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New Renewal Certification Requirement Means New Language in Advertising Contracts

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In the March and June, 2008, *Memos to Clients*, we described the FCC's recent "diversity" initiative order, and the wide ranging nature of the new rules and policies adopted by the FCC in the name of expanding opportunities for minority- and women-owned broadcasting outlets.

In this issue, we want to highlight a new policy, adopted as part of the order, that requires broadcasters to add nondiscrimination clauses to their advertising contracts. Not complying with this new requirement could result in delays and, possibly, fines when your next license renewal application is processed.

The policy in question requires each broadcaster to certify in its next license renewal application that: (a) the broadcaster's advertising contracts do not discriminate on the basis of race or gender; and (b) such contracts contain nondiscrimination clauses. Its purpose is to combat long-rumored practices in the advertising business regarding "no urban/no Spanish" provisions which specify that commercials will not be run on stations which feature such formats. While the existence of such practices has not been conclusively established, anecdotal evidence has for decades fueled concern about the adverse effects that such practices could have – and, according to some, have actually had – on minority broadcasters.

The good news is that compliance with this new policy appears to be fairly simple. All that is required is "yes/no" certification at renewal time that the licensee/renewal applicant is in compliance. Simple, no?

Unfortunately, as with most other ostensibly simple "yes/no" certifications, the bad news is that nothing is quite as easy as it may seem at first.

For example, the Commission declined to provide, for purposes of illustration, the text of an approved nondiscrimination clause. So we don't know for sure exactly what the FCC has in mind when it refers to nondiscrimination clauses. Of course, the clause should

clearly articulate that the licensee has a policy of nondiscrimination, but what kind of additional detail (if any) might the Commission be looking for?

At least one minority-oriented public interest organization has informally circulated a model clause that, in the organization's view, satisfies the new FCC policy. The suggested language provides that, in the placement and scheduling of, and compensation for, advertisements, there shall not be discrimination on the basis of race, color, religion, sex, national origin, or language spoken by the broadcaster's audience; it also includes a separate clause, designed to implement the nondiscrimination policy. That separate clause would require periodic reports, notices to employees, training in nondiscriminatory policy compliance, etc.

In our view, provisions of this type are unnecessarily broad in scope and could potentially open the door to claims against broadcasters who contractually agree to these standards but who subsequently fail to follow-through in practice with the requirements. We also think that overly-complicated and detailed nondiscrimination clauses and overly-burdensome compliance requirements could scare away potential advertising clients at a time when the radio business in particular is facing declining revenue.

As an alternative, we suggest a somewhat more pragmatic approach to compliance, keeping it simple by sticking with the wording of the Commission's diversity order and not overly elaborating upon it with any unnecessary requirements. For example, the following clause would appear to comply with FCC's policy:

NONDISCRIMINATION POLICY: [Insert name of broadcaster] and its station[s] do not discriminate in advertising contracts on the basis of race or gender. Any provision in any order or agreement for advertising that purports to discriminate on the basis of race or gender, even if handwritten, typed, or otherwise made a part of a particular contract, is hereby rejected.

The FCC's diversity order implementing the new policy went into effect on July 15. However, the revised license renewal application on Form 303-S has not yet gone through the (somewhat Orwellian-named) Paperwork Reduction Act process. So it is unclear exactly when the requirement for adding these nondiscrimination clauses to your advertising contracts begins.

It is also unclear how this new policy will apply to existing advertising contracts. As mentioned earlier, the policy is to be implemented through certifications in routine license renewal applications: when your next renewal application comes due in a couple of years, you will be required to certify that your advertising contracts contain nondiscrimination clauses. But let's say you have a standing order with a client for

weekly spots that began on January 1, 2008, and runs through the end of the year, with the only paperwork being an contract/order form that was signed in January before the new policy took effect – will that agreement be covered by the certification you will be required to make in 2012 (or whenever your next renewal application happens to be due)?

To be abundantly clear that you are in compliance, in addition to starting to add a nondiscrimination clause to all new contracts, you should consider sending out a mailing to all existing advertisers (including your national rep firm, if you have one) amending your current contracts to include this new clause. Perhaps when we see the revised renewal application Form 303-S and the instructions regarding this issue, it will be clearer exactly what the compliance certification will require regarding existing agreements.

Finally, we are constrained to observe that there is a bit of irony in the approach the FCC has taken with this new policy. Presumably, when station license renewal time rolls around, if a licensee is unable to certify in its renewal application that its advertising contracts contain the required nondiscrimination clause, the FCC will delay approval of the application and either admonish the licensee or possibly seek to impose a monetary fine for failure to comply with this policy. That has been the FCC's course of action when dealing with certifications regarding public file rule requirements, for example, in the last round of license renewals. But what if the licensee's station is broadcasting an urban or a Spanish-language format – the precise type of format this policy is designed to protect and encourage? Will the FCC still punish such licensees for failing to have nondiscrimination clauses in their advertising agreements? We shall see.