Broadcast LAW BLOG

PUBLISHED BY
Davis Wright Tremaine LLP

A Summary of the FCC Rules Implementing the CALM Act to Regulate Loud TV Commercials

By David Oxenford

December 15, 2011

The FCC this week adopted its rules implementing the **CALM Act** to address the public perception that **commercials are too loud** – louder than the programming which they accompany. Congress passed a law last year requiring that the FCC address the issue, and this week's order adopts these implementing rules which will go into effect on December 13, 2012 (see our articles on the passage of the Act here, and on the Notice of Proposed Rulemaking in this proceeding here). The rules adopted by the FCC allow television stations and MVPDs (multichannel video programming distributors – cable and satellite TV companies) to meet the requirements of the Act by relying on the **A/85 Recommended Practice**, a standard adopted by the **ATSC (the Advanced Television Standards Committee**) setting out a process by which these TV providers can assure that commercials that they insert into program streams are not louder than the programs that they accompany. The rules also allow a safe harbor by which stations and MVPDs can comply with the Act in connection with "embedded commercials", i.e. commercials that are sent to the station or system by a network or other program supplier.

The specific requirements for compliance with the new rules depend on whether the advertisements that are being broadcast are originated by the station or system, or whether they come embedded from some third-party program provider. For commercial insertions by the station or MVPD, compliance is assumed if they install the equipment required by A/85, use it in connection with their insertions, and maintain and repair it as necessary to keep it in good working order. For embedded commercials, stations can run all the programming through some sort of real time processing to ensure that the audio loudness is uniform. However the Commission was concerned would audio processing would degrade the audio quality of the programming provided by third parties. Thus, the Commission offered an alternative **safe harbor** with respect to embedded advertising. To comply with the safe harbor, stations and systems would either:

- Rely on **widely available certifications** from networks and other program suppliers that they have complied with the standards necessary to assure that the commercials are no louder than the programming in which they are embedded, or

- The stations and systems will need to perform **"spot checks"** on programming for which they

- have obtained no certification. Spot checks are done as follows:

    - Large stations (with over $14 million in annual 2011 revenue based on BIA Media Access Pro information) and very large MVPDs (those with over 10 million subscribers) needs to annually spot check 100% of their non-certified programming. Large MVPDs (those with between 500,000 and 10 million subscribers) need to spot check 50% of their programming. Small stations and systems are exempt from regular spot check obligations

- The spot check is a once-a-year obligation, requiring the station or system to do 24 hours of monitoring within a 7 day period, including at least one complete program from each non-certified program supplier, to ensure that the programs comply with the A/85 standards

- Spot checks will phase out over 2 years as more and more programming is brought into compliance

- If a spot check reveals an issue, the station or system needs to notify the program provider and the FCC, and do another spot check of the non-compliant programming within 30 days . If the programming continues to be noncompliant, then the programming is outside the safe harbor (meaning that, if a station or system continues to run it, they can be subject to fines)

The Order also set out additional details about what kinds of programming are subject to the rules, the complaint process for those who believe that stations or systems are not complying with their obligations, and waivers for small stations and systems. These matters are discussed below.

Some of these specific details include the following:

- **Noncommercial stations are exempt** from the CALM Act rules (unless they have commercial programming in their ancillary and supplementary digital services)

- **Political ads are considered commercials** for purposes of these rules. The FCC determined that any limits on the volume of these spots are not editorial changes that would violate the no censorship provision of Section 315 of the Communications Act (see, e.g. our articles here and here on the no censorship provisions of the Act)

- **Station promotional announcements and program length commercial programming are subject to the new rules**

- **Successor standards** to those currently set out in A/85 will be reviewed by the Commission. If minor, they will be adopted by Public Notice and become part of the compliance obligations of stations and systems. If they are more substantial changes to the current standards, they will be subject to public comment before they can be adopted

- The FCC **will not audit stations** for compliance. Instead, enforcement will be on a **complaint-driven** basis. If there are a pattern of complaints about the compliance of a station or system, the FCC will notify the station or system, which will then need to certify that their equipment is in place and has been properly maintained. The station or system will also need to demonstrate compliance with the safe harbor, and potentially it may need to do some spot checks on compliance

    - The complaints, to be considered by the FCC, must be very specific as to the station or system, channel, program, network and nature of the problem for the FCC to investigate

    - Stations and systems do not need to buy monitoring equipment, but may instead rent it for spot checks or when there are complaints that the FCC brings to their attention.

- While the rules go into effect next December, **waivers are available for small stations and systems,** and for larger entities that can demonstrate actual financial harm from the implementation. A small station or system can get a one-year waiver by certifying that they are small and that the financial burden of compliance would be great. Larger stations and systems actually have to document the financial hardship through the filing of financial statements and cost estimates. A second one-year waiver may be granted on the same basis as the first waiver. Waivers should be filed 60 days in advance of any compliance deadline

All in all, the FCC has adopted rules that, thus far, have received positive reviews from the entities that will be regulated by the rules. But the rules are detailed, so stations and systems should carefully review their implementation obligations. Over the next year, look for commercials to have more consistent volume levels as these rules are implemented.