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Memorandum to Clients

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Noncommercial Stations Beware: When 'Underwriting' Spots Turn into Advertising, a Big Penalty Can Follow

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Many noncommercial educational (NCE) stations – and their lawyers – were caught by surprise in February when the FCC issued a $115,000 civil penalty against an NCE licensee. The Cesar Chavez Foundation (CCF) was hit for running underwriting spots promoting for-profit entities. CCF agreed to the monetary penalty as part of an FCC approved consent decree released on Feb. 1.

In the past, FCC civil penalties and forfeitures for violation of underwriting restrictions have been more modest, typically $12,500 or less. The size of this penalty may indicate an interest by Chairman Pai's new Enforcement Bureau Chief, Rosemary Harold, to get tougher about NCE underwriting practices. But it also might indicate a loss of patience with CCF, since this is not the first, not the second, but at least the third time that CCF has been cross-wise with the FCC over underwriting copy. Specifically, in 2012 CCF was hit with a $12,500 forfeiture and then in 2016 it agreed to another $12,500 civil penalty as part of a consent decree deal.

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The penalties in this latest CCF latest case include, in addition to the $115,000 assessment, a one-year prohibition on broadcasting any underwriting announcements on behalf of for-profit entities. This is a death knell for many NCE stations – this is the first time we can recall such a restriction being imposed.

The practice of resolving cases through consent decrees, where the licensee agrees to certain sanctions in return for closure of an investigation, makes it difficult for other NCE stations and their lawyers to tell how egregious the offensive announcements were because decrees typically don't quote the offending language.

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But in this case, the FCC accompanied the consent decree with a news release that provides a little more detail.

According to the FCC, the spots CCF aired ran afoul of the underwriting rules in various ways by:

- Drawing comparisons between an underwriter's products or services and those of its competitors and making a qualitative statement ("There are times that we fear going to see cars because we don't know who to trust. You can trust the Bill Luke car dealership");
- Including information on prices, savings, or value ("Additional holiday bonus savings on select models");
- Making calls to action ("Are you ready to buy a house? Want to know if you qualify?");
- Listing a "menu" of products or services ("Cell phones from companies such as Verizon Wireless, Cricket, T-Mobile, Virgin Mobile, TracFone"); and
- Making the spots too long (here, between 30 and 60 seconds in duration).

Regarding this last point, while the FCC has not set a maximum length for underwriting spots, it has said, "the longer the announcement, the more likely it is to contain material that is inconsistent with their 'identification only' purpose." As to the "menu" restriction, we don't recall seeing that policy being applied to a spot listing as few as five items, which is the number in the example included in the FCC's news release. Seven, yes; five, no.

Whether the CCF consent decree marks the beginning of enhanced enforcement of the FCC's underwriting restrictions or only an outlier involving a repeat offender remains to be seen. But, in any case, NCE stations should exercise particular care in reviewing underwriting copy going forward. More and more, underwriters are pushing stations toward going over the line. Stations now have a concrete reason to push back against calls to action and qualitative or comparative claims. It could get them in trouble if they don't.

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FCC Officially Publishes Net Neutrality Rollback Rule; Will Take Effect on April 23

By FHH Law

Well, it's official: the Open Internet rule, better known as Net Neutrality, will go bye-bye starting April 23.

On Feb, 22, the hotly debated final notice of the Open Internet Rule (better known as Net Neutrality) was published in the Federal Register. Net Neutrality goes away as of April 23 except for certain provisions that require review by the Office of Management and Budget (which will take effect later). The rule rolls back FCC Internet regulations and reclassifies Internet service providers. (For a history of how we got here, read up on Net Neutrality on our blog: CommLawBlog.com.)

However, this doesn't mean that the fight over the Internet is over just yet. This is an important procedural milestone in the debate over the Internet as it sets in motion pending challenges to the rule. Already, attorney generals in 22 states, along with governors in Montana and New York, have filed lawsuits to block the deregulation of Internet access. It is likely more states will follow suit.

The rule follows a Dec. 14 FCC party-line decision to reverse the 2015 Title II Order, which reclassified broadband Internet access as a "telecommunications service." This decision means that the Internet will now return to its pre-2015 Title I "information service" classification, moving oversight of the Internet to the Federal Trade Commission.

The battle of how to regulate (or how not to regulate) the Internet isn't quite over. Be sure to follow developments at CommLawBlog.

Above 95 — FCC Hits the Stratosphere

By Peter Tannenwald
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The FCC voted on Feb. 22 to issue a Notice of Proposed Rulemaking and Order looking toward issuing licenses for frequencies above 95 GHz. That's ***Giga-Hertz***, not MegaHertz – way up there, beyond the highest frequencies that are commonly used today, at least by the private sector.

Historically, frequencies this high were not considered useful for communication transmission. But the radio art has advanced quickly; and Amateurs, who make it their business to advance the state of the art, have been allowed to operate above 95 GHz for years. Today, commercial inventors and entrepreneurs are seriously at work

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developing ways to exploit higher and higher frequencies. The amount of available bandwidth is enormous; if the high frequencies can be used, the possibilities for ever-faster wireless broadband and backhaul speeds are significant.

The FCC has proposed to authorize three types of operations: regular licensing, unlicensed systems, and experimental licensing. The structure for licensed systems would be based on the existing system for the 70, 80, and 90 GHz bands, where licenses for point-to-point systems will be issued to anyone who wants them, all for nationwide operation, and without limit on the number of licenses available. All operators will be required to register each of their point-to-point links with one or more private database managers, with protection of links from interference given on a first-come, first-served basis. In other words, each new link must protect those that were registered earlier. The amount of spectrum the FCC hopes to open up for licensed use is 102.2 GHz.

Unlicensed systems would be regulated similarly to existing regulations for the 60 GHz band. The FCC anticipates that transmission range will be limited; that's because signals so high in frequency, which in turn have very short wavelengths, tend to be absorbed or blocked by atmospheric particles. This characteristic should allow many systems to co-exist without interfering with one another. As much as 15.2 GHz of spectrum is proposed for unlicensed use.

The FCC also proposes to issue experimental licenses from 95 GHz up to 3,000 GHz (3 TeraHertz). All operation would be conditioned on not interfering with other systems, presumably both licensed and unlicensed. The FCC proposes more flexibility for these licenses than it has allowed for experimental licenses in the past, including a longer than normal license term and the ability to transfer experimental licenses.

Finally, the FCC is proposing to permit the sale of new equipment during market trials, contrary to the existing heavy restrictions against equipment sales before operating rules are adopted and before equipment receives certification.

While the prospects for exploitation of ever-higher frequencies are exciting, it appears that the FCC is assuming for now that uses will be limited to relatively short, straight-line, point-to-point communications and very short-range Wi-Fi-like systems. However, we are aware of research currently in progress which has demonstrated that propagation is not limited to straight-line paths and that frequencies above 95 GHz may bend around corners to some degree. As technology develops, it will be interesting to see what applications are the most successful and what traditional technical assumptions may require additional analysis.

Meanwhile, the FCC has also voted to propose rules to implement Section 7 of the Communications Act, which requires the FCC to act on petitions or applications for

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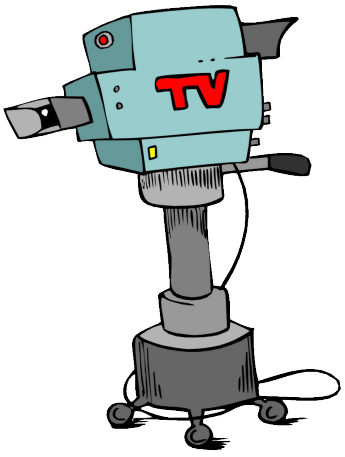
new technologies and services within one year of receipt. The FCC proposes that its Office of Engineering and Technology (OET) make a recommendation within 90 days as to whether a petition for approval of a new technology should be put on a one-year track or processed normally. The full Commission will review the recommendation and decide whether to initiate a formal rulemaking.

We will be happy to answer any questions about the FCC's proposals and to help you file written comments or meet with the FCC's staff to present your ideas. Contact Peter Tannenwald at tannenwald@fhhlaw.com.

FCC Opens Up Special Displacement Window for LPTV Stations

By FHH Law

In February, the FCC's Incentive Auction Task Force and the Media Bureau announced the opening of a 60-day filing window for those LPTV stations that are being displaced as a result of the post-incentive auction repacking process. The "Special Displacement Window" applies to certain LPTV stations, TV translators, and analog-to-digital replacement translators. The window will be open from **Tuesday, April 10 through Tuesday, May 15 at 11:59 p.m. EDT**. Once a station has identified which channel it wants – and on which it can operate without causing unacceptable interference — it should file a construction permit application during this filing window.



This special filing window is open to "operating" ***and*** "displaced" LPTV/translator stations only. An LPTV is considered "operating" for purposes of this window if it was licensed, or had a license to cover the application on file, as of April 13, 2017 – the date on which the incentive auction closed. "Displaced" stations are defined by the Media Bureau as stations that:

- Are authorized on channels that are being taken by a full power or Class A television station in the repacked television band (channels 2- 36) as a result of the incentive auction and repacking process; or
- Are licensed on frequencies that will serve as part of the 600 MHz Band guard bands (which includes the duplex gap).

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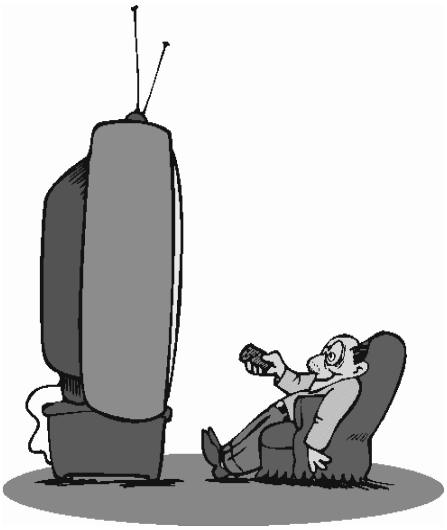
In conjunction with this filing window, the FCC has announced that it is releasing data that, according to the Media Bureau, "identifies locations and channels where LPTV/translator stations filing applications in the Special Displacement Window likely cannot propose displacement facilities because of the presences of non-displaced LPTV/translator stations and permittees, full power and Class A television stations, or land mobile operations." Displaced stations should consider this information in determining what channels may be available to them in the filing window.

To increase the number of available channels, the FCC also clarified that displaced LPTV/TV Translator stations may apply to operate on channels (between 2 and 36) that are currently occupied by full-power or Class A stations but are being given up in the repack. Any applications for such channels may only be filed on the condition that operations will not begin until the full power or Class A licensee vacates the channel.

All applications filed during the window will be treated with equal priority which means that the FCC will have to hold an auction if there are conflicting applications that cannot be resolved. The FCC has been very reluctant to hold LPTV/translator auctions in the past because they have not drawn enough money in bids to pay for the cost of the auction; it is likely that the FCC will offer one or more settlement opportunities in which mutually exclusive applicants can make deals (though probably not "for-profit" deals).



The one exception to equal treatment of applications is that applications for fill-in translators by full power stations will have priority over LPTV and other translator applications.

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If you need advice on navigating this filing window, we will have attorneys ready to help with strategy and application preparation.

Commercial Broadcasters March Toward a Second Extension of GMR Interim License

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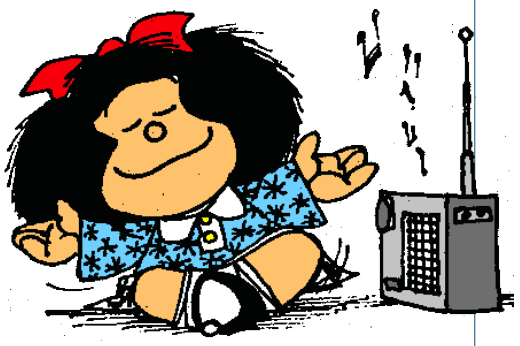

Over the past 15 months, we've kept our readers updated on the music licensing fight between the Radio Music License Committee (RMLC) and Global Music Rights (GMR). This, of course, started when the two sides couldn't reach an agreement on the terms of a license that would allow the commercial radio stations represented by the RMLC to perform publicly the musical works in GMR's catalog.

As the end of 2016 approached without a license in place, those radio stations faced four undesirable alternatives:

1. Pay the fees demanded by GMR (which the RMLC discourages given how high those fees are);
2. Attempt to avoid playing any GMR compositions (which could be hard given the prominent names that figure in GMR's catalog, the fluid state of that catalog, and the difficulty of clearing performances in commercials and third-party programming);
3. Continue to play GMR music without attempting to negotiate a license (a risky and unadvisable venture given how high infringement damages can run); and
4. Challenge GMR's anticompetitive conduct in a lawsuit.

As regular CommLawBlog readers know, the RMLC chose No. 4, filing a lawsuit in the United States District Court for the Eastern District of Pennsylvania on Nov. 18, 2016. The complaint was accompanied by a Motion for Preliminary Injunction seeking to prevent GMR from charging commercial radio stations monopoly prices during the pendency of the litigation. The litigation is still ongoing, with the most recent update being a Nov. 29, 2017 recommendation from a United States Magistrate Judge that the RMLC's antitrust lawsuit be dismissed due to lack of personal jurisdiction over GMR in Pennsylvania and refiled in California. There, GMR responded to RMLC's suit by filing its own responsive antitrust lawsuit against the RMLC.

Of course, the filing of a lawsuit itself didn't automatically permit commercial radio stations to perform publicly GMR-represented musical works. But GMR granted that permission in late 2016 when the RMLC and GMR reached an interim license agreement that would allow

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GMR-represented commercial radio stations to broadcast and webcast GMR music through Sept. 30, 2017, as long as the station opted into the interim license by Jan. 31, 2017. On Aug. 8, 2017, this license was extended for six months – through March 31, 2018 – on the same terms and conditions for any station who opted into the extension by the Sept. 30, 2017 deadline.

As the deadline for this extended interim license now approaches, the RMLC and GMR have agreed on a second extension to Sept. 30, 2018. Like the first extension, the agreement merely continues the interim license under the current terms and conditions (including price).

Unlike the first extension, GMR may take the initiative this time around and contact interim-licensed stations before the beginning of March. According to an RMLC press release issued on Feb. 9, 2018:

> *GMR has advised RMLC that, beginning no later than March 1, 2018, GMR intends to contact individual stations to offer this interim license extension. If you wish to accept this interim license extension offer but have not heard from GMR by March 1, 2018, please contact GMR directly before your current license expires on March 31, 2018.*

If you are a commercial radio station who did opt into the interim license and then extended that license, expect to hear from GMR about this extension. **If you find yourself in March without contact from GMR, you should affirmatively reach out to GMR to ensure that your interim license does not expire (which would leave you exposed to liability for copyright infringement if you broadcast or webcast GMR works).**

Please feel free to contact us – in March or sooner – if you have any questions.

Political Broadcasting Rules Q&A

By Dan Kirkpatrick
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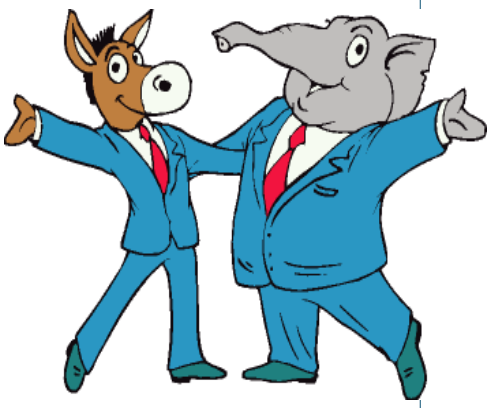

With primaries in some states happening as soon as March, the 2018 election cycle is certain to be contentious and hard-fought. ***Now*** is the time for broadcasters to review their systems to ensure that they will be in compliance with the FCC's political advertising requirements. Now that all broadcast stations are required to place political files online, it will be increasingly important for all radio and television stations to ensure compliance with the political broadcasting rules – not just the substantive rules, but the recordkeeping portions as well. A little advanced planning can go a long way in making this election season run smoothly (and, ideally, profitably) for your station.

The FCC's political broadcast rules generally cover: 1) who is entitled to access to broadcast advertising time; 2) how much they pay for that time; and 3) disclosure and recordkeeping requirements. We'll look at each of those areas below, but we highly encourage stations with questions to contact their communications counsel. The FCC's rules and policies are fairly complicated when it comes to political broadcasting, and the answers to many questions are highly dependent on the specific facts at hand.

Central to understanding and complying with the political rules is the concept of a candidate's "use" of a broadcast station. As we will delve into in greater detail below, the "use" of a broadcast station by a candidate triggers several potential obligations. Therefore, it is important to know as a threshold matter: a) when someone is a candidate and b) when they are considered to have made a "use" of a station.

Who is a "candidate"?

To be considered a candidate a person must:

- Have announced his/her intention to run;
- Be qualified to hold the office he/she is running for; and
- Be qualified to be on the ballot or be eligible to be a write-in candidate.

What is a "use"?

In general, a "use" is any positive appearance of a candidate whose voice or likeness is either identified or is readily identifiable. The appearance in question does ***not*** need to be approved by the candidate or the candidate's committee to be considered a "use" – third party ads may trigger a "use," as can appearances in entertainment programming. The candidate's

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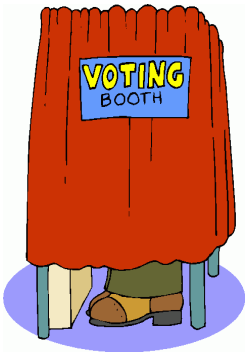
appearance on the station must be "positive," so a third party attack ad against a candidate would not be considered a "use" by that candidate. Candidate appearances in certain types of programming do not count as "uses."

For example, appearances by a candidate on "bona fide" news, in news interviews, or documentary programs are not considered "uses." Thus, coverage of a "bona fide" news event, such as a debate or candidacy announcement, does not constitute a "use" even if the candidate is featured prominently in that coverage.



What candidates are entitled to "reasonable access" and what access is "reasonable"?

The FCC's rules (and the Communications Act) provide that "legally qualified" candidates for ***federal*** offices (*e.g.*, President, Vice President, House and Senate) are entitled to "reasonable access" to commercial broadcast stations for the broadcast of advertising. This means that, as a general rule, commercial broadcasters ***must*** make time available to candidates for federal offices. Demands for "reasonable access" can only come from a candidate or his/her authorized campaign committee. Third party advertisers and "issue advertisers" do ***not*** have reasonable access rights and, as discussed below, neither do candidates for state and local offices.

Although a federal candidate's reasonable access rights ensure access to a broadcast station's airtime, federal candidates do ***not*** have the right to demand time during specific programs or day-parts. In addition, stations may choose to exclude political advertising from news programming. But, beyond those limited exceptions, the station must offer federal candidates "reasonable" access to the station's full schedule.

Precisely what degree of "access" is "reasonable" is not always easily determined. Since federal candidates enjoy considerable discretion to tailor their campaigns as they see fit, stations should avoid setting flat limits on the total amount or types/classes of time available to federal candidates. Questions about what is "reasonable" in any given circumstance may need to be referred to legal counsel. In any event, in view of the clear requirement that federal candidates be afforded "reasonable access," stations should do some advanced planning about the amount of time likely to be required to reasonably accommodate political advertising. (For such planning, it is obviously wise to consider the number of candidates competing for the various federal offices, since a "use" by one candidate can trigger "equal time" claims by others running for the same office.)

In contrast to federal candidates, candidates for state and local office (*e.g.*, mayor, county council, school board, etc.) are not entitled to "reasonable access." Thus, a station can choose not to sell any time to any candidate for a particular state or local office. BUT if the station does sell time to one candidate for a particular non-federal office, other candidates for that office will be entitled to insist on "equal opportunities" (see below).

If a large number of candidates are vying for one particular non-federal office, selling time to one candidate for that office could result in multiple demands for "equal time" from that

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candidate's competitors, which could in turn seriously reduce the station's commercial inventory. That being the case, stations should consider, in advance, the non-federal political races for which advertising time will be made available.

Once that determination has been made, any restrictions should be included in the station's disclosure statements (see next page) – and consistently applied.

What are "equal opportunities"?

All candidates for the same office must be treated in an equal manner. This rule – known as the "equal opportunities" or "equal time" rule – applies to ***both*** federal ***and*** non-federal (*i.e.*, state and local) candidates; it is ***not*** restricted to a limited period of time before the election. The rule is triggered by a "use" of a station by a legally qualified candidate. Once a legally qualified candidate for a given office makes a "use" of a station, all other legally qualified candidates for the same office are entitled to the opportunity to make equal use of the station. That is, the station must make the same amount and kind of time available at the same cost.

In order to take advantage of this rule, a candidate seeking equal time must request it within seven days of the opposing candidate's triggering "use" of the station. A station is not obligated to notify opposing candidates when a "use" is made but, as described later, it must document all uses in its political files, which are now part of the station's online public inspection file. If a station does not post such documentation to its public files in a timely manner, the seven-day deadline for equal time claims may be extended.

The equal opportunities rule can become a serious issue when on-air talent wishes to run for office. All of that person's appearances on the station after becoming "legally qualified" count as free uses of the station. Similarly, if an actor or other entertainment personality becomes a legally qualified candidate, the broadcast of movies, TV shows or other material in which the actor/personality is identifiable would also count as free uses. Such uses would obligate the station to give equal amounts of free time to all opposing candidates.

Equal time claims can also become a serious issue in the final days before an election, when some stations may need to monitor their available commercial inventory closely to ensure that they are able to accommodate equal time demands from candidates.

What is "lowest unit charge" and when does that apply?

Perhaps the most troublesome question for many stations is the question of the rate that may be charged for political advertising. All legally qualified candidates for any political office – state, local or federal – are entitled to the "lowest unit charge" (LUC) (or "lowest unit rate") during the 45 days before a primary election and the 60 days prior to a general election. (The 45/60 day periods are often referred to as "LUC windows.") In general, the LUC is

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the lowest rate charged to any other advertiser for the same class and amount of time for the same time period, including all discounts and bonus spots. As a practical matter, political candidates are to be treated as the "most favored" advertiser during the LUC windows. This favorable treatment is available only to candidates or their authorized campaign committees for "uses" by the candidate; it is ***not*** available to any third-party advertisers, including political action committees, citizens groups and the like. As explained below, federal candidates also must make an affirmative certification that their advertisements meet certain criteria to qualify for the LUC.

Determining the exact amount of the LUC for any particular candidate order can be tricky. It depends on what the candidate is buying (*e.g.*, ROS vs. fixed position, preemptible vs. non-preemptible, etc.). A station must also take into account other factors that affect advertising rates charged to its non-political customers, such as day-part, discounts given for large purchases, the value of "bonus spots," etc. Most stations will have more than one LUC depending on the various classes of time sold on the station during the LUC window.

Because the calculation of the LUC can be complex, stations should begin considering the issue well in advance of the LUC window, and should consult with legal counsel as necessary.

What are "Disclosure Statements" and are stations required to have them?

A disclosure statement is a written summary of the station's advertising rates and policies. Ordinarily, it should describe the classes of time available to advertisers, the LUC for each class, any make-good policies, policies on the preemption of ads, and any other sales practices or information that would be relevant to advertisers. The station should provide the disclosure statement to any candidate, agency, or group requesting political time (inside or outside of the LUC window). Of course, disclosure statements should be updated as often as necessary during the election season to ensure accuracy and stations should be sure to comply with any policies set forth in the statements.

The FCC's rules do ***not*** require that stations prepare written disclosure statements. Nevertheless, disclosure statements provide both station sales staffs and prospective advertisers a clear guide to the factors relevant to any advertising purchase; they also tend to limit after-the-fact disputes. In addition, the process of preparing a complete disclosure statement forces the station to consider and resolve, in advance of the election season, a number of practical questions (*e.g.*, whether to decline to sell time to candidates for certain non-federal offices).

What sponsorship identification requirements apply to political ads?

All political advertising must include some form of sponsorship identification. Specifically, when a political ad is run, there must be a statement that the ad was "paid for" or

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"sponsored by" the group or person actually purchasing the ad time. If the advertiser provides the station with a pre-produced spot that does not include the required sponsorship ID, the station must add this language on its own accord (if necessary, it can do so over the content of the spot – no free time need be provided, and this type of addition is exempt from the usual non-censorship rules that apply to candidate advertising). For television ads, the statement must be visual, run for at least four seconds, and occupy at least four percent of the screen.

Ads for federal candidates also must meet a variety of additional requirements imposed by the Bipartisan Campaign Reform Act (BCRA). If the ad refers to an opposing candidate, BCRA requires that a statement be spoken by the candidate who is purchasing the time and that the ad identifies the candidate and the office sought. BCRA requires that the candidate state that a) he or she approves the broadcast and b) he or she (or a candidate's campaign committee) paid for the ad. Television ads must also display a clearly identifiable image of the candidate.

BCRA also requires that federal candidates, or their authorized committees, provide a broadcast station with a written certification stating whether or not the advertisement refers to another candidate for the same office. If it does refer to another candidate, the certification must state that the ad will comply with the "stand by your ad" announcement requirements as described above. This certification must be provided to the broadcast station when the time is purchased. If the certification is not provided, the station is not obligated to give the candidate the LUC.

If the ad advocates the election or defeat of a specific candidate and is paid for or sponsored by a third party, the ad must clearly indicate whether it was or was not authorized by a candidate. That is, the sponsor identification statement must include both the "paid for" or "sponsored by" language *and* the "authorized by" or "not authorized by" a particular candidate or campaign committee language. If it is not authorized, there must be an additional audio statement that the name of the entity purchasing the ad "is responsible for the content of this advertising." This is in addition to relevant state law, which may require more.

Can a station revise the content of a political "use"?

When a legally qualified candidate for office makes a "use" of a station, the station is ***NOT*** permitted to censor or otherwise alter the candidate's message ***in any way*** (other than by adding a missing sponsorship identification). While some political uses may contain content which the station might ordinarily choose not to broadcast, the station cannot alter the use at all. However, the station is protected from any liability that may result from the candidate's message. This "no censorship" provision applies ***only*** to candidate advertising and ***not*** to third party advertising. Thus, stations need to take potential liability into account when deciding whether to accept such third party ads.

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What records need to be kept with respect to political advertising?

The FCC's political file rule requires stations to maintain, and allow public inspection of, records of all requests for political time. With the advent of the online public file requirements now applicable to all broadcast stations, these materials will now be available for review by anyone with internet access. The records placed in the political file must include details of:

- The nature and disposition of all requests;
- The schedule of time provided or purchased;
- The classes of time involved;
- The rates charged; and
- Contact information of the purchaser.

In addition to the FCC's political file requirements, BCRA requires that the broadcaster's public file contain all requests for time by anyone (including non-candidates) who seeks to communicate a message that refers either to: 1) a legally qualified candidate; 2) any election to federal office; or 3) a national legislative issue of public importance. Because the political file is often reviewed by parties seeking "equal opportunities," it is important for stations to keep the political file up-to-date at all times. (***Note***: since the political file is available online for inspection by the public, care should be taken to remove or redact any confidential information, such as credit card or check numbers that might otherwise be included in the materials placed in the file.)

As noted above, this is a thumbnail overview of the political broadcasting rules. We also invite readers to review our firm's archived webinar from January that was presented with the FCC's Bobby Baker and Gary Schonman on the political broadcasting rules. In the coming weeks and months, stations should review the rules in detail and confirm that their disclosure statements and station policies in place are up-to-date.

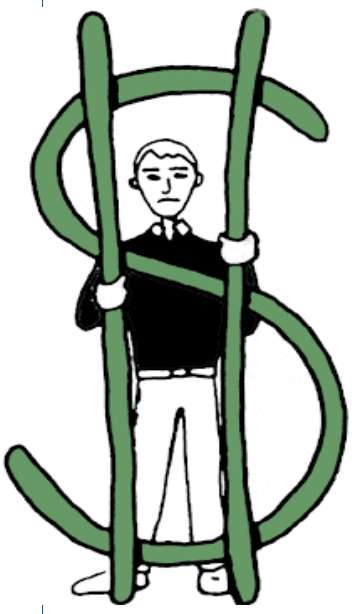
As election season approaches, station management should ensure that all sales personnel are well-informed about the substantive rules and the recordkeeping obligations related to political broadcasting.

Once the political advertising season begins in earnest, questions and controversies can arise quickly. Those questions and controversies can be complicated and require careful analysis.

Don't hesitate to call us for help at 703-812-0400.

DataConnex Gets Hit with $18.7M Fine for Violation of the Rural Health Care Program

By FHH Law



As it has for many months now, the FCC in February continued its review of the Rural Health Care Program (RHCP). This time, it issued a proposed $18.7M fine against health care telecommunications service provider DataConnex. A reseller of telecommunications services, DataConnex is alleged to have taken in millions of dollars from the RHCP that it was not entitled to collect. Primarily, the FCC alleges that DataConnex "willfully and repeatedly" provided inaccurate, forged, misleading, or unsubstantiated documents to support that DataConnex had made payments to the Universal Service Fund. Furthermore, the FCC says that DataConnex violated the RHCP's competitive bidding rules.

The most significant aspect of this forfeiture is the amount of the proposed fine. DataConnex's fine is three times the amount it wrongfully received from the RHCP and the FCC has warned it may revoke the company's authorization to sell telecommunications services altogether. Plus, the FCC said it is considering a measure to waive the competitive bidding rules because DataConnex undermined the bidding process for other telecommunications services in the RHCP.

The RHCP was established by the 1996 Telecommunications Act to "facilitate health care delivery in rural and remote parts of America." Health care providers in rural America use the RHCP in order to, according to the FCC, "provide telemedicine, transmit health records, and conduct other telehealth activities, thereby improving patient care and reducing health care costs." The program provides eligible health care providers with a 65 percent discount on broadband services in rural America. The FCC alleges that DataConnex took advantage of this program.

The FCC's DataConnex fine was issued based on six instances of wrongful conduct that, according to the FCC's Forfeiture and Order, include:

- Engaging in an undisclosed multiyear financial relationship with an RHCP consultant through which DataConnex gained an unfair advantage in the competitive bidding process;
- Steering healthcare providers to this RHCP consultant and paying more than $200,000 to a company owned by the consultant over a two-year period during which time DataConnex received dozens of contracts from health care providers represented by this same consultant;

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- Making monthly payments ranging from $250 to $2,000 to a company owned by the RHCP consultant which were directly tied to six contracts awarded to by healthcare providers represented by the same consultant;
- Reaching agreements in principle with the RHCP consultant under which healthcare providers would award contracts to DataConnex before the required competitive-bidding period ended;
- Using documents containing forged, false, misleading, and unsubstantiated information – including material misrepresentations – to increase its receipt of payments from the Telecom Program (a reminder that The Telecom Program, the Health Care Fund Program, the Internet Access Program, and the Rural Health Care Pilot Program all fall under the umbrella of the RHCP Program); and
- Submitting payment requests based upon service contracts tainted by violations of the Commission's competitive bidding and urban rates rules and, in so doing, falsely implying compliance with Commission rules.

The largest fine stems from DataConnex's violation of the competitive bidding process, through which health care providers apply to the Universal Service Fund (USF) in order to support eligible RHCP services. The bidding process, like most, is intended to protect the RHCP from waste, fraud, and abuse so that health care providers can choose, according to the FCC, "the most cost-effective bid so that USF funds are used wisely and efficiently."

This all comes as the RHCP has undergone increased scrutiny since, back in December, the Commission issued a Notice of Proposed Rule Making and Order to review and update the program. As we reported then, the NPRM asked for comment on: 1) the spending cap for the program, 2) evaluating the program for fairness and accuracy, 3) re-defining what "cost-effectiveness" means, 4) ensuring funding for rural and tribal health care providers, 5) simplifying program participation, and 6) enhancing proper oversight of the program. The Forfeiture and Order seems is aimed at addressing the last concern.

During its January meeting, FCC Chairman Ajit Pai supported the forfeiture, stating, "I'm pleased that we're taking aggressive action against a company that we believe sought to scam the system." The forfeiture was approved by all five Commissioners with Commissioner Brendan Carr stating, "This means that DataConnex's apparently fraudulent scheme might have resulted in providers that are playing by the rules—and the potentially millions of consumers they serve—losing out on the valuable health care services made possible by the Program. Needless to say, we are not taking this conduct lightly."

It is predicted that the FCC will continue to reform the RHCP in ways that will impact health care service providers, telecommunications services, and the health care industry as a whole. Our attorneys have experience with FCC regulations and compliance that has been relied on by telecommunications and health care providers nationwide. If you have any questions about your own compliance, please contact us.

Upcoming FCC Deadlines —

Do you know what FCC filing deadlines are in the coming months? We do. Note that our list is not comprehensive, and other proceedings may apply to you.

March 1 —

Radio Station Online Public Files – All radio stations in all markets must have uploaded their entire public inspection files, with the exception of the political file, to the location provided for such public files on the FCC's website. The records which must be uploaded by March 1, 2018 include, but are not limited to, any and all issues/programs lists and EEO public file reports for the current license term, as well as either a current list of or copies of organizational documents and contracts required to be filed with the Commission.

March 2 —

Biennial Ownership Reports – All licensees and entities holding an attributable interest in a license of one or more commercial or non-commercial AM, FM, TV, Class A television, and/or LPTV stations must file a Biennial Ownership Report reflecting information as of Oct.1, 2017. Please recall that not only corporations and limited liability companies, but also sole proprietorships and partnerships composed entirely of natural persons (as opposed to a legal person, such as a corporation), are included in the licensees that must file reports. For the first time, noncommercial and commercial entities are required to file by the same date. Additionally, all persons holding an attributable interest in a commercial licensee must have acquired either an FCC Registration Number (FRN) or Restricted Use FRN.

March 9 –

Multiple Ownership Rules – Comments are due in response to the Notice of Proposed Rulemaking portion of the Commission's Order on Reconsideration released in November in its media ownership proceeding requesting comment on the creation of an incubator program to encourage diversity in media ownership.

March 20 –

Next Generation TV – ATSC 3.0 – Reply Comments are due in response to the Commission's Further Notice of Proposed Rule Making which accompanied its November Report and Order authorizing television broadcasters to use the Next Generation television transmission standard (ATSC 3.0).

March 27 –

National TV Audience Reach Limits – Reply Comments are due in response to the FCC's Notice of Proposed Rule Making which seeks input on whether to modify, retain or eliminate the national TV multiple ownership rule (or national TV audience reach cap), a rule that limits the number of TV stations a single entity may own nationwide to an audience reach of 39 percent of all television households.

FHH - On the Job, On the Go

On Feb. 25-28, **Frank Jazzo, Scott Johnson, Matt McCormick, Frank Montero, and Davina Sashkin** all attended the National Association of State Broadcasters Association in Washington, D.C.

On Feb.26—March 2, **Karyn Ablin** will be attending the National Religious Broadcasters Convention where she will also be presenting on FCC regulations in Nashville, Tenn.

On March 10, **Michelle McClure** and **Frank Montero** will be attending the Colorado Broadcasters Association's Annual Convention in Denver, Colo. Frank Montero will also be presenting at the convention.

On March 13, **Davina Sashkin** will be a panelist at the FCBA "Modernization of Media Regulations" Brown Bag in Washington, D.C.

On March 13, **Frank Montero** will be attending the Hispanic Radio Conference in Miami, Fla. He will be, alongside FCC Commissioner Jessica Rosenworcel, presenting on a panel entitled "Radio to the Rescue: Serving Communities in Times of Disaster."

On March 15, **Scott Johnson, Matt McCormick, Frank Montero, and Kathleen Victory** will be attending the FCBA's reception with FCC and NTIA Bureau and Office Chiefs in Washington, D.C.

On March 16, **Dan Kirkpatrick** and **Frank Montero** will be teaching a class on purchasing a broadcast station at the annual National Association of Broadcasters' Leadership Training Program in Washington, D.C.

On March 16-17, **Peter Tannenwald** will be attending a two-day training workshop at WBRU.com at Brown University in Providence, R.I. He will also be attending a Board of Directors meeting for the non profit that owns and operates WBRU.com.

On March 21, **Frank Montero** will be attending the George Washington (GW) University Law School Dean's Dinner, GW Law Alumni Association's board meeting, and he will be a panelist on Net Neutrality at GW Law alongside FCC Commissioner Mignon Clyburn all in Washington, D.C.

On April 7-April 12, **Karyn Ablin, Kevin Goldberg, Frank Jazzo, Scott Johnson, Dan Kirkpatrick, Mark Lipp, Michelle McClure, Frank Montero, Davina Sashkin, Peter Tannenwald, and Kathleen Victory** will all be attending the National Association of Broadcasters' Annual Convention held in Las Vegas, Nev. On April 8, Sashkin will be a panelist for a repacking and ATSC 3.0 panel. On April 8, Tannenwald will be delivering short remarks and will be taking questions on LPTV Coalition Repack Rally and on April 9, he will be attending the Advanced Television Broadcast Alliance meeting.