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MEMORANDUM TO CLIENTS

August 2020

No. 20-07

FCC Proposes $15,000 Penalty for LPFM Violations of Underwriting Rules

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On July 2, 2020, the Federal Communications Commission ("FCC" or the "Commission") issued a Notice of Apparent Liability for Forfeiture ("NAL") against low power FM ("LPFM") broadcast station KELS-LP, Greeley, Colorado, in which it assessed a $15,000 civil penalty for the station's apparent violations of the prohibition on noncommercial educational ("NCE") and LPFM broadcast stations underwriting acknowledgements that the FCC deems to be forbidden commercial advertisements. The announcements in this case were not like some of the outright commercials that have been the subject of past NCE forfeitures. There were no specific dollar prices or outright exhortations to "come on down and spend your money with us" that we have seen in other cases. The KELS-LP case focuses mostly on qualitative statements about the underwriter and the number of products or services mentioned. While it does not establish any new forbidden types of content that have not been previously announced in policy statements and forfeiture cases, it is the first case we have seen in a while where the actual on-air copy was included in the NAL, and it finds fault with some underwriting copy that does not jump off the page as being over the legal line; so the case is worthwhile reading to provide guidance to the staff of NCE and LPFM stations.

Section 399B of the Communications Act of 1934, as amended (the "Act"), and Section 73.503(b) of the Commission's rules prohibit NCE and LPFM stations from airing "advertisements," which are defined as any programming material broadcast "in exchange for any remuneration" and intended to "promote any service, facility, or product" of *for-profit entities*. While NCE and LPFM stations are permitted to make on-air acknowledgments of financial donations and other support, such announcements must be for *identification purposes* only and must not *promote* the contributors' products, services, or businesses.

While the Commission allows NCE broadcast licensees to exercise reasonable "good faith" judgment in determining whether an announcement is promotional (and thus an impermissible advertisement), it has long-established several categories of promotional announcements which violate Section 399B of the Act and Section 73.503(b) of its rules:

- *Comparative or Qualitative Descriptions* – Announcements containing comparative or qualitative descriptions are impermissible. This includes announcements which favorably distinguish their underwriters from their competitors.

- *Price Information* – Announcements containing price information or other information relevant to a buying decision are not permissible.

- *Calls to Action* – Announcements must not serve to induce listeners to do business with a sponsor.

- *Lists of Products and Services* – The announcement may not serve as a "menu" of the sponsor's products or services.

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- *Lengthy Promotions* – The FCC has found that the length of an announcement can, if too long, be in and of itself overly promotional.

In the NAL, the Commission found that KELS-LP aired announcements 1,600 times for 14 different for-profit entities that contained impermissible promotional material. The Commission noted that none of the 14 announcements were within the scope of reasonable licensee discretion, because each contained "clearly promotional" language that fell within one or more of the above categories. While the Commission published the announcements with which it found fault, it did *not* pinpoint the exact language in each announcement that was problematic. It did find that at least 6 of the announcements were between 30 and 60 seconds in length, which it deemed to be "clearly promotional." This approach was consistent with prior guidance that while there is no set maximum on the length of an announcement, announcements longer than 30 seconds are presumptively suspect, as they are more likely to contain material inconsistent with the "identification only" purpose of underwriting acknowledgement.

Here are some of the types of content that the FCC found to be impermissible:

- For restaurants, lists of 8 and 11 items on the menu, and reference to "serving the community for almost 30 years" (menu and qualitative claim).

- For auto repair shops, references to providing "personalized, full service" with "ASE certified master technicians using state-of-the-art equipment," being in business for 110 years, a "knowledgeable staff," a "comfortable waiting area," and "quality workmanship" (qualitative claims). One spot included a musical jingle, which almost always sets off an FCC alarm. Another offered a $30 discount off the repair bill if the customer donated money to a certain charity (price information).

- For a realtor, references to being "one of the fastest growing real estate companies in the county, with "some of the most well-known agents" with a "combined experience of over 300 years" (qualitative claims).

- For computer repair services, "don't waste your time when you have a professional nerd to help make our life easier and your computer run better…we're not your average nerds," and a menu of 9 services available for 11 types of hardware" (qualitative claims and menu).

- For a garage door repair company, "we are not just sponsoring Pirate radio, we are also fans of the most wonderful music ever recorded" (qualitative claims).

- For pet care, "over 5,000 pet products… and a new state-of-the-art grooming studio…and a 4,000 square foot daycare center" (qualitative claims).

- For a shoe store, "they will professionally measure the right length and width of your feet…offering [numerous men's and women's sizes in 3 widths]" (qualitative claims and possibly a menu violation).

- For a property manager, "over 25 years of…experience…up on the continuing changes of the fair housing laws,… and with the latest most innovative solutions concerning all of your property's management needs" (qualitative claims).

- For a jeweler, "make that old piece of jewelry look new again…your headquarters for all your jewelry and watch repair needs (call to action and qualitative claim).

FCC enforcement of its underwriting restrictions has been infrequent in recent years, and some NCE and LPFM stations have been aggressive in pushing FCC limits, although not often to the extent that KELS-LP did. There is no indication that the KELS-LP case is the start of a new wave of enforcement actions, but the case does serve as a reminder to underwriting copywriters that the FCC has its ears open and continues to take its NCE regulations seriously. It also reminds us that competitor commercial stations are listening and willing to file complaints triggering an FCC investigation, which was what happed in the KELS-LP case.

Should you have any questions regarding your station's compliance with the underwriting rules, please feel free to contact Keenan Adamchak at (703) 812-0415 or at adamchak@fhhlaw.com.

240,000 Reasons to File Proper FCC Applications When You Buy a Business That Holds Wireless Licenses

by Paul J. Feldman
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The FCC recently released a *Consent Decree* in which the Archer Daniel Midlands Company ("ADM") agreed to pay a $240,000 penalty for violating the FCC's rules by engaging in transactions where five FCC wireless licenses were transferred without filing for and obtaining the prior consent of the FCC, and by failing to reveal in numerous other applications that it had been convicted of a felony. It is important for wireless licensees to comply with these requirements if they wish to avoid a similar or worse result.

Companies often purchase other companies that hold FCC licenses or purchase the licenses alone. But prior to closing on such transactions, the parties must file an application at the FCC, seeking permission to transfer of control of the company being sold or to assign the licenses, and obtain the FCC's consent prior to closing on the transaction. In the present case, ADM and Cargill completed two separate transfers of control, involving five wireless radio licenses, without going through this process. The FCC is never happy to discover this.

The other mistake that ADM made here resulted from the fact that in 1996, ADM was convicted of the felony of price-fixing. The FCC assignment and transfer of control forms down deep in the fine print specifically ask whether the applicant or any party controlling the applicant has ever been convicted of a felony. The FCC may consider that fact in choosing whether to consent to the proposed transfer or assignment. However, it is our experience that if the applicant discloses the prior conviction, and provides information showing that the conviction was years ago and that the people involved in the felonious behavior are no longer with the company, then the prior conviction usually does not prevent the FCC from granting the application. But if the applicant fails to disclose the prior conviction, the FCC considers that failure to be "lack of candor", which the FCC really does not like. A finding of lack of candor can be the basis for the FCC's denial of the application and/or prohibiting that party from holding other FCC licenses.

So, the lesson here is (a) to obtain FCC consent before closing on the purchase of FCC licenses, or companies that hold FCC licenses; (b) if your company was previously convicted of a felony, disclose that fact; and (c) read the fine print! There are several certifications in FCC applications that you are making under the legal equivalent of an oath so you need to know what you are signing. Please contact us if you have any questions about this.

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127,000 More Reasons to File Proper FCC Applications When Your Company Goes Through Bankruptcy

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In another recent action, the FCC entered into a $127,000 *Consent Decree* with Caesars Entertainment Corporation, the company that runs the gambling casinos. Caesars apparently bet that they could get away with going in and out of bankruptcy, and then engaging in post-bankruptcy transactions involving corporate entities that hold FCC licenses, without seeking prior FCC consent to transfer control of those licenses. Caesars lost that bet.

As part of Caesar's bankruptcy process, its assets were transferred to debtors-in-possession ("DIP") by operation of law. This process is common, but in doing so, the debtor must apply to the FCC for consent to transfer its wireless license assets to the DIP. Then as part of the process, Caesar's assets were put into two companies, including a newly formed, publicly-traded real estate investment trust. From the FCC's perspective, an additional transfer of control occurred, but Caesar's again did not seek prior FCC consent.

So the lesson here is, if your company has FCC licenses and is going through the bankruptcy process, consult with your telecommunications attorney, and prepare to file FCC transfer of control applications at the same time that bankruptcy filings are being prepared. Similarly, when your company comes out of bankruptcy, wireless licenses are being transferred, so you must file for FCC consent again.

Or, you could ante up and place the bet the Caesar's made. Just be prepared to lose big.

The FCC Designates "988" as a 3-Digit Dialing Code to Reach Suicide Hotline

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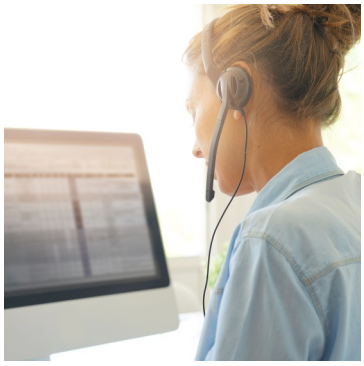

The FCC has adopted its proposal to establish "988" as a nationwide abbreviated telephone dialing code to reach the National Suicide Prevention and Mental Health Crisis hotline. "988" will replace or supplement the existing 800 number (1-800-273-TALK). The proposal was discussed in our blog post on January 7, 2020.

Congress has passed the National Suicide Hotline Improvement Act of 2018, directing the FCC to consider the feasibility of a 3-digit abbreviated dialing code. In response, the FCC adopted rules that closely follow what it proposed, concluding that the number of actual and potential suicides is serious enough to justify action and that a 3-digit dialing code will make it easier and faster for potential suicide victims to reach help.

Proposals to expand or repurpose an existing "N11" code (211, 311, 411, etc.) were rejected, because use of any

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of those numbers would take longer to implement. The public would have to be re-educated about numbers that are now used for hundreds of millions of calls each year, and an N11 suicide line might be burdened with calls intended for the previous service.

Implementation of the 988 dialing code will be mandatory for domestic telephone companies of all sizes, including both traditional telcos and two-way and one-way Voice over Internet Protocol ("VoIP") providers. The FCC concluded that the costs of implementing 988 dialing, including replacement of an estimated 12% of local switches, will be much lower than the value of lives that should be saved through better suicide prevention. Each telephone company will have to bear its own costs; there will be no federal subsidy. Many members of the public not contemplating suicide will be affected by implementation of 988, because it will bring the nation closer to the end of 7-digit dialing for local calls. There are approximately 90 Area Codes that still allow 7-digit dialing and have a local exchange with a "988" prefix. All of those areas will be required to implement 10-digit dialing, where the Area Code is dialed for both local and non-local calls. The FCC considered an alternative to transitioning these areas to 10-digit dialing, which would be to have the local switch wait a certain amount of time after receiving 988, to see whether additional digits are dialed before deciding whether to route the call to the suicide center or to a local customer. The FCC decided not to implement this solution because a delay system could result in call routing errors, as well as the abandonment of calls by potential suicide victims confused by the delay.

The FCC decided that all 988 calls should be directed to the national Lifeline and Veterans Crisis Line. The national center can decide whether to handle the call or pass it on to a regional center. The FCC turned down a request for a special arrangement to direct calls originating in Puerto Rico to a suicide prevention center on that island because of the extra cost and implementation delay that would be incurred. The Puerto Rican center can request certification to participate in the national Lifeline.

There is no indication that the FCC will require private switches in places like hotels and large businesses to pass through "988" calls without having to dial "9" first to get an outside line. While 911 calls must be passed to emergency response centers without dialing any prefix, no such requirement applies to any of the other N11 codes. Texting capability to 988 is also not being mandated at this time.

One change that the FCC did make in its original proposal was to delay the mandatory implementation date from 18 months to 24 months, with the new deadline for implementation by all voice service providers now set for July 16, 2022. Voice service providers will need to begin promptly making arrangements to reprogram or to replace their switches to implement 988 dialing.

Safe Harbor Order Could Help Carriers Kick Robocalls to the Curb

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On July 17, the FCC released its latest *Report and Order and Further Notice of Proposed Rulemaking* ("Order") attempting to stop unwanted and illegal robocalls. The Order creates a "safe harbor" (*i.e.*, legal protection from liability) to protect carriers that block calls based on reasonable analytics or other permissible criteria. It also seeks to ensure that carriers do not erroneously block wanted calls. In the *Further Notice of Proposed Rulemaking*, the Commission broadly asks whether it should expand the scope of permissible blocking, the safe harbor for carriers that block robocalls, or the remedies available to consumers who want to receive calls that are being blocked.

A major sticking point in suppressing illegal and unwanted robocalling has been whether carriers should receive legal protection against governmental and civil liability for their attempts to block unwanted calls using

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permitted methods, whether intentionally or by mistake. Throughout its history, one of the Commission's cornerstone principles has been that any caller across the country should be able to place a call that will be connected to the intended recipient of that call, as well as to receive calls made to him or her. While most callers may not worry about their call being completed, failure to complete calls to rural exchanges with high terminating access charges remains an issue that the Commission has taken steps to improve as recently as 2018. Therefore, allowing carriers intentionally to block calls is something of a sea change for both the Commission and carriers.

Nonetheless, the scourge of unwanted and illegal robocalls has helped create a consensus that blocking calls is appropriate under certain circumstances and that carriers should not be liable for good faith blocking attempts. To encourage carriers to undertake blocking of unwanted and illegal calls, the Order creates a safe harbor from liability "for the unintended or inadvertent blocking of wanted calls where terminating voice providers block based on reasonable analytics that include caller ID authentication information and the consumer is given the opportunity to opt out." In addition, the Order creates a safe harbor allowing carriers to block calls from "bad-actor upstream voice service providers" Blocking calls from bad actors will allow carriers to refuse to connect calls from another carrier that is notified it is carrying banned traffic by the Commission and fails to implement effective mitigation measures for such traffic.

Along with the creation of a safe harbor for call blocking, the Order requires carriers to take "all reasonable efforts to ensure that calls from PSAPs (Public Safety Answering Points) and government outbound emergency numbers are not blocked." Determining which originating numbers should never be blocked will be a challenge because those numbers must be kept secret and out of the hands of bad actors that spoof originating numbers. The Order also requires that carriers create a single point of contact for callers, other service providers, or customers to report blocking errors. Carriers must provide this point of contact at no charge to callers or other voice service providers, and carriers must promptly stop blocking calls if they determine calls from the blocked number should not have been blocked.

The Order also seeks further comment on refining how and when carriers should be permitted to block calls. It asks if there are other instances in which carriers should be permitted to block calls that aren't currently covered by the Commission's recent call blocking decisions, and if so, the Order seeks comment on whether the Commission should extend its safe harbor to other types of blocking. Finally, the Order asks whether the Commission should establish a specific process by which adversely affected callers can verify the authenticity of their calls to stop them from being blocked.

On July 31, 2020, a summary of the *Call Blocking Fourth Further Notice* was published in the Federal Register. Comments are due August 31, 2020, and reply comments are due September 29, 2020.

Inside This Issue

FCC Revises Cable TV Leased Access Rate Formula and Appears to Invite a First Amendment Challenge

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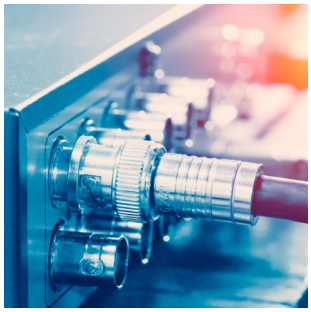

In an *Order* released recently, the FCC revised the calculation of maximum permissible rates for cable TV commercial leased access by changing from a formula that sets a uniform rate for all cable tiers to a formula that will set a separate rate for each tier. The result may reduce the regulatory burdens on cable providers of calculating such rates. It is unclear if the new formula will produce higher or lower rates for particular programmers because their rate will depend on the tier on which they are carried. In the same *Order*, the FCC states that its role does not include interpreting the Constitution; but several Commissioners have their doubts about the Constitutional sustainability of the leased access rules, and they appear to give their blessing to cable operators to ask the courts to strike down the leased access rules as a violation of their First Amendment rights.

The commercial leased access rules have a long and checkered history. As originally enacted as part of the 1984 Cable Act, cable operators are required to set aside channel capacity for use by unaffiliated programmers. The amount of capacity that operators must reserve for leased access programming depends on the cable system's total activated channel capacity - cable operators with more activated channels are required to set aside a greater number of leased access channels than those cable operators with fewer activated channels. The 1992 Cable Act also required the Commission to adopt maximum reasonable rates for commercial leased access. While leasing was intended to promote program diversity, the statute required that rates not adversely affect the operation, financial condition, or market development of the cable system, thus in effect establishing a floor as well as a ceiling for rates. The Commission accordingly adopted leased access rate regulations in 1993, and subsequently modified its leased access regulations in 1996 and 1997. The Commission's implementing rules, which the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) upheld in 1998, include a formula for calculating maximum rates that cable operators could charge leased access programmers.

The commercial leased access regime never really stimulated leasing and pleased very few people, as measured by the extremely small number of instances it was used. Cable operators complained that the method for calculating rates was too complex, and produced rates that were too low, while programmers complained that the rates were too high for a feasible business model. Although the Commission revised its commercial leased access rate rules in 2008, those revisions never went into effect. Attentive readers of CommLawBlog know that in 2019, the Commission modified much of the leased access regulatory regime, in ways that made compliance easier for cable operators. In that 2019 action, the FCC also sought further comments on the calculation of rates, as well as on whether the entire regulatory regime violated the First Amendment rights of cable operators by forcing them to carry programming against their will, when there may be a sufficient number of other platforms that programmers might use instead.

In the *Order*, the Commission adopts its 2019 proposal to implement a "simplified" leased access fee calculation methodology that is **tier-specific**. The rate will be calculated by first determining the total amount the operator receives in subscriber revenue per month for the programming **on the tier** on which the leased access channel will be placed. Next, the operator will subtract the total amount it pays in programming costs per month for that tier. Finally, the operator will divide that figure by the number of channels on that tier. The resulting "average implicit fee" will be the maximum rate per month that a cable operator may charge a leased access programmer for a full-time channel on that particular cable tier. The Commission believes that the shift from calculation of a uniform average implicit fee for **all** tiers all with subscriber penetration over 50 percent, to calculating the fee for only for the tier on which a leased access programmer seeks

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carriage, should reduce the burden on cable operators. Of course, this does not seem to address the likely situation where a programmer seeks rate quotes for multiple tiers.

What, you may ask, will be the impact on rates from this new approach? According to the *Order*, "[r]ates are likely to decrease if leased access programmers request channel capacity on less profitable tiers, whereas rates are likely to rise if programmers request channel capacity on more profitable tiers." OK, then.

And then there's the First Amendment. As the Order notes, under applicable court precedent, the question would be whether the burden on operators taking on unwanted programming was justified by the governmental interest in promoting diverse programming. When the rules were upheld by the D.C. Circuit in 1998, there were almost no other platforms for exhibiting such programming. Obviously, the media universe has changed radically in the intervening 22 years, with the advent of numerous online platforms, as well as satellite carriers. Programmers pointed out, though, that the large expansion of cable TV channel capacity reduces the burden on cable operators. While today's Order states that the FCC will take no action to rule on Constitutionality, some Commissioners seem to favor the position that the leased access rules are no longer Constitutionally permissible. The FCC appears to be inviting cable operators to challenge the leased access rules in court, either as a direct challenge to the new rules, or the next time that a programmer seeks to enforce its leased access rights. Stay tuned.

If you have any questions about leased access, please contact us.

The Guillotine Falls On Analog LPTV One Year From Now

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The FCC has issued a Public Notice reminding analog Low Power Television ("LPTV") licensees that all analog transmissions must cease by July 13, 2021, and that deadline will not be extended or waived.

Most construction permits for new digital LPTV stations and CPs for existing stations to flash cut to digital on their current channel or to construct a digital companion channel also expire on July 13, 2021. A one-time extension of that deadline for up to 180 days may be requested and will be granted only if the need for more time is due to circumstances beyond the permittee's control; extension applications must be filed no later than March 13, 2021. Stations needing to modify their digital construction permits before they build must file applications by May 1, 2021, to allow the FCC sufficient processing time before the July deadline for going on the air.

If an analog station is unable to begin digital broadcasting by July 13, 2021, it will have to shut down altogether until its digital facilities go on the air. Authority to remain silent must be requested from the FCC. As a reminder, licenses for stations that remain silent for more than one year will automatically expire by operation of law and will not be saved by an extension of a digital construction permit. While the FCC has the legal au-

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thority to extend the one-year maximum silent period, it has exercised that authority only rarely and only under extreme circumstances – do not expect you will be the rare exception.

The July 13, 2021, deadline applies to analog Channel 6 LPTV stations that provide service to FM radio receivers. The FCC has under consideration requests to allow these specific audio services to continue; but the requests have been contested, and there is no assurance of the outcome. Even if the continuation of the transmission of an analog aural signal is permitted, LPTV stations are unlikely to be permitted to continue analog video and may have to overlay an analog audio carrier on a digital video/audio signal.

Applications by Full Power TV stations that to need construct digital-to-digital replacement ("DTDRTs") to fill in gaps in their main station service area resulting from the TV spectrum repack may file applications only until July 13, 2021. DTDRTs may become less attractive if the use of Distributed Antenna Systems ("DTS"), which allow multi-transmitter operation on a station's main channel rather than on a different translator channel, becomes more widespread.

Analog LPTV stations that want to convert to digital operation without changing channels, and can do so without causing prohibited interference, may still apply for on-channel "flash-cut" authority. For those that are unable or do not wish to flash cut, the FCC is still accepting applications for separate companion digital channels. But, by July 13, 2021, each station will have to choose either to flash-cut to digital or to activate its companion digital channel and to cancel its analog channel license. Stations currently operating on both analog and companion digital channels may remain permanently on their companion digital channel or apply for a flash-cut construction permit and surrender their digital companion authorization.

LPTV stations planning to terminate analog operation are reminded that the FCC's Rules require notification to viewers before analog service is shut down. The Rules are flexible with regard to the frequency, length, and content of notifications; but stations with local program origination capability are expected to give notice on the air unless on-air notices would be a hardship.

We would be happy to answer any questions about the end of analog LPTV and construction of new digital stations, as well as to assist with fulfilling FCC application requirements.

Now Available: 2020 Political Broadcasting Rules Refresher

On July 30, Fletcher, Heald & Hildreth attorneys, Frank Montero and Dan Kirkpatrick, along with the FCC's political programming experts, Bobby Baker, Gary Schonman, and Sima Nilsson, discussed the requirements and latest developments in the FCC's political broadcasting rules, including equal time, lowest unit rates, PAC ads, BCRA, and record keeping.

If you didn't catch the webinar live or just want to see it again, you can download and print the presentation's PowerPoint slides here. You may also watch the full video recording of the webinar on YouTube.

With the 2020 election season in full swing, this webinar will help answer any compliance questions that you may have concerning political broadcasting.

Getting to the Bottom of the Recent Rural Health Care Funding Announcement

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On June 30, the FCC ordered the carry-forward of $198 million in Rural Health Care (RHC) funding for use in 2020. Seems like good news, but it depends on how you look at it. But note this action simply makes the funding available — it does not waive or increase the RHC caps for 2020. Unless the FCC takes further action, the caps remain: $604.8 million for the overall program; $152.7 million for upfront payments, and multi-year commitments under the Healthcare Connect Fund (HCF).

More potentially available funding is of course welcome news, but it raises the question: Why is so much funding available to be carried forward? The Universal Service Administration Company's (USAC) May 1 summary of the last five RHC funding years helps tell the story. Below is a compilation of that data with some additional calculations below the table (in millions):

USAC DATA AS OF MARCH 31, 2020	2014	2015	2016	2017	2018	2019
Amount Authorized and Actually Collected	$232.88	$294.16	$ 402.70	$367.59	$581.28	$594.07
Amount Carried Forward / Backward	($1.92)	$0.33	($33.64)	$72.67	($20.19)	$103.37
Amount Authorized for Disbursement	($218.47)	($268.74)	($302.32)	($298.00)	($189.30)	($17.14)
Reserve for Outstanding Obligations	($1.03)	($7.72)	($8.43)	($41.59)	($7.95)	($110.02)
Reserve for Pending Applications	$0.00	($0.03)	($3.45)	($43.06)	($142.93)	($513.92)
Reserve for USAC Appeals	$0.00	($0.01)	($1.51)	($37.64)	($34.82)	($38.86)
Reserve for FCC Appeals	($11.43)	($17.22)	($20.98)	($5.42)	($1.19)	$0.00
Administrative Expenses	--	--	($12.29)	($10.37)	($12.09)	
Estimated Remaining Balance	$ 0.03	$ 0.77	$ 20.08	$ 4.18	$172.81	$ 17.50
					$197.87	
Disbursement + Outstanding + Pending	($219.50)	($276.49)	($314.20)	($382.65)	($340.18)	($641.08)

Before diving in, some definitions: (1) "Authorized for disbursement" effectively means expenditures; (2) "reserve for outstanding obligations" generally includes committed funds that have not been invoiced; (3) "reserve for pending applications" means either (a) USAC has not processed the application, or (b) USAC has processed but is holding for some reason. For example, if you look at the $142.93 million in 2018 in this category, this likely includes funding being held back due to unapproved rural rates. If you look at the $513.92 million in this category for 2019, this includes the substantial backlog of unprocessed applications (as of March 31, 2020).

If you total for each year the combination for these three categories, you get a sense of what effective program expenditures were through 2018 – recognizing that pending applications and obligations will not necessarily turn into expenditures. By this measure (which generously assumes these funds will be expended) program expenditures declined by over $42 million in 2018 compared to 2017. Moreover, authorized disbursements have *declined each year since 2016*. So while the FCC has significantly increased the cap, from 2016 to 2018 the annual program spend has actually been going down (with millions obviously still "pending").

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That is the data. Now, some analysis and a little opinion:

Why is there is so much rollover funding? With respect to unused funding generally, it seems to represent applications for funding (1) that are denied in processing, and (2) that are abandoned after commitment because the funding is never ultimately utilized. For #1, if you look at the $513 million USAC reserved for pending 2019 applications, it appears the delays in processing are forcing USAC to treat pending applications as potential obligations – creating future rollover funding from those pending applications that are eventually denied. When applications are processed more quickly, there is no need for such a large reserve. Moreover, one might reasonably ask what a large percentage of applications being denied in processing means about how well program rules are understood by applicants, or if the rules are being uniformly applied.

For #2, abandoned funding happens when funding decisions are delayed so long that it is too late to take advantage of an actual funding commitment after it is finally issued. An example of this would be when hospitals refuse to go at-risk for services or equipment and wait for application approval – leaving little or no time before the invoicing deadline to procure once USAC issues the funding decision.

We can only hope these trends of delays, denials, held funding, and large rollovers of unused funding will reverse soon.

Comment Deadlines Set for ATSC 3.0 Implementation Proposal

On June 9, we wrote that the FCC has tried to remove a potential barrier to the deployment of the ATSC 3.0 technical standard by TV broadcasters by ruling that a broadcaster's lease of spectrum to a third party for provision of ancillary, non-broadcast services does not trigger attribution for the FCC's broadcast ownership rules. The FCC also issued a *Notice of Proposed Rulemaking*, seeking comments on other proposals intended to enhance implementation of ATSC 3.0.

The new rules and proposals have now been published in the Federal Register, establishing August 17, 2020, as the effective date of the new rules and deadlines of August 17, 2020, for initial Comments and August 31, 2020, for Reply Comments.

We will be happy to provide further information on request and to assist clients in preparing Comments and Replies.

Upcoming FCC Broadcast and Telecom Deadlines for August – October

Broadcast Deadlines:

September ??, 2020

Annual Regulatory Fees – On a date not yet determined but certainly before September 30, 2020, annual regulatory fees will be due. These will be due and payable for Fiscal Year 2020 and will be based upon a licensee's/permittee's holdings on October 1, 2019, plus anything that might have been purchased since then and less anything that might have been sold since then. The fees must be paid through the FCC's online Fee Filer, and once again this year, the FCC will not accept checks as payment of the fees but will require some form of electronic payment (credit card, ACH transfer, wire transfer, and the like). Please keep in mind that timely payment is critical, as late payment results in a 25 percent penalty, plus potential additional interest charges.

October 1, 2020

Radio License Renewal Applications Due – Applications for renewal of license for radio stations located in Iowa and Missouri must be filed in the Licensing and Management System ("LMS"). These applications must be accompanied by Schedule 396, the Broadcast Equal Employment Opportunity ("EEO") Program Report, also filed in LMS, regardless of the number of full-time employees.

Radio Post-Filing Announcements – As of this writing, radio stations licensed in Iowa and Missouri must begin broadcasts of their post-filing announcements concerning their license renewal applications on October 1. These announcements must continue on October 16, November 1, November 16, December 1, and December 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the Online Public Inspection Files ("OPIF") within seven days, or by December 23. It is, however, possible that the updated rules governing public notices will go into effect during the period of the announcements, in which case, stay tuned for updates on transition to the new requirements.

Television License Renewal Applications Due – Applications for renewal of license for television stations located in Florida, Puerto Rico, and the Virgin Islands must be filed in LMS. These applications must be accompanied by Schedule 396, the Broadcast EEO Program Report, also filed in LMS, regardless of the number of full-time employees. As noted above, however, it is possible that the updated rules governing public notices will go into effect during the period of the announcements, in which case, stay tuned for updates on transition to the new requirements.

Television Post-Filing Announcements – Under current regulations, television stations licensed in Florida, Puerto Rico, and the Virgin Islands must begin broadcasts of their post-filing announcements concerning their license renewal applications on October 1. These announcements must continue on October 16, November 1, November 16, December 1, and December 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the OPIF within seven days, or by December 23.

EEO Public File Reports – All radio and television station employment units with five or more full-time employees and located in Alaska, American Samoa, Florida, Guam, Hawaii, Iowa, the Mariana Islands, Missouri, Oregon, Puerto Rico, the Virgin Islands, and Washington must place EEO Public File Reports in their OPIFs. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

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Telecom Deadlines:

August 14, 2020

Quarterly Percentage of Interstate Usage (PIU) Reporting and Certification – Prepaid calling card providers (PCCPs) must report the percentage of interstate use factors and associated call volumes to carriers that provide them with transport services. Additionally, PCCPs must file traffic information and a certification signed by a company officer stating that the provider is in compliance with the FCC's PIU and USF reporting requirements.

September 1, 2020

FCC Form 477 – This form is filed online biannually on March 1 and September 1. The Commission collects a variety of information about broadband deployment and wireless and wired telephone service on Form 477. Broadly speaking, the following providers must fill Form 477: 1) facilities-based providers of broadband connections to end users, 2) providers of wired or fixed wireless local exchange telephone service, 3) providers of interconnected VoIP service; and 4) facilities-based providers of mobile telephony (mobile voice) services. If you have any questions about whether your company must file Form 477 or what information your company is required to submit in the filing, you should contact your telecommunications counsel.

September ??, 2020

Annual Regulatory Fees – On a date not yet determined but certainly before September 30, 2020, annual regulatory fees will be due. These will be due and payable for Fiscal Year 2020 and will be based upon a licensee's/permittee's holdings on October 1, 2019, plus anything that might have been purchased since then and less anything that might have been sold since then. The fees must be paid through the FCC's online Fee Filer, and once again this year, the FCC will not accept checks as payment of the fees but will require some form of electronic payment (credit card, ACH transfer, wire transfer, and the like). Please keep in mind that timely payment is critical, as late payment results in a 25 percent penalty, plus potential additional interest charges.