]t any location within the principal community contour of any AM, FM, or TV broadcast station licensed to the station's community of license; or (3) [w]ithin twenty-five miles from the reference coordinates of the center of its community of license as described in § 73.208(a)(1)." The Notice also proposes defining the "local" market as the station's service contour.

What Programming is Locally "Originated"? The Notice proposes to broadly define what programming would be considered locally "originated." It would consider "any kind of activity involved in creating audio (radio) or video (TV) programming that occurs within the 'local' market" to be sufficient. As proposed, programming would be permitted to be partially produced outside of the local market so long as some part of the production process occurred locally. The

Notice would not require locally originated programming to be produced by the licensee directly; locally originated programming created by third parties would suffice.

What Difference Might This Make? Until the record is fully developed, it is unclear what real-world impact the proposals of the Notice may have on FCC processing of affected applications. Chair Rosenworcel suggests the proposal represents an "incentive-based system that creates no new obligations, but instead puts in place a structure to better support the capacity for local news and content—and the local journalism that is absolutely vital for our communities."

Commissioners Carr and Simington aren't buying it. Commissioner Carr, in his dissent to the Notice, opined that the proposal would not "make much difference in the real world." Commissioner Simington went further, arguing that the Notice's proposals amount to the "weaponization of application processing" that is an unwarranted response to the prior repeal of the Main Studio Rule:

> Commission leadership has clothed recent regulatory revanchism in broadcast in the language of localism, and this item is no different. It purports to serve localism by providing an incentive to broadcasters to create or retain sources of 'locally-originated programming.' If broadcasters wish to have their broadcast license applications fast-tracked,—that is, timely processed—and those applications are otherwise encumbered by a hold, petition to deny, or 'other processing issue' (left to the staff's discretion), then staff will timely act on the application. While the language of the item suggests that this means that broadcasters with locally-originated programming have a leg up, what it actually means is that any broadcaster who originates news for Market A from a studio in Market B might now have any application—at least for which a 'processing issue' credibly can be discovered or manufactured—slowed. This is a collateral attack on the Commission's elimination of the Main Studio Rule, and the item all but says so."

Comments on the Notice are due by March 11, 2024, with Reply Comments due by April 8, 2024.

FCC Finds Yet Another Broadcast Retransmission Consent "Good Faith" Violation; Results in $720k Proposed Forfeiture

In early February 2024, the FCC's Media Bureau released a Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture (the "Order") proposing a $720,000 fine against the licensee of six television stations in Hawaii for allegedly violating the Commission's retransmission consent "good faith" negotiating rules. The Order stems from a July 2023 complaint filed by Hawaiian Telcom Services Company, Inc. against Nexstar Media Inc., in which Hawaiian Telcom accused the broadcaster of failing to negotiate in good faith for (1) conditioning retransmission consent on Hawaiian Telcom's acceptance of three proposals that, among other things, sought to prevent Hawaiian Telcom from seeking further relief at the Commission with respect to the parties' negotiation and final renewal agreement; and (2) refusing to extend the parties' then-existing retransmission consent agreement until the parties either reached a new agreement or came to an impasse.

The Media Bureau rejected Hawaiian Telcom's complaint regarding the broadcaster's refusal to grant a further extension; however, as set forth below, the Bureau did conclude that the broadcaster "breached its duty to negotiate in good faith under the 'totality of the circumstances' test" when it proposed terms that would have prevented the cable operator from filing complaints with the FCC.

The Order may prove instructive for other broadcasters (and, frankly, MVPDs) in their retransmission consent negotiations, particularly to the extent its reasoning sheds at least some light on the Bureau's view of certain contractual provisions.

The "Good Faith" Rules. As broadcasters know, the Commission has established a two-part test for establishing good faith (or a breach thereof) in terms of retransmission consent: the Commission can (1) find a *per se* violation of its good faith rules if a broadcaster or MVPD engages in any of the acts set forth in a specified, objective list of negotiation standards; or (2) find a violation based on the agency's more subjective "totality of the circumstances" test (i.e., the facts presented, viewed in their totality, amount to a failure to negotiate retransmission consent in good faith in the FCC's eyes). The Commission, in adopting its "totality of the circumstances test," stated that while it was "difficult to develop a . . . list of proposals that indicate an automatic absence of competitive marketplace considerations . . . it is implicit in section 325(b)(3)(C) [of the Communications Act] that any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement." The Commission identified various examples of bargaining proposals that it deemed presumptively inconsistent with the good faith rules, including a "proposal for contract terms that would foreclose the filing of complaints with the Commission."

Problematic Proposals. In the Order, the Media Bureau determined that, based on the totality of the alleged circumstances, the broadcaster breached its duty to negotiate retransmission consent in good faith "by proposing terms for renewal of the parties' agreement that would have foreclosed Hawaiian Telcom from filing complaints with the Commission relating to the parties' negotiation and final renewal agreement." The exact proposed contract language at issue does not appear in the Order.

According to the Order, Nexstar did not dispute that it proposed "so-called 'mutual release' or 'clean slate' provisions that contained language seeking to prevent Hawaiian Telcom from bringing future complaints to the Commission." Instead, the broadcaster argued that such provisions were lawful because they would have applied mutually to both parties, and they would not have prevented the cable operator from filing *any* future complaint against the broadcaster, but, rather, only complaints stemming from the specific negotiations leading to a renewal agreement.

The Bureau rejected these arguments, stating, "proposals for contract terms that would foreclose the filing of complaints with the Commission are presumptively at odds with the good faith negotiation requirement. . . . In particular, the fact that the provisions called for a mutual release of claims is irrelevant, as is the fact that Hawaiian Telcom was not prevented (nor would have been prevented) from filing *any* complaint. This is because Hawaiian Telcom, under the

express terms of Nexstar's proposal, would have been foreclosed from filing complaints with the Commission. . . ."

Television stations may wish to note what the Media Bureau had to say (or, really, what it did not say!) in declining to address the issue whether *other* proposals put forth by the broadcaster in this case ran afoul of the "good faith" retransmission consent negotiation rules. The Order indicates that the broadcaster made proposals that would have required Hawaiian Telcom (1) to release the broadcaster from its claims to the FCC of Nexstar's alleged bad faith (in the retrans negotiations), and (2) to withdraw its then-filed bad faith complaint (against Nexstar) to the Commission. The Bureau stated:

> In contrast to Nexstar's proposal to foreclose the filing of future [FCC] complaints, the Commission has not spoken directly to whether release/settlement provisions of this kind would violate the good faith duty, and such provisions may not in all cases run counter to the public interest. . . . Given that we have found Nexstar to have clearly violated its duty to negotiate in good faith as discussed herein and proposed significant forfeitures for its violations, further action at this time to deter future breaches of its duty (whether via use of the same, or similar, contract provisions) may not be necessary. We will not hesitate to revisit these issues and take appropriate action should Nexstar continue to fail in its duty to negotiate retransmission consent in good faith."

Failure to Further Extend. The Bureau did reject Hawaiian Telcom's argument that the broadcaster breached its duty to negotiate in good faith when it elected not to further extend the parties' then-existing retransmission consent agreement during the course of negotiations, resulting in the stations' signals being removed from the MVPD's systems. Per the Order, while the Commission strongly encourages parties to agree to short-term extensions, the FCC cannot lawfully *require* such extensions.

The Proposed Forfeiture. As for the proposed forfeiture amount of $720,000, the Bureau explained that the base forfeiture amount for a violation of the Commission's cable broadcast carriage rules is $7,500. It found that the conduct at issue continued for eight days, which would lead to a $60,000 proposed fine for each of the six stations ($7,500 X eight days). The Bureau then adjusted that amount upward, in its discretion, in light of the broadcaster's revenues and prior rules violations. According the Order, the proposed fine is designed to be sufficiently high so as not to "render the proposed forfeiture 'merely an affordable cost of doing business' and that the forfeiture acts as a 'meaningful sanction and deterrent against future misconduct.' "

The Order marks the second high-profile, high-dollar proposed fine against a broadcaster for alleged violations of the retransmission consent "good faith" rules in as many months. You may recall that the Media Bureau proposed a $150,000 fine against the licensee of a New York television station (Mission Broadcasting) for allegedly violating the Commission's retransmission consent "good faith" negotiating rules in a January Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture (the "January Order"). Similar to the Order discussed above, the January Order dealt with a December 2022 complaint filed by Comcast against Mission Broadcasting and Nexstar in which Comcast accused the broadcasters of failing to negotiate in

good faith by "conditioning retransmission consent on Comcast's acceptance of contract proposals that were presumptively inconsistent with competitive marketplace conditions because they would foreclose the filing of future complains with the Commission." According to the January Order, Nexstar represented Mission in the carriage negotiations at issue; the January Order's proposed fine, however, is directed at Mission—the FCC states that its investigation of Nexstar in that matter is ongoing. Both Mission and Nexstar have objected to the January Order.

FCC Proposes Mandatory Broadcaster Participation in DIRS and NORS

According to a January 2024 Further Notice of Proposed Rulemaking ("FNPRM"), the long-time voluntary nature of broadcasters' participation in the Disaster Information Reporting System ("DIRS") may soon be coming to a close, as the FCC has proposed mandatory broadcast reporting both in DIRS and the Network Outage Reporting System ("NORS"). The last time the FCC broached the issue, many within the industry, including the National Association of Broadcasters and National Public Radio, opposed any such mandate. Judging by the FNPRM, however, that opposition appears to have been unable to completely change the FCC's mind thus far.

Background. In 2007, in the wake of Hurricane Katrina, the FCC adopted DIRS with the goal of facilitating greater operational understanding of the status of critical communications infrastructure during and immediately after emergencies. As initially adopted, DIRS was voluntary; the FCC would "activate" the system for a particular area during a natural disaster or other qualifying emergency and encourage various communications stakeholders—from broadcast, to cable, to wireline and wireless providers and beyond—to submit reports on the status of their infrastructure. Over the last several years, however, the FCC has been considering transitioning to mandatory reporting for various entities, with the stated goal of allowing the system to "work to its fullest potential." Earlier this year—in a Report and Order accompanying the FNPRM—the FCC took its first steps into mandatory DIRS reporting, requiring cable, wireline, wireless, and interconnected Voice over Internet Protocol ("VoIP") providers to make daily DIRS reports when the system is activated, as well as a "final" report within 24 hours of DIRS deactivation.

Adopted several years earlier in 2004, NORS has always been mandatory for wireline, cable, satellite, wireless, VoIP, and Signaling System 7 providers. The purpose behind NORS reporting is slightly different than DIRS—providers subject to mandatory NORS reporting must report network outages that last at least 30 minutes and satisfy other specific thresholds. In that sense, NORS reporting is not necessarily tied to a geographic emergency, and it relates more directly to consumer and public safety communications mediums.

The FNPRM. Seemingly spurred in part by the 2023 wildfires in Maui, the FNPRM couches its proposed DIRS and NORS mandates largely in the fact that the FCC has not revisited broadcasters' voluntary (or, in the case of NORS, non-) participation in the systems "in almost two decades, even as the disaster and emergency landscape continues to change and technology continues to advance." Among other important changes that have occurred since NORS and DIRS were adopted, the FNPRM notes that the Wireless Emergency Alert ("WEA") system has been

created, the "severity and frequency of natural disasters" have increased, and greatly increased connectivity has heightened concerns regarding technological incursions on infrastructure.

At the same time, and as noted above, broadcasters have previously made their voices heard in the proceeding, filing comments against any mandate and arguing the broadcasters should prioritize the dissemination of news and timely emergency information to the public during times of crisis. The FNPRM does not entirely discount those prior comments, noting that television and radio broadcasters "are sufficiently different in kind and resources" from other typical DIRS and NORS filers such that the FCC believes it advisable to seek comment on how, if at all, to modify broadcasters' mandatory reporting obligation as compared to other providers. At the highest level, the areas on which the FNPRM solicits comments are: "the classes of broadcasters that should be included as mandatory filers, whether a simplified reporting process would be appropriate, and what reporting elements should be included for such a purpose in NORS and/or DIRS." In further examining those general comment areas, the FNPRM raises—among other things—the following questions and considerations:

- Whether the FCC should consider adopting different reporting requirements for small and large broadcasters and, if so, how should those lines be drawn?
- Whether booster or translator stations should be subject to any reporting requirement?
- What specific limitations and challenges small broadcasters face and how, if at all, the Commission can assist or encourage cooperation with larger broadcasters to facilitate DIRS or NORS filings?
- How the FCC might be able to "simplify" reporting for broadcasters, such as modifying the daily reporting cadence, or requiring a broadcaster merely to identify whether it is "on-air" or "off-air," (i.e., unable to operate or broadcast regularly) or provide details on any necessary restoration?

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Comments on the FNPRM will be due within 30 days after publication in the Federal Register, with reply comments due 60 days after such publication. As of this writing, the FNPRM has not yet been published.

NPRM Seeks Comment on How to Facilitate EAS Alert Distribution in Multiple Languages

In a February 2024 Notice of Proposed Rulemaking ("NPRM") the FCC is seeking comment on how to facilitate the distribution of multilingual alerts; specifically, whether it would be advisable for the FCC to create template alert scripts to be pre-installed and ready for distribution on broadcast EAS equipment. According to the NPRM, such an approach could assist broadcasters with more easily disseminating EAS alerts in languages other than English. The NPRM seeks comment on various other EAS accessibility issues as well, including the feasibility

of developing and implementing American Sign Language ("ASL") versions of any such template alerts.

Background. The EAS has long been one of the nation's most important emergency alerting tools, and is regularly used by national, state, and local authorities to notify communities of impending emergencies. The current system incorporates multiple mechanisms for distributing emergency information, both via EAS participants' monitoring of upstream audio transmissions and via internet-issued alerts. Regardless of the distribution system used, however, so-called "alert originators" are typically the ones who program and distribute the initial alert, and thus those alert originators typically have control over the content and language of the alert.

Although the vast majority of EAS alerts are transmitted in English, alerts are technically capable of being transmitted in any language. As a practical matter, however, the typically exigent circumstances surrounding the need to inform the public via an EAS alert impose significant time constraints on EAS participants' ability translate an alert into a language other than English prior to distribution.

Over the years, the FCC has taken various actions to study and encourage multilingual alerting. For instance, in 2018 all State Emergency Communications Committees ("SECC")—i.e., the entities charged with developing and implementing their state's EAS plan—were charged with submitting a report to the FCC summarizing "the overall multilingual EAS efforts by EAS Participants in the state." Overall, according to the NPRM, those reports indicated "sparse or isolated, localized efforts to relay multilingual alerts in a few states." And broadcast reports from the last several nationwide EAS test reports paint a similar picture.

The NPRM. Given the current apparent lack of multilingual alerting, as well as recent U.S. Census data indicating that more than 26 million people in the U.S. report not speaking English very well or at all, the NPRM seeks ways to facilitate the distribution of multilingual alerting by removing the current barrier imposed by the need to translate alerts prior to distribution. In particular, the NPRM proposes to create template alert scripts that would be pre-translated into the 13 most commonly spoken non-English languages in the United States (based on U.S. Census data)—Spanish, Chinese, Tagalog, Vietnamese, Arabic, French, Korean, Russian, Haitian Creole, German, Hindi, Portuguese, and Italian—as well as English. These pre-translated template-based scripts and audio files would be produced by the Commission, and would be pre-installed in EAS equipment operated by EAS Participants, including alert originators and broadcasters. This approach would be very similar to recent rules the FCC adopted regarding wireless emergency alerts ("WEA"), except that there the template alerts are to be pre-installed and stored on mobile devices (i.e., cell phones).

As far as implementation goes, the NPRM proposes requiring broadcasters to transmit template alerts using the language that corresponds to the station's primary language (i.e., the language of their programming content). For stations that multicast, the language of the template alert would need to mirror the primary language used on the multicast channel (e.g., if the station's primary stream was in English, but the station's .2 stream is in Spanish, separate template alert languages would need to be used for the two streams).

The NPRM goes on to solicit comment on various technical and other issues related to the proposal, including: the appropriate language for stations whose primary broadcast language is not one of the languages for which a template alert will be available; how alert-specific (i.e., non-template) data, such as time, date, and location, should be conveyed; and how much memory would be required for EAS equipment to store the various templates, which would likely total in the hundreds, each of meaningful length.

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Comments on the NPRM will be due within 30 days after publication in the Federal Register, with reply comments due 60 days after such publication. As of this writing, the FNPRM has not yet been published.

FCC Adopts New Rules Authorizing Wireless Multichannel Audio Systems

By a February 2024 Report & Order ("the Order"), the FCC has established technical rules for operation of an emerging wireless microphone technology: Wireless Multichannel Audio Systems ("WMAS"), while concurrently updating FCC rules governing traditional wireless microphone operations.

What are WMAS? WMAS are designed to increase spectrum-use efficiency for wireless microphone deployments, particularly as part of large events or in particularly crowded areas with frequent need for such equipment. Whereas the conventional—i.e., non-WMAS—approach would require deploying several individual microphones, each with it's a dedicated narrowband radio frequency ("RF"), WMAS permits carriage of several audio channels within a single block of RF spectrum—as many as 24 or more channels within a 6 MHz band, according to at least one wireless microphone provider. The Order indicates that this will potentially allow for greater consolidation of spectrum use, leaving greater room for unlicensed or other uses of the same spectrum bands. However, the Order makes clear that the Commission does not see WMAS as a replacement for narrowband microphone systems—due to the complexity and expense of the new equipment, the Order posits that WMAS will be primarily utilized for large concerts, sporting events, and other circumstances when a large number of simultaneous audio channels are necessary.

Where are WMAS Authorized? The Order authorizes WMAS operation in most of the frequency bands where wireless microphones are currently permitted to operate—both in licensed and unlicensed capacities—including portions of the VHF and UHF TV bands, and the 600 MHz duplex gap. Within the TV bands, WMAS may operate with a maximum bandwidth of 6 MHz, but must operate within a single 6 MHz channel (rather than spanning two adjacent channels).

Addressing Interference Concerns. In comments and ex parte activity, NAB and other industry advocates expressed concern that authorizing WMAS could increase interference concerns with existing narrowband microphone users, broadcasters' electronic newsgathering operations, and similar activities. The Order rejected those concerns, finding that such interference

would be unlikely due to the anticipated use of WMAS for only large-scale events requiring access to numerous simultaneous audio channels, and the relatively short distances signals are expected to travel. However, that doesn't mean broadcasters are without recourse in the event they begin to experience interference from new WMAS deployments. The Order also noted that under the FCC's existing rules governing low-power auxiliary devices (such as wireless microphones), licensed users (WMAS or otherwise) are required to coordinate among themselves to ensure they do not cause mutual interference. And, similarly, unlicensed WMAS would be required to coordinate with or adapt to other unlicensed users to resolve any conflict or resulting interference.

Other Updates to Wireless Microphone Rules. Beyond authorizing WMAS operations, the Order made several updates to FCC rules governing both unlicensed and licensed wireless microphone operations, including updating the list of RF spectrum where wireless microphones may operate post-Incentive Auction, removing rule references to analog TV stations, and removing the database access requirement for unlicensed wireless microphones operating in the guard bands (given that those bands are now unavailable for licensed services).

When Will the New Rules Take Effect? The Order specifies that its adopted rule changes, including those authorizing WMAS deployments, will take effect 30 days after the Order is published in the Federal Register. As of this writing, the Order has not yet been published.

December 2023 LPFM Filing Window Draws More than 1,300 Applications

In December 2023, for the first time in nearly a decade, the FCC opened a brief window for applicants to file for new LPFM stations. Approximately 1,335 applications were filed during the window, with approximately 34 in Ohio. As of this writing, FCC Staff have already identified "singleton" applications—i.e., applications that did not conflict with any others filed in the window—and begun granting those that are technically acceptable. The FCC will now turn to so-called "MX" / mutually exclusive applications—i.e., applications that cannot be granted due to technical overlap with another application—which, as of this writing, remain pending.

Although relatively unlikely, interference concerns for existing full-power FM broadcasters could potentially arise from applications that were filed in the window. In particular, LPFM applicants are permitted to request a waiver of the spacing requirements typically applicable to second-adjacent stations, so long as the LPFM applicant can demonstrate that the proposed LPFM facility will not cause any harmful interference to an existing station. Although the FCC's application processing calls for staff review of the technical and legal merits of each application, broadcasters may nonetheless wish to independently examine the technical specifics of pending applications requesting a new LPFM facility near their existing broadcast operations to determine whether the filing presents any risks.

FCC Poised to Adopt "All-In" Price Disclosures for Cable and Satellite Operators

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.

As of this writing, the FCC has released a draft Report and Order for consideration at its March 14, 2024, open meeting. Although the current draft is subject to change, it currently appears likely the FCC will adopt the Notice's proposals largely unchanged.

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.

FCC Proposes Impasse Reporting Requirement for MVPDs (and Perhaps Broadcasters)

In December 2023 the FCC released a Notice of Proposed Rulemaking (the "Notice") seeking comment on a proposal to require MVPDs (and, potentially, broadcasters) to notify the FCC when a broadcast television station's signal is unavailable on the MVPD's system (commonly but inaccurately referred to both in the Notice and by the MVPD industry as a "blackout") for more than 24 hours due to failed retransmission consent negotiations between the broadcaster and the MVPD. The Notice's proposal, approved by all five Commissioners, would also require MVPDs to disclose the number of subscribers that lose access to the station's programming on the MVPD's system and to notify the FCC within two business days of resolution of the impasse. According to the Notice, the new rule is intended to ensure that the FCC and the public have timely access to accurate information about MVPD service disruptions involving broadcast television stations.

The Notice cites the number and duration of broadcast station "blackouts" on MVPD platforms in the last decade as the impetus for the proposed reporting requirement. Because neither broadcast stations nor MVPDs currently are required to report service disruptions publicly (although MVPDs must notify their subscribers), the FCC, Congress, and the public purportedly have no consistent, reliable means for learning about significant MVPD service disruptions. The proposed reporting requirement, according to the Notice, would be particularly beneficial for consumers, empowering them to make informed decisions about MVPD services based on timely, accessible, and accurate information. The reported information also would help the FCC track the frequency and duration of impassess and identify "statistically meaningful trends," thereby

enabling the agency to more effectively discharge its responsibility to oversee the retransmission consent negotiation process.

The proposed rule would require MVPDs to submit reports using a standardized form via an FCC-administered online reporting portal within 48 hours of the start of any service disruption lasting more than 24 hours. The initial notice would include the name of the MVPD; the station or stations no longer being retransmitted and the network affiliation(s) of each affected primary and multicast stream; the name of the broadcast station group that owns the station(s); the DMAs in which affected subscribers reside; and the date and time of the initial interruption to programming. MVPDs would also be required to report the number of subscribers affected but would have the option to select confidential treatment of subscriber data. A second report identifying the date that retransmission of the broadcast signal(s) resumed would be required within two business days after resolution of the impasse. The reported information (other than that designated confidential) would be publicly available on the FCC's website, and the FCC proposes to delegate to the Media Bureau the authority to manage the specific reporting procedures and set the date on which the reporting requirement would take effect.

The FCC in the Notice invites comment on several aspects of the proposed rule, including how to define a "blackout"; whether the rule should apply to carriage of class A and LPTV stations; whether the reporting obligation should be mandatory or voluntary; whether MVPDs, broadcasters, or both should be obligated to report; whether the 24-hour threshold and the 48-hour reporting window are appropriate; how best to make reported information available and/or searchable; and the costs and benefits of the proposed rule.

Comments on the notice were due February 26, 2024; reply comments are due March 26, 2024.

Divided FCC Proposes Customer Rebate Requirement for Cable Operators and Satellite Providers

In a January 2024 Notice of Proposed Rulemaking (the "Notice"), the FCC invited comment on a proposed rule that would require cable operators and direct broadcast satellite (DBS) providers to give refunds to subscribers who are "deprived of video programming they expect to receive" during a retransmission consent impasse. The proposed rule, according to the Notice, is intended to address the "customer service shortcoming" resulting from subscribers paying fees for a service—access to broadcast (and non-broadcast) programming—that they receive only in part (at least from their MVPD provider) during an impasse.

The Notice was adopted by a 3-2 vote along party lines, with the Republican Commissioners voting against the Notice and offering harsh rebukes of the majority's positions. Additionally, like the "blackout reporting" proposal the FCC released at the end of 2023 (and discussed above), which would require cable operators and DBS providers to report retransmission consent impasses that last more than 24 hours to the Commission, the Notice uses the inaccurate "blackout" terminology, once again effectively ignoring the undisputed fact that broadcast programming is available all the time, free over the air—and is never actually "blacked out."

The Notice. The Notice invites public comment on an array of questions that bear on the proposed rebate requirement, including: how the FCC should enforce the rule; whether and how cable operators and DBS providers should be required to use specific methods to offer and issue rebates; whether the rebate requirement should only apply to cable operators and DBS operators; how to calculate and determine the duration of a rebate when the broadcaster and the MVPD do not renew a carriage agreement; how the rule should apply to subscribers who sign up for the applicable MVPD's service during an impasse; whether any MVPDs currently provide rebates during a carriage impasse; whether the FCC has authority to adopt a rebate rule; and whether there are alternative proposals that would benefit customers who lose access to programming they have paid for because of a "blackout."

On the question of the FCC's authority to adopt the proposed rule, the Commission tentatively concludes that its statutory authority to regulate matters that bear on "customer service" issues involving MVPDs supports the proposed rebate requirement, "because billing practices governing an interruption of service, such as blackouts, involve the 'direct business relation between a cable operator and a subscriber.' " The Notice acknowledges, though, that the Communications Act "limits [the FCC's] authority to regulate rates for cable service in areas where effective competition exists, and that nearly all cable operators now face effective competition." The Commission ultimately determines in the Notice that the proposed rebate requirement would not be tantamount to rate regulation, citing recent court decisions in which "requirements that addressed cable operator charges to subscribers for services that were no longer being provided to the subscriber" distinguished "prohibited rate regulations from regulations similar to the [proposed rebate rule] that provide basic protections for cable customers."

The Notice also poses a number of questions directed to potential causes of a purported increase in the numbers of retransmission consent impasses, including whether increased consolidation in either the broadcaster or MVPD markets contributes to "blackouts"; whether "the proliferation of streaming services," including virtual MVPDs (vMVPDs), has impacted the number or duration of impasses, "as these services may provide subscribers with alternative viewing options during a carriage dispute"; and whether certain categories of programming (e.g., sports) are more likely to lead to impasses. The Notice also asks whether there are certain "broadcasters or MVPDs whose negotiations result in blackouts more frequently than others" and what steps the Commission might consider to "incentivize both broadcasters/programmers and distributors to limit programming blackouts."

Four Commissioners made separate statements with respect to the rebate requirement. According to Chairwoman Rosenworcel, "this rulemaking is about fairness," because consumers deserve a rebate when they are unable to watch the programming that they have signed up and paid for. Commissioner Starks likewise expressed support for the proposed rule. On the other hand, Commissioners Carr and Simington dissented, the former criticizing the proposal as a form of rate regulation and the latter criticizing the proposed rule as "creat[ing] zero consumer welfare (and, likely, . . . harm[ing] consumer welfare)[.]" Commissioner Simington also expressed skepticism that the proposal would in fact make customers who lose access to programming during "blackouts" whole, citing numerous, detailed reasons.

Comments on the Notice are due by March 8, 2024, with Reply Comments due by April 8, 2024.

FCC Still Considering Increased FM Digital Power Output

In February 2024, just as it seemed the FCC was nearing a decision to permit increased FM digital power levels and asymmetric sideband usage, NAB and Xperi filed a Petition for Clarification in the relevant FCC docket to modify their requests and account for additional modes of digital operation. The FCC has solicited public comment on the Clarification Petition; Comments are due by April 1, 2024, with Reply Comments due by April 15, 2024. The underlying context for the Rulemaking is as follows.

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.

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 sought comment on and tentatively concluded 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."

Qualifying Low Power TV Stations to Soon Be Afforded Limited Class A Conversion Opportunity; FCC Application Window Likely to Open in Coming Months

In a development of particular interest to low power television ("LPTV") stations operating in smaller markets, in December 2023 the Commission unanimously adopted a Report and Order (the "Order") implementing the Low Power Protection Act (the "LPPA"). As a result, once the Report and Order goes through necessary additional regulatory approvals and the Media Bureau successfully updates its license application form, qualifying LPTV stations will have one year in which to apply to the FCC to convert to Class A status.

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.

In early January 2023, Congress sought to change that, at least as applied to certain LPTV stations operating in smaller markets. In particular, Congress enacted the LPPA, which directed the FCC to offer a level of heightened protection to qualifying LPTV stations similar to that previously provided to certain LPTV stations in 2000 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.

To implement the new law, including by proposing rules regarding the various eligibility criteria articulated therein, the FCC solicited comment on various aspects of the LPPA via a March

2023 Notice of Proposed Rulemaking ("NPRM"). After considering all comments submitted in response to the NPRM, the recent Order adopts nearly all FCC implementation proposals.

The Order and Adopted Eligibility Criteria. Although the Order's discussion of the adopted eligibility criteria is too exhaustive to fully discuss here, some of the most important eligibility criteria follow:

- 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) complying 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"), as defined by the Nielsen Local TV Report, with not more than 95,000 television households as of January 5, 2023.

- An eligible LPTV station—from and after the date of its application for a Class A license—must 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.

- The Order mostly declines to adopt the NPRM's proposal that a station would lose its Class A status if its DMA were ever to exceed 95,000 television households for any reason. Specifically, the Order determines that an LPTV station converting to Class A status pursuant to the LPPA will not lose its Class A status if the station is no longer able to comply with the 95,000 TV household threshold for reasons that "are beyond the station's control," defined as a change in market size due to: "(1) population growth, (2) a change in the boundaries of a qualifying DMA such that the population of the DMA exceeds 95,000 television households, or (3) the merger of a qualifying DMA into another DMA such that the combined DMA exceeds the threshold amount."

Bipartisan and Bicameral AM Radio for Every Vehicle Act Continues to Have Strong Support; AT&T Service Outage Emphasizes Need

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 Continue to Go Head to Head

The same performance tax bill from the last U.S. congressional session—the American Music Fairness Act (the "AMFA")—remains "live" in the current Congress, along with the 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 were 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." As of this writing, the AMFA has only 3 cosponsors in the Senate and 4 in the House.

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 217 cosponsors of the House of Representatives (including fourteen Ohio Representatives), and the Senate version enjoys support from 23 cosponsors.

FCC Remains Without Spectrum Auction Authority

In March 2023, the FCC's spectrum auction authority expired for the first time in three decades. Since that time industry members, FCC Chair Rosenworcel, and Members of Congress have all lobbied 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 when the FCC's authority will be restored.

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

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