Virginia Association of Broadcasters Legal Review

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FCC PUBLIC NOTICE CLARIFIES CLOSED CAPTIONING CERTIFICATION PROCESS AND ADVISES HOW TO REPORT NON-CERTIFYING PROGRAMMERS

The FCC recently released a Public Notice relating to the requirement that television stations use their "best efforts" to obtain certifications from each video programmer stating either that (i) the video programmer's programming satisfies the caption quality standards; (ii) in the ordinary course of business, the video programmer has adopted and follows the Best Practices for video programmers with respect to captioning quality; or (iii) the video programmer is exempt from the closed captioning rules, under one or more properly attained exemptions.

First, the Public Notice clarifies that if a video programmer chooses to provide a certification stating that, in the ordinary course of business, it has adopted and follows the Best Practices for video programmers with respect to captioning quality, such certification must be executed by the *video programmer* and state that the *video programmer* adheres to the Best Practices for video programmers. A video programmer that provides only a certification *from a captioning vendor* stating that the captioning vendor complies with the captioning vendor Best Practices will not have provided a certification that satisfies section the rule. In other words, to satisfy the certification rule, the certification from the video programmer must state that the *video programmer* adheres to the video programmer Best Practices.

Second, the Public Notice instructs stations how to report non-certifying programmers. As we have previously advised, there is a multi-step process for stations to obtain closed captioning certifications. Initially, stations may obtain a programmer's certification from the programmer's website or some other widely available location. If a station is unable to obtain a certification from the programmer's website or other widely available location, the station must request, in writing, that the programmer provide a certification within 30 days after receipt of the written request. If a video programmer does not make a certification available within 30 days after receipt of a written request, the station is required by the FCC's rules to "promptly submit a report to the Commission identifying such non-certifying video programmer for the purpose of being placed in a publicly available database." These rules became effective on March 16, 2015, but until the recent Public Notice was released, the FCC had not provided guidance to stations as to how to report non-certifying programmers to the Commission.

According to the Public Notice, here is how the process will work for stations to report non-certifying programmers:

- A station must send the name and "contact information" of the video programmer via e-mail to captioningcertification@fcc.gov. The "contact information" of the video programmer must include the video programmer's address, telephone number, and e-mail address.

- Stations must report the information of non-certifying programmers by the later of (1) within 40 days of the date that the station informed the video programmer that the video programmer must provide the certification or (2) by June 4, 2015.

- Upon receipt of a report identifying a non-certifying video programmer, the FCC will send an acknowledgement to the station by e-mail and will place the name of the non-certifying video programmer in a publicly available database. (According to the Public Notice, the FCC will issue another Public Notice to announce the web address of the publicly available database when it is available.)

- If a video programmer provides a certification in compliance with the rules after a station has submitted a report identifying the video programmer to the FCC as non-certifying, the station *may* notify the FCC of this certification by sending an e-mail to captioningcertification@fcc.gov.

Reporting any entity to the FCC for any reason is an undertaking that warrants careful consideration. In the realm of closed captioning certifications, revenue streams and relationships may be at risk because stations are required to obtain certifications from all programmers, including paid programming providers. Stations are encouraged to work closely with rep firms, agencies, and programmers to ensure sufficient certifications are obtained in a timely fashion. Stations would be well-advised to consult with legal counsel before reporting a non-certifying programmer to the FCC.

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LEGISLATION INTRODUCED IN THE U.S. SENATE TO GRANDFATHER JSAs

A bi-partisan quartet of U.S. Senators—Senators Blunt (MO), Schumer (NY), Scott (SC) and Mikulski (MD)—introduced legislation that would grandfather every joint sales agreement ("JSA") that was in effect as of March 31, 2014. The bill would reverse the FCC's controversial ruling that made pre-March 31, 2014, JSAs attributable under the Commission's media ownership rules. The broadcast industry strongly supports the bill, and NAB is seeking additional co-sponsors.

JSAs are financial arrangements between local TV broadcasters where one station sells advertising time for another. These agreements have become increasingly popular in recent years among broadcasters in small and medium-sized markets across the country, and the financial savings realized by broadcasters using such arrangements have helped to expand the diversity, localism, and competition of programming.

In introducing the bill, Senator Blunt said:

> "Joint Sales Agreements across the country have helped save TV stations from going dark, increased program diversity, and enabled local news programming for many TV broadcasters."

Senator Mikulski added:

> "This is about protecting our constituents' access to local news, politics, sports, cultural events, and emergency notifications from their own states. Local broadcasters who play by the rules should be able to trust that Washington won't make rule changes apply retroactively in ways that harm their ability to serve their communities."

The FCC ruled in 2014 that JSAs are attributable under the Commission's media ownership rules. Under the rule, broadcasters are precluded from using JSAs in the future if they create impermissible arrangements under the FCC's ownership attribution rules, and preexisting JSAs that would now violate the ownership attribution rules are required to unwind by December 19, 2016.

by Wade H. Hargrove

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REMINDER: VIDEO DESCRIPTION REQUIREMENTS EXTEND TO BIG FOUR AFFILIATES IN MARKETS 26-60 AS OF JULY 1, 2015

As of July 1, 2015, the FCC's video description requirements will extend to Big Four affiliates in Designated Market Areas ("DMAs") 26-60. Currently, affiliates of Big Four networks in the top 25 DMAs must provide 50 hours per calendar quarter of video-described programming. With this deadline on the horizon, this is a good time for a brief review of the key provisions of the video description rules.

* *50 Hours Per Quarter*. Since July 1, 2012, Big Four affiliates in the top 25 markets have been required to provide 50 hours per calendar quarter of video-described programming during prime time or children's programming, and, as of July 1, 2015, these requirements will also apply to Big Four affiliates in markets 26-60. For purposes of the video description rules, "children's programming" is any programming directed to children 16 years of

age and under. (*Please note*: The definition of "children's programming" for purposes of other FCC rules is different.) Video-described program counts toward the 50-hour requirement the first time it is aired on the station and once more when it is re-run. In other words, a broadcaster may "count" toward its required 50 hours per quarter each program it airs with video description a maximum of two times. (As discussed below, a station has additional obligations where the station carries another Big Four network's programming on a secondary digital stream.)

* *"Pass Through" of Video Description.* Since July 1, 2012, all network-affiliated stations, including all Big Four and non-Big Four network affiliates, have been required to "pass through" video described programming where they are "technically capable" of doing so. The technical capability exception is discussed in more detail below. Any programming aired with video description must always include the video description if re-aired on the same station.

* *Technical Capability Exception.* The video description rules include a "technical capability" exception: if a station is not "technically capable" of providing video description, then it is not required to do so. The FCC considers a station to be "technically capable" to provide video description if the station has "virtually all necessary equipment and infrastructure to do so, except for items that would be of minimal cost." Pass-through of video description is required to the extent that a station is technically capable and when that technical capability is not being used for another purpose related to the programming. Thus, for example, if a station is technically capable of passing through video description of a particular program but is using its SAP channel for a Spanish-language audio track, then, in such circumstance, the station is not required to pass through the video description.

* *Exemption for Live and "Near-Live" Programming*. The Act mandates that the video description rules exempt "live" and "near-live" programming. The Order adopted the proposed definition that "live" programming is, "self-evidently, programming aired substantially simultaneously with its performance." So, for example, stations are not required to provide video description for live sporting events and live news programming. ("Near-live" programming is defined as a program "performed and recorded less than 24 hours prior to the time it first aired.")

* *Exemption for Economic Burden.* Video programming providers may petition the FCC for a partial exemption from the video description rules upon a showing that the requirements are "economically burdensome." The new standard mirrors the "economically burdensome" standard currently used in the context of the closed captioning rules. Under the adopted rules, a petitioner is required to demonstrate that compliance with the rules would impose "significant difficulty or expense" (the same standard used for closed captioning exemptions).

* *"Breaking News" Exemption.* The video description rules have an exemption relating to "breaking news": This exemption allows a full, video-described program to count toward the 50-hour requirement even if it is interrupted by breaking news.

* *Multicast Streams.* The FCC will consider only programming on the primary programming stream when measuring a station's compliance with the 50-hour requirement, unless the station carries a Big Four network on another stream and is in a DMA subject to the rules. If the station is affiliated with another Big Four network on a secondary stream, the FCC will apply the rules in the same manner as if the multicast stream were carried by a separate station. In other words, there would be a 50-hour per quarter requirement for each and every Big Four-affiliated network stream carried by a station located in a top-25 market (top-60 market as of July 1, 2015). In addition, the pass-through requirements apply to all network-provided programming carried on a station's network-affiliated programming streams.

Most video described programming is provided by Big Four networks and major syndicators. Stations with questions about the applicability of these video description requirements should contact FCC counsel.

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CAN STATIONS USE DRONE-GENERATED IMAGES AND VIDEO FOOTAGE IN NEWSCASTS? THE FAA HAS WEIGHED IN!

On May 5, 2015, the FAA generated an internal memorandum to explain that (i) news media may use UAS for newsgathering if the FAA has authorized the flights and the flights conform to the specific authorization; (ii) the FAA does not have jurisdiction over broadcasters and other news media organizations that use images or recordings obtained from third parties that used UAS to record such images or footage; and (iii) the FAA does have jurisdiction over *UAS operators* that obtain images or recordings via UAS operations, and that the primary intention of the UAS operator in obtaining the images or recordings (i.e., whether for hobbyist purposes on the one hand or for the purpose of selling the images or recordings on the other hand) will be considered carefully, on a case-by-case basis, by the FAA to determine whether the UAS operator was truly a hobbyist or needed FAA authorization for the UAS operations.

While, at first glance, the FAA's May 5 memorandum would appear to create a bright-line policy to allow news organizations to pay UAS operators for video footage, broadcasters should be cautious and careful as they consider using such resources. At a minimum, broadcasters themselves should not use UAS for newsgathering (or any other purpose) without FAA authorization, and broadcasters should not *solicit* "hobbyists" to engage in newsgathering activities for pay. During the pendency of the FAA's small UAS rulemaking, there is surely more to come on this topic.

by Stephen Hartzell

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If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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