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MEMORANDUM TO CLIENTS

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No. 21-02

ATSC 3.0 Order Encourages the Deployment of Broadcast Internet Services

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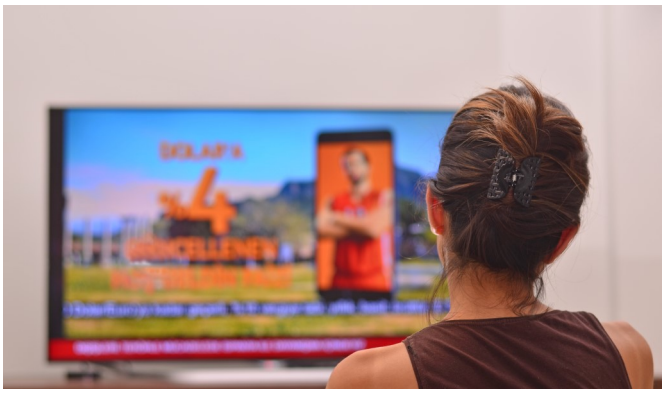
On December 10, 2020, the Federal Communications Commission ("FCC" or the "Commission") released a Report and Order that is intended to encourage further deployment of the ATSC 3.0 Next Generation Television Standard (ATSC 3.0), and particularly to facilitate the expansion of new and innovative ancillary and supplementary "Broadcast Internet" services by noncommercial educational (NCE) stations. These Broadcast Internet services are distinct from traditional over-the-air video programming services.



The Report and Order is the culmination of a proceeding commenced last year with the Commission's release of a Declaratory Ruling and Notice of Proposed Rulemaking (NPRM). That Declaratory Ruling clarified 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. In the NPRM, the Commission sought comment on several issues to enhance the growth of ATSC 3.0-enabled Broadcast Internet services. The Report and Order acts on a number of those issues.

1. Ancillary and Supplementary Service Fees

Except for NCE stations discussed further below, the Report and Order declines to adjust the Commission's current ancillary and supplementary services fee of 5% of the gross revenues received by a broadcaster for any fee-able ancillary or supplementary services provided. Broadcasters must pay such fees for ancillary and supplementary services which the broadcaster charges a subscription fee or receives compensation from a third party. The Report and Order does conclude, however, that in the case where a broadcaster is leasing spectrum to a third party for ancillary services, the service fees should be calculated based on the gross revenues received by the broadcaster, rather than revenue received by the spectrum lessee. The Order also provides that to the extent a licensee and a lessee are affiliated, the Commission will attribute the gross revenue of the lessee to the licensee for purposes of calculating the ancillary and supplementary services fee, based on the share of gross revenue that is proportional to the licensee's stake in the lessee.

2. Noncommercial Educational Television Stations

In light of the important role that NCE stations play in providing educational programming to their communities, the Report and Order adopts several proposals designed to promote and support NCE

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stations' provision of Broadcast Internet services.

First, the Report and Order provides NCE stations with enhanced flexibility to provide Broadcast Internet services alongside their required free, over-the-air, noncommercial educational video broadcast service. In 2001, the Commission interpreted Section 73.621 of its rules, which requires that an NCE broadcaster use its spectrum "primarily" for nonprofit, noncommercial, and educational purposes, as meaning that a "substantial majority" of an NCE station's digital capacity must be dedicated to the provision of nonprofit, noncommercial, and educational broadcast services, thus limiting the amount of ancillary and supplementary services an NCE station could otherwise provide. The recent Report and Order clarifies that an NCE station may provide any type of Broadcast Internet services, provided that the "substantial majority" of its 6 MHz channel is dedicated to a combination of free, over-the-air, noncommercial, educational television broadcast service and any noncommercial, educational ancillary and supplementary services it chooses to provide. The Report and Order declines, however, to specifically define what constitutes a "substantial majority" of an NCE station's digital bitstream, though it promises to address that in a future proceeding.

The Report and Order also holds that, to the extent NCE stations offer ancillary or supplementary services that are considered "primary" services (*i.e.*, nonprofit, noncommercial, and educational in nature), those services will be subject to a reduced fee of 2.5% on gross revenues generated by the services. This is a reduction from the 5% fee otherwise applicable to commercial television stations.

Lastly, the Report and Order clarifies that when an NCE station provides "donor exclusive" ancillary and supplementary services that are nominal in value in return for contributions to the licensee, the Commission will not treat such contributions as "subscription fees" subject to the agency's ancillary and supplementary services fee program. The Report and Order identifies as examples of "donor exclusive" services exclusive links to supplemental content, such as extended interviews or reference materials for public affairs programming, or enhanced viewing experiences such as an opportunity to view a local orchestra performance in 4K definition and immersive sound. Such "donor exclusive" services will not be considered fee-able, provided that the services are comparable in value to the kinds of small gifts that NCE stations often give to donors in exchange for contributions (*e.g.*, coffee mugs or tote bags).

3. Derogation of Service Standard

As long as broadcasters provide at least one free stream of video programming to viewers, they may also offer any number of ancillary and supplementary services, provided that such services do not "derogate" the broadcaster's free over-the-air video programming service. Under the Commission's current rules, TV licensees must transmit at least one free standard-definition over-the-air video program signal to viewers that is at least comparable in resolution to analog television programming. But analog TV is long gone, folks, so that is a very difficult comparison to make! The Report and Order now defines a non-derogated video service with the precise minimum resolution of 480i (a vertical resolution of 480 lines, interlaced). This 480i standard replaces the requirement that the free stream be "at least comparable in resolution to analog television programming."

More changes to ATSC 3.0 rules will be forthcoming, so stay tuned to CommLawBlog, and contact us directly if you have questions or need further information.

Inside This Issue

Offense Not Limited to the Field: The NFL's Aggressive Push To Protect Its Trademarks

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Most people have undoubtedly heard the Super Bowl referred to as "the Big Game" or the "Sunday Game" by advertisers who are continuously coming up with new and imaginative ways to refer to the Super Bowl without actually uttering the words. Some other peculiar terms thrown about include Touchdown Tournament, Big Football Time, and Tom Brady Day. My personal favorite is the Superb Owl. What can I say – I'm not an Eagles fan.

But why do advertisers go to such lengths to come up with creative names? Unless you have been hiding under a rock or don't follow football news at all, you will know by now that the NFL is notoriously tough in enforcing its trademarks. Not only does it hold federal trademark registrations in the term "Super Bowl" in conjunction with a variety of goods and services, including various television, radio, and Internet transmission services, but it holds federal registrations in conjunction with a variety of goods and services for many other trademarks as well, including the popular "Gameday" and "Super Sunday." If you're curious and would like to view any of those registered trademarks, you can conduct a search at tmsearch.uspto.gov.

Even Sunday schools weren't always safe. The NFL also is the copyright owner of the television footage of the game, and in 2007 caught wind of a local Indianapolis church which had planned to show the Colts-Bears 2007 Super Bowl game. The League sent a cease-and-desist letter, objecting to the church's plans to charge admission, promote the event using the mark "Super Bowl," and use a projector to show the game on a screen larger than 55 inches.

Since then, the NFL has backed off slightly. It has said that it will no longer object to churches that use "Super Bowl" to describe their event or show the game on a screen larger than 55 inches but that it would object to churches renting out spaces (watch parties should be held on church premises or in a church facility). The NFL also has said that churches should not use the Super Bowl logo, the NFL's logo, or any team logos in connection with an event.

Whether the NFL's aggressive enforcement tactics would prevail in court is another issue. Unlike the much more robust exclusive rights granted under the patent and copyright laws, which generally allow rights holders to preclude others from using their patented inventions or copyrighted works for a limited time, per the U.S. Constitution, the protection offered by trademark infringement laws necessarily is narrower in scope, as it potentially may last in perpetuity. (I won't go into the nuances of federal trademark dilution law here.) Trademark infringement laws generally only protect trademark holders from uses of trademarks by others that are likely to confuse consumers (a) into incorrectly assuming an "affiliation, connection, or association" between the trademark holder and another or (b) "as to the origin, sponsorship, or approval of" an alleged infringer's goods or services. In other words, you should avoid uses of "Super Bowl" or other NFL trademarks that are likely to con-

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fuse consumers into assuming an affiliation or sponsorship between the NFL and you or your goods and services.

You also may be able to use "Super Bowl" and other registered marks "fairly and in good faith only to describe the" NFL's Super Bowl game. That's why you may hear your local sports reporter using the name "Super Bowl" to deliver a report on the game. It's also important not to use someone else's trademark for any promotional or commercial purpose, including advertising events, selling products, and even contests or giveaways, as those types of activities may be more likely to lead to confusion as to the affiliation of your goods and services with those of a trademark owner.

To sum up the trademark lay of the land, it's best to be careful. Unless you can be certain that your use of a trademark would be found to be "fair" use exception, the best practice from a business risk perspective would be to avoid the marks – and avoid drawing the ire of the League. This includes any names or phrases that get a little too cute, such as Souper Bowl for soups, or even my preferred Superb Owl. Even if a court ultimately agrees that your use of the term "Super Bowl" doesn't create any confusion, it could be very costly for you to litigate the issue to find out.

The NFL not only holds federal trademark registrations in logos and terms like "Super Bowl" but it also is the copyright owner of the television footage of the game itself. Thus, any bars, restaurants, or other establishments planning a watch party (although in-door gatherings are probably a bad idea for other reasons right now) should ensure that their showing is either appropriately licensed under the copyright laws or falls into an exception where no license is required. It's better to be prepared in advance than risk receiving one of those infamous cease-and-desist letters.

If you would like assistance either in registering or enforcing one of your trademarks or in defending against claims by others that you have infringed their trademarks, feel free to call 703-812-0424 or email me at Craig@fhhlaw.com.

The Implications of COVID-19 on Contract Law

By Thomas F. Urban
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For nearly a year, the world has battled a pandemic defined as Coronavirus-19 or COVID-19. This virus has caused enormous damage worldwide in terms of human life, health, and economic devastation. This destruction has been acutely felt here in the United States, with the death of hundreds of thousands of Americans and the long-term illness of millions, as well as severe economic loss due to factors beyond the control of those who have been affected.

The COVID-19 pandemic also has had a significant effect on the U.S. legal system. Criminal defendants have been released or had their charges dropped due to delays in processing them through the criminal adjudication system because of the lack of jury trials and the constitutional requirements for speedy trials. Similarly, delays in civil jury trials have created an enormous backlog of cases, denying injured parties from being able to hold persons who have damaged them liable, while also preventing defendants who have been wrongly accused from being able to have their day in court to prove their inno-

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cence of any liability. As courts continue to delay jury trials, the backlog is growing exponentially due to certain constitutional requirements for both criminal and civil actions.

Substantively, the pandemic has caused litigants and courts to evaluate the application of various traditional common law principles and existing statutes to the conditions caused by COVID-19, such as the restrictions on business openings, working from home, and slowdowns in the availability of various products. Moreover, the pandemic has led to legislation at both the federal and state levels which has had a substantial effect on the lives of all Americans and does not show any sign of dissipating under the new Biden/Harris administration.

Contract Doctrines

Due to the various restrictions necessary to combat the pandemic, it has become difficult, if not impossible, for many parties to be able to honor the terms of their contracts. The question then becomes which party to the contract will have to bear the loss of failure to perform under the contract – the non-performing party or the party that was relying upon performance? These issues arise in a wide variety of contracts – contracts for goods and services, commercial and residential leases, construction contracts, employment contracts, and many others.

There are various contract doctrines that potentially apply, depending on the jurisdiction in which the contract was made or the choice of law selected for interpretation of the contract. These doctrines include force majeure, impossibility, and frustration of purpose, but each is reliant upon on how they are interpreted under each state's common (or civil) law. Moreover, some contracts have been affected by local, state, and federal regulations and laws that were adopted in response to the pandemic. In addition, the remedies available to contracting parties for which any of these doctrines, statutes, and case law may apply vary by state.

Force majeure – This is defined as an unexpected and disruptive event operating to excuse a party from a contract, and the application of this doctrine is dependent in most jurisdictions on the language agreed to by the parties at the time of contracting. For example, in Virginia, force majeure clauses are strictly construed and limited to the specific terms of the contract and the specific events described in the force majeure clause in the contract. California takes a more liberal approach to interpret force majeure clauses, and Louisiana, a civil law state, has a code provision that applies the doctrine to all contracts in the state, regardless of whether the contract contains a force majeure provision. The key to most force majeure cases, once it is established that the doctrine applies, is foreseeability – whether the parties to the contract could have reasonably foreseen the event that impeded performance under the contract. In the COVID-19 context, the jurisdiction chosen under the contract can have a profound effect on the application of the doctrine. While a court in one state may require that the applicable clause specifically mention a disease or pandemic to trigger the clause, another may consider a reference to gov-

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ernment action or "act of God" as sufficient to invoke the provision as a defense to a breach of contract claim.

Impossibility – This is a doctrine under which a party to a contract is relieved of their duty to perform when performance has become impossible or impracticable through no fault of the non-performing party. A key to the impossibility doctrine is that the impossibility of performance must be objective rather than subjective. In the COVID-19 context, the fact that many state and local governments required businesses to close in order to stop the spread of the virus provides a basis for an impossibility defense.

Frustration of Purpose – This common law doctrine excuses a promisor in certain situations when the objectives of the contract have been utterly defeated by circumstances arising after the formation of the contract through reasons beyond the party's control. While there are few cases invoking this doctrine, this court-developed doctrine has been applied in only limited jurisdictions with varying degrees of success even before COVID-19.

No matter which of these doctrines are asserted, each may be subject to remedies that are more limited than merely invalidating the contract. Depending on the circumstances of the effect of the pandemic on a contract, the relief that may be provided may be limited to excused delay in performance of the contract or monetary relief in the form of setoffs for any breach.

Each of these doctrines has a varying application to a wide range of contracts, which an experienced litigator can evaluate based upon the specific contracts and facts at issue in any dispute.

Other Legal Impacts of COVID-19

The COVID-19 crisis has prompted substantial executive and legislative responses from the states and the federal government, which have impacted a wide variety of legal relationships – from landlord/tenant to the repayment of student loans to employment and unemployment. Each of these areas requires expertise and constant monitoring in the fast-changing environment in which we currently find ourselves, especially with the advent of a new Biden/Harris administration on the federal level.

Fletcher Heald & Hildreth, PLC attorneys are monitoring the COVID-19 situation as it unfolds and can assist our clients in dealing with this crisis regarding their legal obligations, potential contractual liabilities, and the effect of legislative actions in a range of different practice areas—from their mainstay telecommunications practice to commercial litigation, contract law, commercial real estate, cybersecurity, and labor and employment matters. We stand ready to assist our clients in these difficult times.

New Webinar: Writing Contracts for a Post-COVID World

On Tuesday, March 23 (12 noon EST), join Fletcher Heald Attorney Thomas Urban for a complimentary, hour-long update that will delve deeper into the complexity of contract litigation and how to protect yourself.. This will include a Q & A session, so bring any lingering questions you may have.

REGISTER HERE

Upcoming FCC Broadcast and Telecom Deadlines for March – May

Broadcast Deadlines:

March 12, 2021

NPRM: Permit FM Booster Stations to Transmit Geo-Targeted Content – Reply Comments are due in response to the Federal Communications Commission ("FCC" or the "Commission") Notice of Proposed Rulemaking with regard to possible changes to the booster station rules that could enable FM broadcasters to use FM booster stations to transmit geo-targeted content (e.g. news, weather, and advertisements) independent of the signals of its primary station within different portions of the primary station's protected service contour for a limited period of time.

March 29, 2021

Targeted Changes to TV White Space Device Rules – Comments due in response to the FCC's *Report and Order and Further Notice of Proposed Rulemaking* adopting targeted changes to the Part 15 (Radio frequency devices) white space devices rules in the TV bands (channels 2-35). The objective is to provide improved broadband coverage and applications associated with the Internet of Things ("IoT") for the benefit of consumers in rural and underserved areas.

April 1, 2021

Radio License Renewal Applications Due – Applications for renewal of license for radio stations located in Texas must be filed in Licensing and Management System ("LMS"). These applications must be accompanied by Schedule 396, the Broadcast Equal Employment Opportunity Program Report ("EEO"), also filed in LMS, regardless of the number of full-time employees. Under the new public notice rules, radio stations filing renewal applications must begin broadcasts of their post-filing announcements concerning their license renewal applications between the date the application is accepted for filing and five business days thereafter and must continue for a period of four weeks. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the Online Public Inspection File ("OPIF").

Television License Renewal Applications Due – Applications for renewal of license for television stations located in Indiana, Kentucky, and Tennessee 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. Under the new public notice rules, radio stations filing renewal applications must begin broadcasts of their post-filing announcements concerning their license renewal applications between the date the application is accepted for filing and five business days thereafter and must continue for a period of four weeks. Once complete, a certification of broadcast, with a copy of the announcement's text, must be posted to the OPIF within seven days.

EEO Public File Reports – All radio and television station employment units with five or more full-time employees and located in Delaware, Indiana, Kentucky, Pennsylvania, Tennessee, and Texas 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

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report is due, and the reporting period for the next year will begin on the following day.

April 10, 2021

Issues/Programs Lists – For all commercial and noncommercial radio, television, and Class A television stations, listings of each station's most significant treatment of community issues during the first quarter of 2021 must be placed in the station's online public inspection file. The lists should include brief narratives describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program with a brief description of the program.

Class A Television Stations Continuing Eligibility Documentation – The Commission requires that all Class A Television Stations maintain in their online public inspection files documentation sufficient to demonstrate that the station is continuing to meet the eligibility requirements of broadcasting at least 18 hours per day and broadcasting an average of at least three hours per week of locally produced programming. While the Commission has given no guidance as to what this documentation must include or when it must be added to the public file, we believe that a quarterly certification which states that the station continues to broadcast at least 18 hours per day, that it broadcasts on average at least three hours per week of locally produced programming, and lists the titles of such locally produced programs should be sufficient.

April 26, 2021

Targeted Changes to TV White Space Device Rules – Reply Comments due in response to the *Report and Order and Further Notice of Proposed Rulemaking* adopting targeted changes to the Part 15 white space devices rules in the TV bands for the purpose of providing improved broadband coverage and applications associated with the IoT in rural and underserved areas.

Telecom Deadlines:

March 1, 2021

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 Voice over Internet Protocol ("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.

April 1, 2021

Form 499-A – The annual Form 499 filing, Form 499-A, must be filed by telecommunications carriers and interconnected VoIP providers Carriers report their prior year's annual revenues using the form, and the FCC uses that information to reconcile, or true-up, a carrier's Universal Service Fund (USF) contributions over the past year based on the carriers quarterly Form 499-Q revenue projections. Carriers that overpaid their contributions will receive a credit, and Universal Service Admin-

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istration Company ("USAC") will bill carriers that underpaid their USF contributions.

Rate of Return Reporting FCC Form 492 – Local exchange carriers ("LECs") groups of affiliated carriers must file FCC Form 492 within three months of the end of each calendar year. Each LEC or group of affiliated carriers may make corrections to the report within 6 months of the due date for the report. Two copies of the report must be filed with the Secretary of the Commission with an additional copy filed with the Wireline Competition Bureau, Industry Analysis, and Technology Division.
Automated Reporting Management Information System ("ARMIS") Reporting – Certain incumbent local exchange carriers ("ILECs") must file ARMIS reports annually by April 1. The Commission has made significant changes to ARMIS reporting over the years to reduce the reporting burden. That said, carriers subject to the reporting thresholds are still required to report some ARMIS information, including pole attachment reporting. Information subject to ARMIS reporting also may vary depending on whether a carrier is a mid-size or large ILEC or a mandatory price-cap, elective price-cap, or non-price-cap ILEC. If you have any questions about the FCC's changes to ARMIS reporting, you should contact experienced telecommunications counsel.

Section 43.21(c) Letter – Common carriers with operating revenue over the indexed revenue threshold must file a letter with the Chief of the Wireline Competition Bureau showing the carriers operating revenues for the prior year and the value of its total communications plant at the end of the year. The indexed revenue threshold is defined in Section 32.9000 of the Commission's rules. The threshold is an inflation-adjusted amount calculated based on the annual revenue of $100 million in 1992.

Recordkeeping Compliance Certification and Contact Information Registration ("RCCCI") – Each year, equipment manufacturers and service providers (including traditional telephone providers, interconnected Voice over Internet Protocol ("VoIP") providers, and Advanced Communications Services, such as non-interconnected VoIP, electronic messaging, and interoperable video conferencing providers) must certify compliance with the FCC's recordkeeping rules related to accessibility of their service by individuals with disabilities. Section 14.31(a) of the FCC's rules requires equipment manufacturers and service providers to maintain certain records related to making telecommunications services accessible to individuals with disabilities. The RCCCI certification requires manufacturers and service providers to certify that they have procedures in place to meet those recordkeeping requirements. The certification is filed online and must be signed by an officer of each company under penalty of perjury.

May 1, 2021 (Due May 3 because May 1 falls on a Saturday)

Quarterly Telecommunications Reporting Worksheet (FCC Form 499-Q) – FCC rules require telecommunications carriers and interconnected VoIP providers to file quarterly revenue statements reporting historical revenue for the prior quarter and projecting revenue for the next quarter. The projected revenue is used to calculate contributions to the Universal Service Fund ("USF") for high cost, rural, insular and tribal areas as well as to support telecommunications services for schools, libraries, and rural health care providers. USF assessments are billed monthly.

Geographic Rate Averaging Certification – Non-dominant interstate interexchange providers operating on a detariffed must certify that their service complies with the provider's geographic rate average and rate integration obligations. The certification is due annually by May 1 and must be signed by an officer of the company under oath. Certifications should be sent to the FCC's Office of the Secretary, directed to the attention of:

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Office of the Secretary
Attn: Chief, Pricing Policy Division,
45 L Street NE
Washington , DC 20002

May 15, 2021 (Due May 17 because may 15 falls on a Saturday)

Quarterly Percentage of Internet Usage (PIU) Certification – USF prepaid calling card providers must file a certification stating that it is making the required USF contributions. The certification must be signed by an officer of the company under penalty of perjury and can be filed electronically using the FCC's Electronic Comment Filing System (ECFS). The Quarterly PIU Certification due May 15, 2021 will cover the First Quarter of 2021 (January 1, 2021 through March 31, 2021).