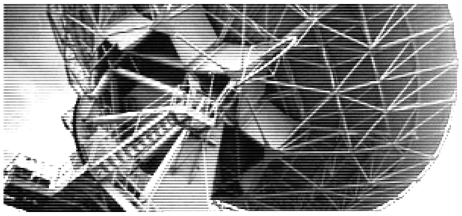

FLETCHER, HEALD & HILDRETH

Communications Law & Regulation

# MEMORANDUM TO CLIENTS

*News and Analysis of Recent Events in the Field of Communications*

*TMI?*

## Revised Form 323 Revealed

### Form would impose new burdens on reporting companies, individuals

*By Harry F. Cole*
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Remember last May, when the Commission issued its Report and Order about biennial Ownership Reports? Sure you do. Do you remember when it dumped onto the Media Bureau the chore of designing a new Ownership Report form (FCC Form 323)? Of course. (We reported on that back in the May, 2009, *Memo to Clients*.)

And do you remember how that new form would require *anyone* and *everyone* with *any* attributable interest in a broadcast licensee to be identified by his/her/its own separate and distinct FCC Registration Number?

Ummm, neither do we – because the Report and Order didn't say anything about that.

But the Media Bureau's draft form – new, improved, hot-off-the-presses and shipped over to OMB for approval earlier this month – would impose just such a requirement.
As we reported back in May, the Commission's Report and Order provided, at most, some very general guidelines about what the new Form 323 should look like. It left it to the Bureau to fill in the details.

But it wasn't until August 11 or so that we finally got a look at what the Bureau has come up with.

A copy of the Bureau's proposed form can be found on the Internet, if you know where to look. You have to go to the Office of Management and Budget (OMB) site and root around a lot – or you can find a convenient link on our blog (http://www.commlawblog.com/2009/05/articles/broadcast/new-ownership-report-audit-designs-left-to-bureau/) Check it out, and if you have any thoughts about it, feel free to let the folks at the OMB know – you have until September 10 to get your comments in.

The fact that we're all just getting a last minute crack at the Bureau's handiwork is unfortunate – and may be contrary to the rules. Since the ownership report is an "information collection" subject to the Paperwork Reduction Act, the Commission is supposed to solicit comments on it ***before*** sending the proposal out for separate review by OMB. While the FCC did technically invite comments back in June, that opportunity was somewhat – how can we say this delicately? – less than useful, being as how the form about which comment was being sought was not available for anybody to review.

The June notice described the proposed changes in the form as follows, without further elaboration or illustration:

> The instructions have been revised to state the Commission's revised Biennial filing requirements adopted in the 323 Order. The instructions and questions in all sections of the form have been significantly revised. Many questions on the form have been reworked or reordered in order to (1) clarify the information sought in the form; (2) simplify completion of the form by giving respondents menu-style or checkbox-style options to select rather than requiring respondents to submit a separate narrative exhibit; and (3) make the data collected on the form more adaptable for use in database programs used to prepare economic and policy.

But now the form has surfaced – although without much of a noticeable splash – and we can all take a look.

*(Continued on page 8)*

**August, 2009** **No. 09-08**

## Inside this issue . . .

*Radio rescue roadmap?*

# MMTC's 17-Point Plan

By Davina Sashkin
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In a petition submitted to the Commission in July, the Minority Media and Telecommunications Council (MMTC) has proposed wide-ranging changes to the FCC's radio regulations aimed at providing some relief to the beleaguered industry. Styled as a "Radio Rescue Petition" by MMTC, the petition proposes 17 specific revisions designed to promote increased participation by women and minorities in broadcasting, primarily through measures that would boost the industry as a whole. Because of the industry-wide potential benefits of the proposals, many are likely to receive broad support in the radio community. For example, MMTC has targeted outdated and onerous engineering rules, promotes flexibility in station construction and siting, and fosters support for non-profits and small businesses in broadcasting.

On the other hand, some of MMTC's ideas are likely to raise considerable controversy. For example, MMTC urges the creation of an advisory panel to make recommendations on the use by AM stations of Channels 5 and 6 in the post-DTV transition landscape – a concept which was initially presented to the Commission almost two years ago, but has since gained little traction. Similarly, MMTC suggests that the time is right for a new radio interference agreement with Cuba.

The NAB has not backed the petition as a whole (perhaps due to disagreement over the AM advisory panel idea), but is expected to support many of the sought-after provisions. There has been no inkling yet from the Commission that any aspect of the MMTC petition is under consideration. The typical timeline for a petition to morph into an order is at least a year. However, the process for some of the items could be shorter if enough support were shown to provide the Commission impetus to get the ball rolling on at least some of the less-controversial proposals.

The following is a summary of all of steps which MMTC has advanced to save radio, one proposal at a time:

*Establish an "AM Transition Federal Advisory Committee" to make recommendations for the post-DTV transition use of Channels 5 and 6*

Clearly the most controversial of the proposals, this seeks the establishment of a high-profile committee (patterned after the Advisory Committee on Advanced Television Services, the folks who ultimately brought us DTV) to work out the details of possibly moving any and all interested AM radio licensees to an FM expanded band created on vacated analog channels 5 and 6, per the proposal previously set forth by (among others) a group calling itself the Broadcast Maximization Committee in comments filed in MB Docket 07-294.

*Removal of AM nighttime coverage requirements from Section 73.24(i) of the Rules*

MMTC asks the FCC to do away with the nighttime coverage requirements for AM stations, citing the burden on broadcasters of sustaining nighttime operations at the expense of improved daytime operations. MMTC also notes the difficulties in complying with the coverage requirement as community boundaries change over time or a station loses its antenna site and must identify another site that will permit the required coverage.

*Modify principal community coverage rules for commercial stations*

MMTC would have the FCC reduce, from 80% to 50%, the required coverage of each commercial station's community of license. This change, according to the petition, would still provide a majority of the community with a listenable signal while making it easier for incumbent stations to make improvements or move tower sites,

*(Continued on page 10)*

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# Focus on FCC Fines

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***FCC shuts down Florida's "Quiet Storm"*** – In Lakeland, Florida, Station WGBC(FM) operated at 87.9 MHz and provided the area with programming 24 hours a day. The station had a Quiet Storm segment in the early hours, featuring local talk and even community programming as part of its programming. The station's advertising car, emblazoned with the station's call sign, frequency, web site and owner's name, was seen around town. The advertising car even had personalized license plates reading "WGBC 1". The station had a fully functional website providing photos and biographies of its on-air personalities, advertising from sponsors, a rate card and even an internet simulcast of the station's over-the-air programming. The station took advantage of the visibility of its studios and offices by advertising boldly in several windows of its suites.

The one thing which this heavily promoted FM was missing was an FCC license to operate. Neither the station nor its owner had ever been issued an FM license. Instead, the Quiet Storm was a not-so-quiet actively-marketed pirate radio station.

With the help of local police, the FCC raided the station and arrested the operator. The operator was charged by the local police with a third degree felony, and the FCC has proposed a $10,000 fine for the operations.

Curiously, the operator had previously held an AM station license, but sold it two years prior to his arrest. Despite the owner's history as an AM licensee, he claimed that on an unspecified date he spoke to an unidentified person at the FCC who supposedly advised him that operations on FM frequencies did not need a license so long as there were no complaints or interference. The FCC did not accept this strange excuse and issued the fine for operating without a license. The internet broadcast of the station continues.

***FCC continues to spread the wealth*** – Readers of this column may recall that the June issue (page 11) warned that the new FCC might be going after profitable companies more stringently when setting fine amounts. The June case involved the government's decision to double a fine levied against a Fox station because Fox is a profitable company. This month the government continued that policy of punishing "large or highly profitable" companies by doubling (from $16,000 to $32,000) the fine issued to another successful company. The FCC continued to warn broadcasters that large or profitable companies can and should expect higher forfeitures. The $32,000 fine was later adjusted down slightly because the company had turned itself in to the FCC.

In the recent case, the station had two satellite earth station licenses which expired in January and July, 2008. However, the station did not notice the expired licenses until a few months later. Having identified the oversight, the station took immediate corrective measures and asked for temporary authority until permanent licenses could be reissued. The FCC issued the temporary authority and also used the application for the authority as the station's admission of guilt.

The latest fine against the station serves as a reminder to large and profitable companies that the FCC may be whacking them harder than their smaller and less profitable *confrères*. Whether or not that's fair is immaterial: it's the Commission's current approach.

***FCC agents surfing the net and listening to CBs*** – What do FCC agents do when they are not inspecting radio and television stations? A series of citations and notices this month reveals that the agents, like many other citizens, surf the internet and (like so many of us did back in the 1970s) listen to CB radio.

As the world's largest retailer, Wal-Mart was an easy target for FCC agents scouring the internet for unauthorized equipment. The FCC issued Wal-Mart a citation after the agency browsed through the retailer's website and found equipment for sale that did not comply with the FCC's rules. A large manufacturer supplied Wal-Mart with dozens of electronics products. The FCC pored over all of the products listed on Wal-Mart's website and found a wireless camera that was operating at variance from the manufacturer's certificate with the FCC. In turn, the FCC hit Wal-Mart with a citation for trying to sell unauthorized equipment.

The FCC similarly went after a "spy store" in Spokane, Washington, that listed certain GPS-jamming equipment for sale on its website. The FCC made inquiries and determined that the store had sold nearly 70 units. Similar to the Wal-Mart case, the FCC issued the store a citation for marketing and selling unauthorized equipment.

Finally, FCC agents revealed that, in addition to surfing the net, they've "got their ears on" when CB radios are running. An Ohio man is under investigation for improperly using a CB radio. Users of CB radios may know that no license is required to use the radios. Most CB users go by on-air nicknames, or handles. Given all that, the Commission cannot easily track down any particular CB operator. However, the Ohio man made it

*(Continued on page 11)*

*Responding to a False Alarm?*

# FCC Seeks Comment on MusicFIRST Claims

***Pro-PRA group alleges misconduct by unidentified broadcasters***

*By Harry F. Cole*
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A new front has been opened in the on-going struggle over the Performance Rights Act (PRA). The new battleground is the FCC, which has invited comment on a "Request for Declaratory Ruling" filed by MusicFIRST Coalition back in June.

As we have previously reported, the PRA would require radio stations to pay for the on-air performance of copyrighted sound recordings. That would be over and above the royalties broadcasters already pay to the composers of the underlying works (through ASCAP, BMI and SESAC). Historically, of course, radio has provided on-air exposure to recording artists for free, just as the artists have made their recordings available to broadcasters for free. That *quid pro quo* arrangement has served everybody – artists, broadcasters and the listening public – well for decades. The artists – well, at least some of the artists, and for sure the record companies for which they work – now want to change the deal.

*MusicFIRST is trying to get broadcasters' attention by attacking them where they are arguably most vulnerable.*

Whether the proposed change makes much sense is a matter of considerable (to put it mildly) debate. (*See* our colleague Peter Tannenwald's post on our blog at www.commlawblog.com for an interesting take on the situation.) But thus far, the debate has been thrashed out in Congress, in connection with various bills which would either impose a new performance rights royalty obligation or not. (While no final votes have been taken, some observers have concluded that the PRA is doomed to failure in this Congress.)

Perhaps sensing a need to expand the battlefield, MusicFIRST – a "partnership of artists and organizations in the music community who support compensating performers for their work when it's played over the air" – has tried to lure the FCC into the fray.

And the FCC has taken the bait.

In June MusicFIRST filed its Request, alleging that, "[b]y using their licenses over public airwaves to promote their own pecuniary interests and to distort an important matter of public debate", broadcasters are violating their public interest obligations. The Coalition suggested that the Commission should consider "strengthening the license renewal process and shortening license terms".

Acting with unusual speed – in our experience, this kind of declaratory ruling request can gather dust for months, if not years, before the FCC even acknowledges that it's been filed – the Commission has invited comments. In particular, the agency is looking for input on the following points:

- whether and to what extent certain broadcasters are "targeting and threatening artists who have spoken out in favor of the PRA," including a refusal to air the music of such artists;
- the effects of radio broadcasters' alleged refusal to air advertisements from MusicFIRST in support of the PRA;
- whether and to what extent broadcasters are engaging in a media campaign, coordinated by NAB, which disseminates falsities about the PRA; and
- whether certain broadcasters have evaded the public file requirements by characterizing their on-air spots in opposition to the PRA as public service announcements.

MusicFIRST is clearly trying to get broadcasters' attention by attacking them where they are arguably most vulnerable – in the soft white underbelly of the regulatory/licensing process.

Of course, the Request does not ask the FCC to address the merits (or lack thereof) of the PRA . . . and properly so, since the FCC has neither the expertise nor the statutory authority to weigh in on such issues. Rather, the Request gets the FCC's attention by claiming that at least some broadcasters may not be playing by the rules and may be acting unfairly in some way. Using that as a hook, MusicFIRST suggests regulatory responses (*e.g.*, shortened renewal terms, possible disciplinary action) that might, um, incentivize broadcasters to be more, er, open to the PRA and its advocates.

The Request is particularly interesting for what it does ***not*** provide: any significant, detailed, factual information to support its extravagant claims of some industry-wide cabal resulting in rampant disregard for any particular rule(s). While the Request purports to "reveal a pattern of threats and intimidation by which broadcasters are using their licenses" improperly, the Request references in the tersest possible manner a total of five instances of such supposed misconduct. And those instances are not identified with respect to the station(s) in question ***or*** the artists who were supposedly threatened or intimidated. While such vague, unverified and unverifiable charges may have worked for Joe McCarthy back in the day, we thought that government had gotten past that particular gambit by now. Apparently not.

Moreover, even if the five examples sketched anonymously in the Request could be shown to be every bit as bad as MusicFIRST would have us believe, that would

*(Continued on page 9)*

*New agreements, new opportunities*

# Noncommercial Webcasting Royalties: The Nitty-Gritty

*By Kevin Goldberg*
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In August SoundExchange reached two agreements affecting ***non-CPB noncommercial*** webcasters. The terms of those agreements have now been published in the Federal Register. Our summary of the terms of those agreements – which were published in the Federal Register on August 12 – follows. ***If you are subject to these agreements, pay attention: your opportunity to opt in may be subject to a September 15, 2009, election deadline.***

One of the two agreements – we'll call it the "General Agreement" – covers ***all*** noncommercial webcasters. (This is noteworthy because the agreement was negotiated with a committee of National Religious Broadcasters. Despite that, the agreement is ***not*** limited solely to religious webcasters.) The second agreement covers only noncommercial ***educational*** entities, who enjoy the best of all possible worlds: they can elect to be subject to the terms of the noncommercial educational agreement or they can elect the General Agreement instead.

*The two new agreements provide still more ways of opting out of the default regs adopted by the Copyright Royalty Board.*

Recall that, for webcasting royalty purposes, the term "noncommercial" is defined by tax code (Section 501) considerations, ***not*** by the conventional FCC definition of the term. That is, a noncommercial webcaster is an entity which either (a) is already tax-exempt under Section 501 or (b) has applied for tax-exempt status or (c) is a government entity acting within its public purpose. As a general default matter, noncommercial webcasters must comply with the royalty rates set out in the March 2, 2007 decision of the Copyright Royalty Board (CRB) and other applicable regulations, which require:

- © a $500 annual minimum fee per channel (though a recent Court of Appeals decision has raised questions about the continued validity of this fee);
- © commercial per performance rates, for listenership above 159,140 aggregate tuning hours in any given month (about 220 simultaneous listeners at every moment in the month);
- © reporting of information about ***all*** songs played for two seven-day periods per quarter; and
- © compliance with the "performance complement" elements of the statutory license limiting, among other things, the number of songs played from the same album or artists in a given time period.

Noncommercial entities can avoid these default requirements in a variety of ways. For example, some entities are covered by the agreement (the term of which was recently extended) between SoundExchange and the Corporation for Public Broadcasting.

The two new agreements provide still more ways of opting out of the default CRB regs. Here is how those new agreements work.

### *The General Agreement*

The General Agreement is available to any noncommercial webcaster, not covered by the CPB/SoundExchange agreement, which simulcasts an over-the-air signal (though it can also have other streams). The terms of the General Agreement apply to the years 2006-2015.

***To take advantage of the General Agreement, the eligible noncommercial webcaster must file a notice of election by September 15, 2009 or within 30 days of commencing webcasting, whichever is later.*** (The notice forms are available on the SoundExchange website.) This will cover the webcaster for every subsequent year unless the webcaster revokes its participation by January 31 in any future year. The noncommercial webcaster must, before September 15, 2009, also make good on all unpaid royalties owed for the period 2006-2009.

The General Agreement calls for participating noncommercial webcasters to pay only a $500 annual minimum fee per channel by January 31 of each year ***as long as*** the webcaster does not exceed 159,140 aggregate tuning hours (ATH) in a given month. This is essentially the same requirement imposed by the CRB default regs, except that under the new General Agreement the webcaster must file a Statement of Account each month, whether or not it exceeds the ATH max.

However, if the webcaster exceeds 159,140 ATH, it must pay royalties at the following rates and time periods:

***2006-10***: $0.0002176 per performance ***or*** $0.00251 per ATH for a music channel ***or*** $0.0002 per ATH for news/talk/business/sports channels)

***2011***: $0.00057 per performance

***2012***: $0.00067 per performance

*(Continued on page 14)*

*Up, up and away!!!*

# 2009 Reg Fees Finalized

***Fee Deadline: September 22***

The Commission has adopted its final schedule of Regulatory Fees for 2009. The new fees are set out in the table on the next page. The deadline for reg fees this year will be 11:59 p.m. (ET) on ***September 22, 2009***.

The new fees are, with one exception, the same as the Commission proposed last May. We described those proposed fees in the May *Memo to Clients*. The sole exception is the fee associated with AM CPs. Here's a surprise: the final fee ($400) turns out to be $80 less than the FCC had originally proposed!

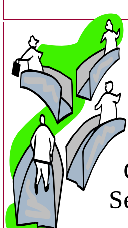
The only real change this year is that electronic payment of all reg fees ***must*** be started through the FCC's Fee Filer system as of this year. The Commission recognizes that some folks may not be able actually to pay through the Fee Filer system. (For example, the fees for some licensees may exceed $100,000, and credit card payments in such amounts may not be a happening thing.) But at a minimum, everybody is supposed to start at Fee Filer because that will enable them to generate a voucher Form 159-E which, the Commission assures us, "will have important electronic attributes associated with this regulatory fee payment." With very limited exceptions, anyone not paying their fees through Fee Filer will need a voucher Form 159-E to accompany their payments.

Accessing the Fee Filer system requires you to have a current FCC Registration Number (FRN) and associated password. In the unlikely event that you don't already have an FRN, we would be happy to help you work through the CORES system to get one.

> *Accessing the Fee Filer system requires you to have a current FCC Registration Number (FRN).*

As it has done for the past five years, the Commission will again send out "assessment notifications" to all broadcast licensees, advising them of the reg fees associated with their primary licenses. But, also as in past years, those notifications ***will NOT include*** any necessary fees for auxiliary licenses. This is important to remember, because even though auxiliary fees don't show up on the FCC's notifications, such fees are still required to be filed – and a failure to file even the weeny little $10 fee for, say, a remote pickup unit can result in "red light status" affecting all your licenses.

As noted above, the deadline for paying this year's reg fees is 11:59 p.m. (ET) on September 22. But why wait until then? The teller windows are now open at Fee Filer, so why not avoid the late September rush and check this chore off your to-do list right now?



## FHH - On the Job, On the Go

If it's September, it must be NAB Radio Show time. If you're heading for Philly, be sure to be on the lookout for **Jeff Gee**, **Frank Jazzo**, **Scott Johnson**, **Frank Montero** and **Howard Weiss**, all of whom will be there. On Friday, **Frank M** will be speaking on a panel on "Convincing Capitol Hill: How to Effectively Petition Members of Congress". (Don't look for **Frank M** in Philadelphia on September 24 — he'll be in NYC that day, checking in at the Hispanic TV Summit at the Marriott Marquis there.)

Heading west will be **Lee Petro**, who will be attending the 4G World Conference in Chicago on September 15-16.

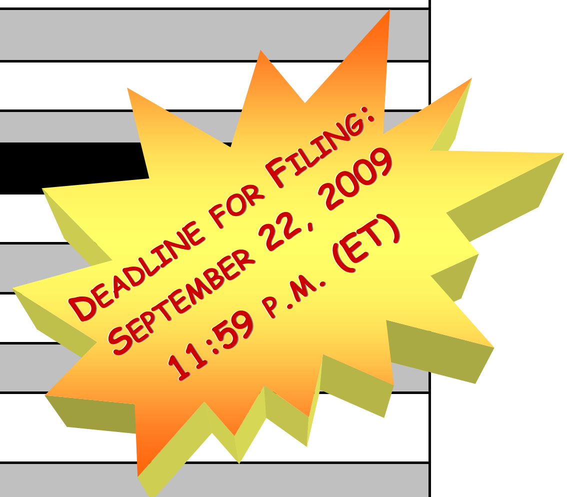
Hanging closer to home will be **Kevin Goldberg**, who's speaking on issues surrounding sports credentialing at the National Press Club (NPC) on September 16 at 10:00 a.m. And from 2:00-3:00 that afternoon, he'll participate in an NPC webinar titled "Understanding the Shield Law: What journalists need to know for the upcoming Congressional debate".

On October 1, **Frank M**, **Vince Curtis** and **Susan Marshall** will attend the Library of American Broadcasting's Giants of Broadcasting Luncheon in New York.

Hey, how about a tip of the *Memo to Clients* hat to **Frank J** and **Howard W**? They were presented with the Minority Media and Telecommunications Council's (MMTC) Extraordinary Service Award for their participation on MMTC's 307(b) Task Force and work on MMTC's Rescue Radio Petition for Rulemaking. (Read more about that Petition in the article on Page 2 of this issue.)

*Media Darling of the Month*? That would be **Mitchell Lazarus**, whose article titled "Radio's Regulatory Roadblocks – How FCC Red Tape Slows New Wireless Technologies and What To Do About It" will appear in the September issue of IEEE *Spectrum* magazine. If your subscription copy of *Spectrum* is late (or if you happen not to be an IEEE member), the article should be available on line at http://www.spectrum.ieee.org/static/magazine/ on September 1 or thereabouts.

| FEE CATEGORY | Final FY 2009 Annual Regulatory Fee (USD) |
|---|---|
| **TV VHF Commercial Stations** | |
| Markets 1-10 | 77,575 |
| Markets 11-25 | 60,550 |
| Markets 26-50 | 37,575 |
| Markets 51-100 | 22,950 |
| Remaining Markets | 5,950 |
| Construction Permits | 5,950 |
| **TV UHF Commercial Stations** | |
| Markets 1-10 | 24,250 |
| Markets 11-25 | 21,525 |
| Markets 26-50 | 13,350 |
| Markets 51-100 | 7,600 |
| Remaining Markets | 1,950 |
| Construction Permits | 1,950 |
| Low Power TV, TV/FM Translators/ Boosters | 400 |
| **Other** | |
| Broadcast Auxiliary | 10 |
| Earth Stations | 210 |




| **Satellite Television Stations** | |
|---|---|
| All Markets | 1,275 |
| Construction Permits | 650 |

| **Commercial Radio Stations** | | | | | | |
|---|---|---|---|---|---|---|
| **Population Served** | **AM Class A** | **AM Class B** | **AM Class C** | **AM Class D** | **FM Classes A, B1 & C3** | **FM Classes B, C, C0, C1 & C2** |
| <=25,000 | 675 | 550 | 500 | 575 | 650 | 825 |
| 25,001 -75,000 | 1,350 | 1,075 | 750 | 875 | 1,325 | 1,450 |
| 75,001 -150,000 | 2,025 | 1,350 | 1,000 | 1,450 | 1,825 | 2,725 |
| 150,001- 500,000 | 3,050 | 2,300 | 1,500 | 1,725 | 2,800 | 3,550 |
| 500,001 -1,200,000 | 4,400 | 3,500 | 2,500 | 2,875 | 4,450 | 5,225 |
| 1,200,001- 3,000,000 | 6,750 | 5,400 | 3,750 | 4,600 | 7,250 | 8,350 |
| >3,000,000 | 8,100 | 6,475 | 4,750 | 5,750 | 9,250 | 10,850 |
| AM Radio Construction Permits | 400 | | | | | |
| FM Radio Construction Permits | 650 | | | | | |

*(Continued from page 1)*

Perhaps the most striking change – a change ***not*** mentioned by the FCC in any of its various notices – is that the proposed form would require that ***every*** person or entity holding an "attributable" interest must have his/her/its own separate and distinct FCC Registration Number (FRN) which must in turn be reported in the new Ownership Report form. Those with "attributable interests" include officers, directors, 5% or greater shareholders and individuals or entities whose interests exceed certain levels under the "equity-debt-plus" standards.

This means that lots and lots and lots of people, and entities, will now have to sign up for their own FRNs, which in turn means that they will have to provide the FCC with their social security number, employer ID number or taxpayer ID number. To be sure, the revised Ownership Report itself does not call for SSN/EIN/TIN disclosure, but in order to get an FRN in the first place, you have to cough up one of those ID numbers to the FCC (through the CORES system for doling out FRNs).

*The FCC will suddenly become a repository of a vast trove of sensitive information it has not previously held.*

It is not hard to imagine the very considerable practical problems that the new FRN reporting will create. The overall number of FRNs issued by the Commission is likely to balloon exponentially. After all, a corporate licensee at this point generally requires only its own FRN. Under the new regimen, each of that licensee's officers and directors and attributable interest-holders will have to have his/her/its own FRN. And if any attributable – and, therefore, reportable – interest-holder is, in turn, a corporation (or other business entity), it too will have to provide FRNs not only for itself but also for *its* officers, directors and attributable interests holders. And so forth down the line. Oh, and don't forget that the Commission has also expanded the universe of services subject to ownership reporting requirements to include LPTV and Class A folks – thereby further jacking up the number of attributable interest-holders who will be filing reports.

So the FCC will suddenly become a repository of a vast trove of sensitive information – SSNs, EINs, TINs – which it has not previously held. In view of the ever-present, and increasing, threat of identity theft, one would think that Federal agencies would be reluctant to collect such data. Additionally, reporting entities – licensees and their various officers, directors, etc. – will have to keep track of the multiple FRNs they are required to include in their reports. To some degree it is already a headache keeping track of multiple FRNs (and associated passwords) – that problem will only get worse when the number of reportable FRNs skyrockets.

Plus, the new form requires that all FRN information be "consistent" among all reports. That is, if an individual or entity listed in one report shows a particular FRN, then that same FRN should be used in all other reports in which that individual or entity happens to be listed. The new form advises that respondents should be sure to "coordinate with each other" to ensure consistency. The unstated problem here is that, historically, the FCC has not limited FRNs on a one-to-a-customer basis. As a result, any individual or entity might have a bunch of different FRNs. In order to achieve the "consistency" mandated by the new form, respondents will have to take pains to use the correct FRNs, and will also have to hope that all other respondents do likewise.

Curiously, the Commission appears *not* to have recognized the likely impact of this change. Check out the FCC's defense of its new form, as presented to OMB. (That defense, which has not been publicized by the FCC as far as we can tell, is also available on the OMB website. A link is available in our blog post noted above.) Nary a word about the new requirement to report FRNs for every attributable interest-holder. In fact, the FCC blithely concludes that "[t]here is no need for confidentiality with [the revised Form 323]" and the revised form "does not address any private matters of a sensitive nature". While it is true that Form 323 itself does not require confidential or sensitive information, the new FRN-reporting requirement will nevertheless compel the submission of boatloads of SSNs, EINs and TINs (through the CORES registration system), all of which would normally be viewed as confidential or sensitive.

With the exception of the FRN aspect, the proposed form contains few other surprises. Still, since the form is now designed to provide conclusive documentation of the precise level of minority ownership in broadcasting, it does seem a bit odd that respondents can choose "two or more races" as an option, without identifying which races are involved – won't that affect the data?

And the Commission's racial definitions still suffer from problems inherent in such governmental efforts at population compartmentalization. For example, "Asian" is redefined to include only those "having origins in the original peoples" of the "Far East, Southeast Asia or the Indian Subcontinent" – hey, we thought Asia started at the Urals, and what about all those folks in "Siberia" thing? "African" similarly now means "not really all of Africa" – since it appears to exclude those "having origins in any of the original peoples of . . . North Africa". And what, exactly, does "having origins in any of the original peoples" mean, anyway? How far back, and how deeply, can or must respondents go to answer that?

While the Commission fails to address any of these practical problems in its OMB defense, it does provide some laughably incomprehensible "estimates" of the "burdens" that the revised form will impose on the private and governmental sectors. For example, with no explanation, the Commission speculates that it will take between 1.5 and 2.5 hours to complete the revised Form 323. (Check it out for yourself: go to the link on the OMB site for "Supporting Statement OMB 3060-0010 (August 2009).doc" and take a look at Paragraphs 12-14 on pages 8-9.) In our experience, that's way over for the simplest situations (*e.g.*, a single-owner licensee with only one station), but probably unreasonably low for more complex

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still reflect the conduct of but a very, very small handful of stations in a radio industry numbering more than 14,000 stations. (By the way, one of the five anonymous instances referred to in the Request has been tracked down by a newspaper: it turns out to be a 100-watt noncommercial high school station in Delaware at which the students opted for a one-month boycott of MusicFIRST-related artists two years ago. It would be difficult to claim with a straight face that that incident reflects some industry-wide "pattern of threats and intimidation".)

The Request also alleges that "broadcasters are refusing to accept ads" from MusicFIRST and its allies relative to the PRA. Again, however, the "evidence" of such refusals is slim at best. The Request mentions six – count 'em, six – stations (by call sign) which purportedly declined the MusicFIRST spots. It also says that a request to run the spots "in 38 different markets on a variety of different types of stations" was sent to Clear Channel – and as of the date of the Request, Clear Channel had not responded, even though "[i]t has now been over a week since we sent the script." No real smoking gun there.

The Request claims that broadcasters are "spread[ing] malicious and untruthful information about the PRA." MusicFIRST's knickers are all in a twist because, for example, some anti-PRA materials distributed by some broadcasters refer to the PRA as a "tax". MusicFIRST's position is that the term "tax" can refer only to situations involving making payments to a government, and since the PRA provides for no such payments, well, then, obviously, use of the word "tax" has got to be a Big Lie. But the word "tax" also means "a heavy burden" (at least according to Webster's), without reference to the precise nature of the burden. If the promo items in question had been hypertechnical legal documents in which the use of the word "tax" called for ultra-precision, MusicFIRST's criticism might have some basis. But the materials don't appear to have called for such nice distinctions. And since pretty much everybody agrees that the PRA would, in fact, impose a heavy burden on broadcasters, it's hardly malicious or untruthful to refer to it as a "tax".

Finally, MusicFIRST frets that all of this supposed nefarious skullduggery is being orchestrated by the NAB and is "blatantly anti-competitive".

So, gesticulating wildly at all that blue smoke and all those mirrors, MusicFIRST urges the FCC to come to the rescue. Interestingly, while the gist of the Request sounds an awful lot like a complaint under the long-gone Fairness Doctrine, MusicFIRST defensively claims that that's not the case. But it asserts that broadcasters "have a statutory duty to use their monopoly . . . responsibly and not simply to further their own economic interests."

The Commission, for its part, acknowledges that "substantial First Amendment interests are involved in the examination of speech of any kind." It also recognizes that no remedies may be necessary, or available, to address the activities which MusicFIRST alleges.

But none of that is stopping the Commission from jumping right into this fracas with both feet, notwithstanding the anonymous, non-specified, unverified and unverifiable nature of MusicFIRST's claims. By doing so, the FCC seems to be signaling its sympathy for the artists' position – for sure, by inviting any comments at all the Commission appears to be giving the benefit of every conceivable doubt to MusicFIRST.

If you want to chip in your two cents' worth, you have until ***September 8, 2009*** to file comments. Reply comments are due by ***September 23***.

*(Continued from page 8)*

situations (*e.g.*, multi-tiered ownership structures).

But wait, the 1.5/2.5 hour estimates do not appear to involve attorney prep time; rather, it appears that those estimates relate only to the amount of time the reporting entity would itself have to devote to preparation of the report. The Commission next figures that attorneys would likely be involved as well, and it speculates (in Paragraph 13) that each report would require eight hours of attorney time – probably on the high side, at least for relatively straightforward reports – at a billable rate of $200/hour (good luck with that).

The unreliability of the FCC's figures is underscored by the fact that it doesn't even get its own filing fees correct. At Paragraph 13 it refers to a filing fee of $55 per biennial report. Call us crazy, but we could have sworn the 2009 Fee Guide sets that fee at $60 a pop, the same level it's been at since at least 2008, and maybe even since 2006.

Finally, the fun continues with the Commission's estimate of the "cost to the federal government". According to the FCC, a GS-11 staffer will require two hours to "process" each report. But the reports are being filed electronically by the licensees. No staff involvement likely there. And it has long been our impression that, except in unusual situations, Ownership Reports go largely unreviewed by the Commission once they are submitted. Where, then, does the two hours of "processing" time come from? Ideally, OMB will be able to sort all this out.

The revised form, and the accompanying report to OMB, do make for interesting, if not enlightening, reading. Since ***all*** full-service radio, TV, LPTV and Class A broadcasters will be having to complete the form biennially, it would be a good idea for everybody to check it over now, while it's still in draft form. You have until September 10 to chip in your two cents' worth about the form at OMB. After that, opportunities to get the form changed will be few and far between.

*(Continued from page 2)*

thereby increasing flexibility in tower siting and facilitating a more targeted approach to some audiences.

*Replace minimum efficiency standard for AM stations with a "minimum radiation" standard*

In exchanging the minimum efficiency rules for AM stations with a minimum radiation standard, says MMTC, the Commission could expand the choices available to AM stations in antenna and site selection. By bringing the rules into the 21st Century, the proposal would allow lower frequency broadcasters to maximize operations by increasing power on shorter antennas without the need for vast parcels of land.

*Allow FM applicants to specify Class C, C0, C1, C2 and C3 facilities in Zones I and IA*

MMTC requests revisions of the rules to allow applicants to specify Class C, C0, C1, C2 and C3 FM facilities anywhere in the United States. (Those classes are currently limited to Zone II.) This would open up desirable Zone I spectrum to existing stations wishing to improve service and, says MMTC, it would promote spectrum efficiency by reducing the effective warehousing of Class B spectrum. Zone I consists of the major population corridor from Illinois in the west, to Virginia in the east, and north to Maine.

*According to MMTC, the costs of maintaining and staffing main studios is a burden on smaller operators that limits their competitiveness.*

*Purge non-viable FM allotments*

This proposal seeks the deletion of "non-viable" FM allotments through an auction process: a vacant allotment put up for auction would be deleted if it did not attract a successful bidder or if the winning bidder failed to construct. MMTC argues that the maintenance of these vacant allotments is an inefficient use of spectrum that effectively precludes new entrants and prevents existing stations from expanding coverage.

*Reaffirm to Congress the Commission's support for repeal of third-adjacent spacing rules*

MMTC asks the Commission to petition Congress to lift its 2001 suspension of the FCC's authority to grant LPFM stations on third adjacent channels. This restriction, says MMTC, should have been lifted long ago, once the FCC provided Congress with independent study findings in 2004 which lent support to those seeking the elimination of third-adjacent channel distance separation requirements for LPFM stations.

*Maintain a rule of "ten translator applications per applicant"*

Also in the vein of promoting LPFM growth (or at least limiting LPFM frustrations), the petition requests that the Commission extend permanently to future windows the restriction it imposed in 2007 limiting applications for new FM translator stations to ten per applicant.

*Create a new local "L" Class of LPFM stations*

MMTC would promote LPFM development by seeking to create a new local "L" Class entitling some LPFMs to primary service status upon the completion of two years of operation as a "significantly local service".

*Relax the limit of four contingent applications*

MMTC asks the Commission to act on its petition for partial reconsideration of the 2006 order streamlining community of license change applications. MMTC renews its request for the FCC to increase the limit on contingent applications to ten (and ultimately to 20, if no problems are encountered). According to MMTC, this change is needed in congested urban areas where many minority broadcasters and minority audiences are located. As an incentive to the adoption of this measure, MMTC proposes a filing fee surcharge for more than six contingent applications, and the possibility of outsourcing application processing after six months so that the staff is not overburdened.

*Relax the main studio rule*

While acknowledging that the main studio rule serves to promote localism, MMTC nevertheless notes that the costs of maintaining and staffing main studios is a burden on smaller operators that limits their competitiveness. Thus, MMTC requests that the FCC seek comment on whether to allow a station to maintain a studio beyond its city-grade contour (or within a 25-mile area of its transmitter site) if it were to (a) maintain its public file and a direct telephone tie line at the library nearest to the community of license and (b) host three town hall meetings a year in the community of license to hear from local citizens.

*Clarify that eligible entities can obtain 18 months to construct major modifications of authorized facilities*

Here the MMTC asks that the Audio Division expand its interpretation of "original construction permits" permitted to be extended upon assignment to an eligible entity to include major modification applications. The petition argues that this interpretation is crucial, especially for AM station modifications which can be especially time-consuming due to multiple tower array construction. MMTC also argues that the Audio Division's stance is inconsistent with the intent of the rule and the purposes of the Diversity Order.

*Extend the three-year period for ALL new station construction permits*

MMTC proposes that, in light of the economic crisis, the Commission adopt a blanket one-year extension of the three-year construction timeframe for all original permits for new stations. Concerns about warehousing spectrum, says MMTC, are vastly outweighed by the hardships and

*(Continued on page 11)*

*(Continued from page 10)*
barriers to entry faced by broadcasters – especially small-market broadcasters – in obtaining financing and tower siting.

*Study the feasibility of a new radio agreement with Cuba*

Radio interference between the U.S. and Cuba has been a persistent problem, giving rise to public safety concerns in Florida and restricting stations' ability to reach minority audiences. MMTC recommends that the Commission urge the Department of State to determine the feasibility of a radio interference treaty with Cuba to protect American AM stations.

*Conduct radio engineering rules tutorials*

MMTC suggests that the Commission to provide public tutorials (at FCC headquarters in D.C. as well as at conferences in the hinterlands) on the current radio regulatory regime. These tutorials, according to MMTC, are necessary to assist small and minority-owned stations in understanding the increasingly complex technical regime – the ultimate goal, of course, being universal compliance with that regime.

*Create a broadcast public engineer position to assist small business and non-profits with routine engineering matters*

In addition to the regulatory tutorials, MMTC wants the Commission to create a staff position to assist small businesses and non-profits with routine engineering matters. This proposed staff member would serve as a help desk, advising non-profit and small business applicants on the engineering portions of applications and providing technical exhibits that can be created without field tests. According to MMTC, this new office would also act as an ombudsman to bring problems with current processes to the attention of the Media Bureau.

*Issue a one-year blanket waiver of application fees for small business and non-profits*

Again in an effort to reduce the financial burdens faced by small and non-profit broadcasters during the economic crisis, MMTC proposes that the FCC institute a one-year blanket waiver of application fees for these entities.

MMTC's proposals are ambitious and far-reaching. Apparently designed to attract the broadest amount of support throughout the radio industry, they offer a little something for just about everybody. In doing so, however, they appear in a number of respects to transgress aspects of the "localism" orthodoxy developed in recent years under the watchful eye of, in particular, Commissioner (and, for a time, Acting Chairman) Copps. For example, the notion of liberalized main studio rules flies in the face of the agency's previously-expressed interest in tightening up those rules.

This puts the Commission in a difficult position. On the one hand, it has – at least tentatively – embraced the concept of tighter regulation designed to insure greater localism. On the other, it has expressed concern about the paucity of minority/female-oriented stations. MMTC, an established representative of minority and female interests, appears to be suggesting to the Commission that the tension between localism and minority/female interests should be resolved in favor of the latter, even if that would benefit non-minority/female interests as well. It will be very interesting to monitor the Genachowski Commission's response to that approach. It has been observed that the 2007 localism proposals were in many respects grossly unrealistic and likely to inflict extensive harm on a radio industry which was already suffering. The intervening economic meltdown of 2008 has exacerbated those problems. The real question is whether the Commission will now back off some (or all) of its localism proposals in the face of MMTC's petition.

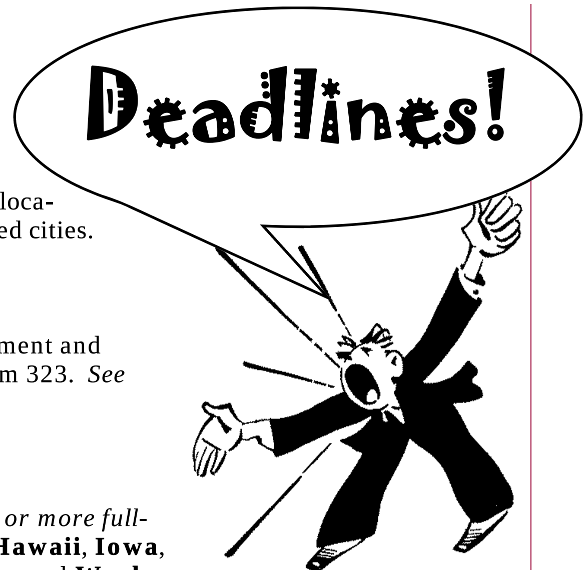
> *MMTC's proposals are ambitious, far-reaching, and apparently designed to attract the broadest amount of support throughout the radio industry.*

Of course, not all of MMTC's proposals run counter to localism. Some are not at all inconsistent with the Commission's previously announced localism approach. But those proposals are still controversial. The Channel 5/6 suggestion, for example, would require the Commission to jump back into the potential quicksand of digital conversion months after the Commission had managed, at long last, to get itself out of that quicksand on the TV side with the completion of the DTV transition. There is bound to be considerable resistance to that proposal, even though its proponents promise a far more efficient and equitable mechanism for distributing radio spectrum for the coming decades.

It is still too early in the Genachowski administration to tell how this will all shake out. The new Chairman's primary focus appears to be on broadband issues, which suggests that he will not be inclined to undertake any massive overhaul on the broadcast side in the short term. Whether – and if so, when – MMTC's proposals will develop any momentum remains to be seen.

*(Continued from page 3)*
easy for the FCC to find him; he used his CB radio to broadcast his address, along with advertisements for his truck-washing, used-tire and repair services. FCC rules prohibit the use of CB frequencies for advertising and somehow the FCC "smokies" got wind of the transmissions. Government agents from Detroit traveled to Ohio, monitored CB frequencies and overheard the advertisements. The G-men issued a notice of violation to the operator and demanded that he provide a written statement about his violations of the FCC rules. The CB user has up to 20 days to respond to the FCC.

**August 25, 2009**




***LPTV and TV Translator Stations*** – Application filing opportunity begins for new, digital-only LPTV and television translator stations, for major changes to analog or digital stations in these categories, and for digital companion channel, so long as the application is for a rural area. An application is deemed to be for a "rural area" if the proposed transmitting site location is more than 75 miles from the reference co-ordinates of any of 100 listed cities.

**September 10, 2009**

***Biennial Ownership Reports*** – Comments due to the Office of Management and Budget (OMB) on the Paperwork Reduction Act aspects of the new FCC Form 323. *See* related story on page 1.

**October 1, 2009**

***EEO Public File Reports*** – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** must place EEO Public File Reports in their public inspection files. 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.

***EEO Mid-Term Reports*** – All *television* station employment units *with five (5) or more full-time employees* and located in **Iowa** and **Missouri** must file EEO Mid-Term Reports electronically on FCC Form 397. All *radio* station employment units *with eleven (11) or more full-time employees* and located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, and **Washington** must file EEO Mid-Term Reports electronically on FCC Form 397. For both radio and TV stations, this report includes a certification as whether any EEO complaints have been filed and copies of the two most recent EEO Public File Reports for the employment unit.

***Television Ownership Reports*** – All *noncommercial television* stations located in **Iowa** and **Missouri** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically. The filing requirement for commercial stations has been suspended, as all commercial stations are subject to the new November 1, 2009 universal filing deadline.

***Radio Ownership Reports*** – All *noncommercial* radio stations located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E. The filing requirement for commercial stations has been suspended, as all commercial stations are subject to the new November 1, 2009, universal filing deadline.

**October 10, 2009**

***Children's Television Programming Reports - Analog and Digital*** – For *all commercial television* and *Class A television* stations, the second quarter reports on FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file. Please note, however, that for television stations, only digital programming will be included, as all analog programming ended last quarter. Only Class A stations will need to use the analog programming section of the form.

***Commercial Compliance Certifications*** – For *all commercial television* and *Class A television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be placed in the public inspection file.

***Website Compliance Information*** – *Television* station licensees must place and retain in their public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

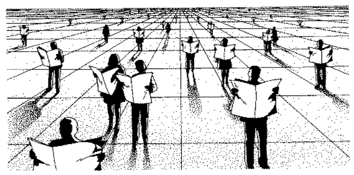
*(Continued on page 13)*

*Stuff you may have read about before is back again . . .*

# Updates on the News

***Mark your calendars – Indecency briefing deadlines are coming up!*** – As we all know, last April the Supreme Court affirmed the FCC's re-cast indecency policy on statutory grounds, and sent the matter back down to the Second Circuit for further consideration. For those of you who have lost track of the case amid various summer distractions, here's a heads up: the Second Circuit has established a briefing schedule for the remand phase.

Fox's brief is due September 16, along with any *amici* briefs supporting Fox's position. The FCC and its friends are set to file their responsive briefs on October 28, and Fox *et al.* will have until November 12 to file their replies. The Court has apparently decided to hold additional oral arguments at some point after it has had a chance to review the briefs, but it won't be announcing a schedule for the arguments until after all the paperwork has been filed. Even if the current briefing schedule doesn't get extended for any reason (and there are never any guarantees), it's clear that the Second Circuit won't likely be issuing any new opinions in the case until mid-2010, at the earliest – if you figure that arguments won't likely happen until the middle of the first quarter of 2010 (again, at the earliest) and then the Circuit takes a few months to crank out its decision.



With that schedule, the losers in the next round (whether those losers be the FCC, again, or Fox) would not likely be asking the Supremes to take another look at it until the latter part of 2010, which in turn means that we're not likely to see a second Supreme Court take on the matter until 2011 or later.

Meanwhile, in Philadelphia, the Third Circuit folks got a slight jump on their Second Circuit colleagues by calling for briefs in the CBS case (involving *L'Affaire Janet Jackson*) starting earlier this month, with the last round of reply briefs currently due toward the end of September. No word yet about plans for oral argument. While the Third Circuit's six-week head start over the Second may result in the CBS case getting to the Supremes' doorstep before the Fox case does, we're still probably looking at 2011 as the earliest before we might be seeing another Supreme Court decision on the merits of the FCC's indecency policy.

***Court rejects cable ownership limits, again*** – Way back in 1992, Congress directed the Commission to fashion rules that would prevent any cable operator (or group of cable operators) from unfairly impeding the flow of programming to the consumer. In response, the Commission reached into its magic hat, intoned a couple of cryptic mathematical incantations, and – *presto* – announced that it had concluded that no single cable operator should be permitted to serve more than 30% of all subscribers. That was in 1993.

Since then, the FCC has twice changed the mystical mathematic formula supposedly used to calculate the subscriber cap, but both times the new formulae have miraculously led back to the same 30% cap. What a coincidence!

The Court had occasion to review the FCC's first revised approach back in 2001, at which point the Court expressed concern that the Commission hadn't adequately addressed all relevant considerations – including, in particular, the increase in direct satellite broadcast (DBS) subscribership. (The Court at that point also questioned the constitutionality of the cap, but since the matter was being shipped back to the FCC for further deliberation, no final determination was made on that score.) In 1992, DBS had accounted for a minuscule share of video subscribers (in the Court's words, DBS providers were "bit players" then). In the intervening years DBS has expanded considerably – today, it accounts for one-third of all subscribers. Unsatisfied with the FCC's initial revised approach, in 2001 the Court shipped the matter back to the Commission for further consideration. The Court specifically directed the agency to consider the effect of DBS on the ability of cable operators to "determine the economic fate" of programming networks.

The Commission dutifully took the case back. In 2008, after several years of proceedings, the Commission again reached into its magic hat, again intoned some mathematical incantations, and, lo and behold, again came up with a 30% cap!

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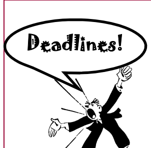


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**November 1, 2009**

***Biennial Ownership Reports*** – Biennial ownership reports will be due for ***all*** *commercial AM, FM, TV, LPTV,* and *Class A Television* stations. The form must be filed electronically on FCC Form 323, and it is anticipated that the new version of Form 323 may be ready by that time. It is not completely clear which version of the form will be available for use at that point, however, as the new form still has not obtained Office of Management and Budget approval. This is the first time that LPTV and Class A stations have been required to file a biennial report, and it is also the first time that sole proprietors and partnerships made up of only individuals have been required to file biennial reports. The information contained in the report must be current as of October 1, 2009.

(Continued from page 5)

***2013***: $0.00073 per performance

***2014***: $0.00077 per performance

***2015***: $0.00083 per performance

(For comparison purposes, the CRB-imposed per performance rates range from $0.0008 to $0.00019 over the period 2006-2010. No CRB rates have been set for 2011-2015.)

Royalties for the excess transmissions can be calculated on the ATH basis by multiplying 12 songs per hour (a permitted approximation) by the number of listeners in each hour.

The General Agreement imposes reporting requirements on participating webcasters. Specifically, they must file quarterly reports (due within 45 days of the end of each quarter) listing all songs played during two seven-day periods during the quarter. While a similar reporting obligation was previously in place, the new deal permits webcasters to report simply the number of times each song was played and the number of listeners per hour, rather than the specific number of listeners for each song.

*The second new agreement is available for any noncommercial* ***educational*** *webcaster not covered by the CPB/SoundExchange agreement.*

During the period 2011-2015, ***if the webcaster exceeds a monthly average 159,140 aggregate tuning hours in any given year,*** it must engage in "census reporting" for the entire following year. That means that it will have to report *every song played during the year* – although the ATH reporting method (*i.e.*, number of times each song is played, along with the total number of listeners per hour) can be used instead of the more specific (and onerous) reporting of the number of listeners to each particular song.

Additionally, if a webcaster certifies that (a) it had fewer than 44,000 ATH in the previous year (about five-six simultaneous listeners at every moment in the year) ***and*** (b) it reasonably expects to stay below that number in the coming year, it can avoid the reporting requirement altogether by filing a $100 "proxy fee". ***This certification must be made by September 15, 2009 or within 30 days of commencing webcasting, whichever is later, and again by January 31 of every year in which the webcaster is eligible for, and chooses, this "microcaster" status***. The noncommercial webcaster can exceed the 44,000 ATH level one year in this time period and still retain this "microcaster" status ***as long as*** it implements technological measures to ensure it does not exceed the limit again.

***Noncommercial Educational Webcasters***

Any noncommercial ***educational*** webcaster not covered by the CPB/SoundExchange agreement can choose to be covered by the terms of this second new agreement for the years 2011-2015 (or, for reporting purposes only, 2009-2010 as well). To be eligible, the noncommercial webcaster must: (a) be directly operated by, or affiliated with and officially sanctioned by, a domestically-accredited primary or secondary school, college, university or other post-secondary degree granting institution; (b) staff its webcasting operations substantially by students; and (c) ***not*** have exceeded 159,140 ATH in any month during the preceding year.

To take advantage of the educational webcaster agreement, a noncommercial educational webcaster must elect this status ***by January 31 of EACH YEAR or 45 days after the end of the month in which it begins webcasting operations, whichever is later***. In other words, this does ***not*** automatically renew, unlike the General Agreement).

Any noncommercial educational webcaster choosing to participate in this agreement must pay a $500 annual minimum fee per channel by January 31 of each year.

If an educational webcaster exceeds 159,140 aggregate tuning hours in a given month, then the overage will be subject to the following royalty rates, depending on the year in which the overage occurs:

***2006-10***: The current CRB-mandated commercial rates

***2011***: $ 0.0017 per performance

***2012***: $0.0020 per performance

***2013***: $0.0022 per performance

***2014***: $0.0023 per performance

***2015***: $0.0025 per performance

In the event that the 159,140 ATH level is exceeded, royalties can be calculated on the ATH basis by multiplying 12 songs per hour (a permitted approximation) by the number of listeners in each hour.

The educational webcasting agreement imposes reporting requirements on participating webcasters. Specifically, they must file quarterly reports (due within 45 days of the end of each quarter) listing all songs played during two seven-day periods during the quarter. While a similar reporting obligation was previously in place, the new deal permits webcasters to report simply the number of times each song was played and the number of listeners per hour, rather than the specific number of listeners for each song.

If a webcaster certifies that it had fewer than 55,000 ATH for all but one month in the previous year (that would amount to about 75 simultaneous listeners at every moment in the month) and that it reasonably expects to stay

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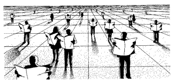
below that number in the coming year, it can avoid the reporting requirement by filing a $100 "proxy fee". (The educational webcaster may exceed the limit for one month, once, without losing its eligibility as an "educational webcaster" ***as long as*** it implements certain technical measures to ensure compliance going forward.) This alternative to the reporting requirement is available not only for 2011-2015, but also for 2009-2010. A webcaster choosing the option for 2009-2010 should file the required certification along with the $500 annual minimum fee due January 31, 2010.

If an educational webcaster exceeds 159,140 average monthly ATH in a given year, then for the entire following year it must engage in "census reporting", *i.e.*, every song played during the year (but it can simply report the number of times the song was performed, rather than the full listenership for each performance).

Finally, ***every noncommercial educational webcaster must keep, for a period of at least three calendar years, "server logs sufficient to substantiate all information relevant to eligibility, rate calculation and reporting".*** So hastily deleting files to save server space may cost you more in the end.



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Representatives of the cable industry again brought the matter back to the Court. And again the Court wasn't satisfied with the Commission's analysis. So much so, in fact, that in its August 28 opinion, the Court vacated the 30% cap, declaring it to be arbitrary and capricious. As a result, for all practical purposes, the cap no longer exists.

The Commission tried to justify its failure to figure in the competitive impact of DBS by observing that it would be difficult to do so. That argument went nowhere with the Court. Referring to the Commission's "dereliction" as "particularly egregious", the Court concluded that the FCC "either cannot or will not fully incorporate the competitive impact of DBS and fiber optic companies" into its calculations. Since the Court had specifically instructed the Commission, back in 2001, to consider DBS impact, the agency's failure to do so appears to have been especially galling to the Court.

The FCC 2007 decision to cling, rigor mortis-like, to the 30% cap was reached on a 3-2 vote, with the two then-Republican Commissioners (McDowell and Tate) dissenting. It will be very interesting to see how the new Democratic Commission reacts to the Court's stinging rebuke.

***Wing wars redux*** – In the March, 2007 *Memo to Clients*, our FCC Fines maven, R.J. Quianzon, reported on a notice of apparent liability issued to a Philadelphia AM station for a contest-related violation. The station had failed to provide its listeners with a complete list of eligibility requirements, which, as we all know, is a major *faux pas*. In view of the particulars of the case, though, the licensee might have been forgiven for its oversight. The prize offered by the station was a chance to participate in Wing Bowl #13, a competitive eating contest. (Not being heavily into the arcana of competitive eating, we assume that getting a seat at the contestants' table is no small thing – but what do we know?) What the station didn't mention in its promotions was the fact that Wing Bowl #13 was sponsored by the Independent Federation of Competitive Eating (IFOCE), and that IFOCE contests are off-limits to members of the Association of Independent Competitive Eaters (AICE), an arch-rival organization. (We're not making this up.)

Needless to say, the winner of the station's contest was an AICE member who was barred from the competition because of his AICE affiliation. He complained to the Commission, and the Enforcement Bureau agreed with him that the station should have mentioned the IFOCE sponsorship (and consequent prohibition against AICE members) in its promotions.

Recently, the Bureau slapped down an interesting argument advanced by the luckless licensee on reconsideration. The licensee pointed out that the contest winner, as it turned out, was not a resident of the station's service area. Since the FCC's contest rule is (in the licensee's view) intended to protect individuals residing with the station's service area, the complainant did not have "standing" to complain.

Wrong. According to the Bureau, "[t]he contest rule is designed to protect the general public from false, misleading, or deceptive licensee-conducted and advertised contests". In other words, the rule "does not preclude any member of the public from filing a complaint if they have information establishing that a contest rule violation has occurred".

The notion that anybody anywhere might complain about a supposed violation at a broadcast station located far from the complainant appears novel, to say the least. It is certainly inconsistent with the FCC's policy requiring that complainants about alleged indecency must establish that they are in the audience of the station broadcasting the alleged indecent material. In the Bureau's eyes, however, that policy is limited in scope to indecency cases because of First Amendment considerations which are not present in contest-related matters.

The Bureau's analysis is not particularly satisfying (although, truth be told, there may be other arguments, not mentioned by the Bureau, for why traditional "standing" considerations don't, or shouldn't, apply to complainants to the FCC). But since the fine issued was only $4,000 – a very small fraction of what it would cost to take this case to the court of appeals – we are probably stuck with the Bureau's reasoning for the foreseeable future.

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