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Memorandum to Clients

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Thumbs down in the Second Circuit

ivi TV Loses Round Two

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ivi TV, the company that burst onto the video delivery scene two years ago with a business plan based on an innovative reading of Section 111 of the Copyright Act, has suffered a major setback at the hands of the U.S. Court of Appeals for the Second Circuit. The court has upheld a lower court's order enjoining ivi TV from infringing the copyrights of the broadcast networks that sued ivi TV back in 2010.

The lower court's injunction effectively put ivi TV's operation on life support.The Second Circuit's decision may have pulled the plug entirely.

ivi TV's idea was relatively simple, if outside the box. ivi TV wanted to stream broadcast stations online in real time. It wasn't a cable company in the traditional sense: no headend, no wires, no set top box. But according to ivi TV, it was entitled to retransmit over-the-air broadcast signals, without the broadcasters' permission, because ivi TV's operation was essentially a "cable system" as that term is used in Section 111. Section 111 gives "cable systems" the statutory right to such retransmission, provided they pay governmentally-established royalties (which ivi TV said it was willing to pay).

The district court disagreed with ivi TV's reading of Section 111 back in 2011. And now the Second Circuit has piled on, concurring with the district court that Congress "did not intend for §111 licenses to extend to Internet retransmissions". That conclusion largely guts ivi TV's claims.

This result is not unexpected. ivi TV was trying to stretch some statutory language beyond its seemingly natural meaning. There's no harm in trying such a gambit, especially when technological change is occurring so fast that decades-old legislative language can't keep up. If existing laws don't specifically address the latest technologies, it makes sense for the proponents of those technologies to do what they can to try to squeeze their ideas into whatever existing regulatory pigeonholes may be available.

Such efforts, however, are not guaranteed to succeed. That's especially true when, as here, the innovative approach would threaten the interests of others (in this case, broadcasters and other copyright-holding video content providers).

According to one published report, an ivi TV spokesperson has said that this is "not the final chapter" to the ivi TV story. It's not clear what ivi TV might have in mind, but one might imagine that it might be thinking about re-casting its legal theory along the lines of Aereo.

As we have previously reported (as recently as last month's *Memo to Clients*), the Aereo system allows subscribers online access to over-the-air programming through dime-sized antennas, each of which is allocated to a single subscriber. Rather than stretch the definition of "cable system", as ivi TV unsuccessfully tried to do, Aereo pitched its system as nothing more than a modern-day equivalent of a VCR. Back in the 1980s, the Supreme Court had held (in the famous Betamax case), that private use of a VCR does not involve copyright infringement. And in 2008 the Second Circuit itself had extended that notion to include a "remote storage" DVR system provided by Cablevision to its customers.

So far Aereo's approach has survived the same type of broadside legal assault mounted by the networks against ivi TV. That probably frosts ivi TV's cookies, particularly because Aereo has succeeded in the same jurisdiction – the federal district court in the Southern District of New York – where ivi TV has struck out. And objective observers might raise an eyebrow at the notion that broadcast programming might legally be made available online to subscribers by Aereo but not by ivi TV. After all, if the end result is the same – *i.e.*, Joe and Loretta Six-Pack can view broadcast programming on their desktops or mobile devices – why should the law distinguish between the ivi TVs and the Aereos of the world?

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Inside this issue . . .

.RADIO and .NEWS, coming soon?

New Broadcast-Related Top Level Domains Proposed to ICANN

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As our readers know, the Internet space is changing. Earlier this year ICANN (the Internet Corporation for Assigned Names and Numbers) accepted applications for "new generic top level domains" or "new gTLDs." We reported last June that ICANN had received 1,930 applications, and we promised back then to share with you the new gTLDs applied for by broadcasters and for broadcast-related services. The full list of new gTLDs (and their applicants) is available on the ICANN website. Applicants include a number of well-known entities, both in the U.S. and overseas:

American Broadcasting Corporation, Inc., applying for .ABC;

British Broadcasting Corporation, applying for .BBC;

BRS MEDIA, Inc. applying for .RADIO;

The Christian Broadcasting Network, Inc., applying for .CBN;

Comcast IP Holdings, LLC, applying for .COMCAST;

Dish DBS Corporation, applying for .BLOCKBUSTER, .DATA, .DIRECT, .DISH, .DOT, .DTV, .LATINO, .LOCKER, .MOBILE, .MOVIE, .OLLO, .OTT and even .PHONE;

European Broadcasting Union, applying for .EUROVISION and .RADIO;

Frontier Communications Corporation, applying for .FRONTIER and .FTR;

Lifestyle Domain Holdings, Inc., and its application for .FOODNETWORK;

HBO Registry Services, Inc., applying for .HBO;

Lifestyle Domain Holdings, Inc., applying for .HGTV;

Dish DBS Corporation applying for .LATINO;

Japan Broadcasting Corporation applying for .NHK;

Limited Telefonica applying for .TELEFONICA;

QVC Inc. applying for .QVC;

Qatar Telecom (QTel) applied for .Qatar in two variations of Arabic, taking advantage of recent Internet changes that allow top level domains to be in a range of languages and scripts.

In addition, companies both broadcasting and non-broadcasting, applied for a range of general terms often associated with broadcasting. For example:

gTLD's Applied For	Applicants
.AUDIO	Holly Castle Uniregistry
.MEDIA	Grand Glen Tucows TLDs Uniregistry
.MUSIC	Entertainment Names Charleston Road Registry (Google) Victor Cross Amazon EU dot Music Limited DotMusic/CGR E-Commerce Ltd DotMusic Inc. .music LLC

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Fifth Circuit short circuit

Court of Appeals Limits Rights of FCC Forfeiture Defendants

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Suppose you receive a Forfeiture Order from the FCC demanding a large check for allegedly violating FCC rules, as happened to Jerry and Deborah Stevens back in 2010. And suppose you want to raise a challenge. When and where do you do that?

The U.S. Court of Appeals for the Fifth Circuit has chimed in with a ruling that stirs up these already turbulent waters.

After the usual preliminary procedural niceties, the Enforcement Bureau issued a Forfeiture Order that dinged the Stevenses $10,000 for operating a pirate FM station out of their home without a license. Although at very low power, the transmitter nonetheless exceeded the permitted power levels for an unlicensed device. The Stevenses did not pay. Eleven months later, the FCC sued them in a Texas federal district court to collect the money. The Stevenses objected that their FM station reached only one state, and claimed the FCC had jurisdiction only over "interstate" radio communications. Accordingly, they argued, the Forfeiture Order was invalid, and the FCC's lawsuit should be dismissed. The district court declined to dismiss; the Stevenses appealed to the Fifth Circuit.

The court's try for a clean split may look like a convenient way of dividing the baby, but reality is not always that tidy.

The Fifth Circuit's problem was to reconcile two statutes.

One – referring generally to appeals of rulings by *any* agency, including but not limited to the FCC – says the only way to challenge the validity of a final agency order is to seek judicial review in a U.S. Court of Appeals within 60 days. The other is Section 504 of the Communications Act, which applies specifically to FCC forfeiture orders. When the subject of such an order opts not to pay, Section 504 tells the FCC it can collect the forfeiture by suing in federal district court, as it did here. Such a case, says the statute, is to be a trial *de novo* – "from the beginning." Ordinarily a trial *de novo* allows the defendant to raise any defense he wishes.

But the Stevenses' effort to raise their "interstate" argument in the district court troubled the Fifth Circuit: it looked like an end run around the general requirement to raise legal challenges only in the Court of Appeals. What the Stevenses should have done, in the Fifth Circuit's view, was to raise their interstate argument by seeking review of the Forfeiture Order in the Court of Appeals. What about Section 504, which clearly provides forfeiture targets the opportunity to sit back and wait for the FCC to sue? According to the Fifth Circuit, that section authorizes the district court to hear only *factual* arguments, not purely legal arguments (like whether the FCC has jurisdiction to regulate conduct that occurs entirely within the borders of only one state). Since the Stevenses had apparently conceded unlicensed operation of the radio station at excessive power levels, they did have anything in the way of a fact-based defense. Accordingly, the Stevenses lost.

The Fifth Circuit's try for a clean split between questions of fact and questions of law may look like a convenient way of dividing the baby, but reality is not always that tidy. Often the recipient of a Forfeiture Order will want to raise defenses that intermix factual and legal arguments. Can he do this in district court, after waiting for the FCC to bring suit? The Fifth Circuit does not say.

It gets worse. The Fifth Circuit described Forfeiture Orders as final agency orders reviewable by the Court of Appeals. That is certainly true: the subject of such an order could seek review by a Court of Appeals should he want to (although he would first have to pay the forfeiture and collect a refund if he wins). But Section 504 plainly provides another option. The subject of a forfeiture order can simply sit tight and force the FCC to make its case in district court, *de novo*. If the Fifth Circuit is correct, though, then Section 504 isn't really much of an option, as it would dramatically limit the scope of the issues a defendant can raise. Nothing in the actual language of Section 504 even begins to suggest any such limitation.

A 2003 case out of the D.C. Circuit took a different and (we think) more sensible view: as the D.C. Circuit held, a forfeiture defendant can either pay the money and bring a challenge in the Court of Appeals, or not pay the money, wait to be sued in district court, and raise any and all defenses there. True, this gives the defendant a choice of forums, which the courts ordinarily disfavor, but the D.C. Circuit thought (as do we) that the combination of statutes requires this result.

The D.C. Circuit's decision remains good law as to cases

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Reg Fees are due to be paid by 11:59 p.m. ET on September 13, 2012

2012 Reg Fees: Helpful Hints for Fee Filers

It's official! This year's regulatory fees must be paid by ***11:59 p.m. (ET) on September 13, 2012***. The online "Fee Filer" system has been up and running for a couple of weeks already. That's the first stop you'll have to make in paying your fees. Once you log into the Fee Filer system (using your FCC Registration Number (FRN) and password), you'll be able to generate a Form 159-E, which you'll need to tender with your payment.

While Fee Filer will ordinarily list fees associated with the FRN used to access the system, **WATCH OUT**: the list of fees shown in Fee Filer may not be complete. The FCC makes clear that it's the payer's responsibility to confirm the "fullest extent of [the payer's] regulatory fee obligation." Double- and triple-checking other FCC databases, as well as your own records, is prudent, since failure to file any required reg fee, even if inadvertent and even if only for a very small amount – like, say, a $10 auxiliary license fee – can result in very unpleasant complications (thanks to the Debt Collection Improvement Act).

Double- and triple-check any fee-related information that the FCC's system might pre-fill for you

As has historically been the case, there are a number of ways in which the fee can be paid, once you have generated your Form 159-E. Helpful tip: the online approach, using a credit card, is extremely efficient. Wire transfer and ACH payments are also good, although they may involve some additional steps. For our money, the least desirable approach is the old-fashioned way, *i.e.*, sending a paper check to the FCC's bank in St. Louis. Lots of things could go wrong between the times (a) you stick the envelope in the mail box and (b) the payment is ultimately credited by the Commission.

Remember, the FCC will ***not*** be sending you a hard-copy reminder of your reg fee bill. And remember, too, the FCC imposes a 25% late filing fee, starting immediately after the deadline. With another couple of weeks to get your fees paid, there's no reason to run afoul of that deadline.

Here are some additional practical tips to help DIY fee filers through some routine questions.

How much are you on the hook for? If you're looking for a quick way to determine the reg fee applicable to any particular AM, FM, TV, FM translator or TV translator/LPTV/Class A station, you can run a quick search at http://www.fccfees.com/request_all.htm. Provide either the station's call sign or FCC Facility ID number, hit the "submit" button and voilà – you should see the station in question listed, with its licensee and facilities all spelled out along with the fee due for that particular station. The fee listed there does ***NOT*** include any auxiliary licensees – STL's, remote pickups, that sort of thing – used in association with the listed station. You're on your own to track those down and make sure any necessary fee(s) is/are paid.

Trust but Verify! As noted above, it's important to double- and triple-check any fee-related information that the FCC's system might pre-fill for you. We've previously reported on at least one mistake in the FCC's system in 2010 (when the FCC initially calculated fees for some Channel 13 TV licensees on the erroneous assumption that Channel 13 was a UHF channel). This year, we heard from one faithful reader of our blog who, hoping to get ahead of things, tried to file some reg fees as soon as she learned that the payment window was open. She reported to us that a number of her company's stations, for which fees had been paid in previous years, were not pre-listed in the FCC's Fee Filer system this time around. Take-home message: use information pre-filled by the FCC, but only after checking it first for (a) accuracy and (b) completeness.

Looking for Payment Type Codes? When you finally get to the point where you're entering your fee information manually into Fee Filer, you'll need the Payment Type Code (PTC) for each separate licensee/fee you enter. If you run a fee search with http://www.fccfees.com/request_all.htm, the search results will include the PTC for that license. You can also find a listing of fee codes at http://www.fccfees.com/feecodes.htm. Heads up though. The search function does not provide information about auxiliary licenses, and the fee code list does not include a PTC for auxiliaries. To see what auxiliaries the FCC thinks you're using, you can check the GENMEN database (go to http://fjallfoss.fcc.gov/General_Menu_Reports/ and enter the licensee name). Once you've got a fix on that, the rest is easy, as long as you know that the PTC for all broadcast auxiliary licenses this year is ***1269***.

Exempt or Non-exempt? Some licensees are exempt from reg fees. Most of you exempt folks know who you are, but if you have any doubt about what the FCC's records

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Invitation into the sausage factory

Reg Fee Calculation Method Under the Microscope

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We all know that regulatory fees are imposed annually. The precise fees to be paid each year are proposed in the spring and then, after a notice-and-comment period, finally announced in summer, usually to be paid in September. It happens with mundane regularity.

But did you ever wonder how the Commission comes up with the actual numbers?

In a Notice of Proposed Rulemaking (*NPRM*), the FCC has pulled back the curtain on that process, inviting us all into the sausage factory so that we can take a look around and maybe provide our own input into possible changes in the system. The deadline for comments is ***September 17, 2012***; reply comments are due by ***October 16***. If you think you might want to toss in your two cents' worth, you should probably get started now – the *NPRM* is pretty dense and requires considerable patience (and some NoDoz®) to wade through.

To get you oriented, here's a thumbnail sketch of what's going on. (Caution: this is ***only*** a thumbnail sketch. If you want to get fully immersed in the *NPRM*, you're on your own.)

The NPRM is pretty dense and requires considerable patience (and some NoDoz®) to wade through.

The FCC is required by Congress to collect reg fees annually to "recover the costs of . . . enforcement activities, policy and rulemaking activities, user information services, and international activities." (It's in Section 159 of the Communications Act – you can look it up.) That means that the total amount of fees collected should amount to the total amount of funds appropriated for the FCC's activities by Congress. Essentially, Congress is looking to have the FCC pay for itself through reg fee collections.

The Act requires that fees be allocated among the FCC's regulatees based on the "full-time equivalent number of employees" (FTEs) in "the Private Radio Bureau, the Mass Media Bureau the Common Carrier Bureau and other offices of the Commission". We put that quaint listing in quotes because that's just what the Act said when it was first adopted nearly two decades ago, and that's what it still says. In the meantime, of course, the names of the Bureaus have changed, and a number of their responsibilities have been shifted to the International Bureau. Nowadays, notwithstanding the statutory language, the FCC treats its present Media, Wireline Competition, Wireless Telecommunications and International Bureaus as the "core licensing bureaus" for reg fee calculation purposes.

The various activities of each of the core licensing bureaus fall into categories. Based on historical data (more on that below), the FCC determines how many FTEs are attributable to each category. The total fees to be collected per category are then calculated by multiplying the total appropriations amount by a fraction, the numerator of which is the FTEs for that category and the denominator of which is the total number of FTEs overall.

Once the fees-per-category have been calculated, the Commission comes up with the fees to be charged individual regulatees within each category by dividing the gross fee for a given category by the total number of "fee payors" in that category. The concept of "fee payor" is somewhat flexible – it depends on "characteristics appropriate to each service, such as the number of licenses or number of subscribers the fee payor has." (That's why the Commission prefers to refer to "fee payors" as "units".)

Some FTEs can't be allocated to specific categories. Those are deemed to be "indirect FTEs"; they get allocated proportionately among the various core licensing bureaus.

So one thing is clear: the calculation of reg fees depends crucially on the allocation of FTEs. But check this out: the FTE data currently in use are based on data collected ***in 1998***. Back then Commission employees' time cards tracked their time based on reg fee categories. The FCC abandoned such tracking in 1999 because, among other things, time card entries "prove[d] subjective and unreliable." Oddly, that subjectivity and unreliability hasn't stopped the Commission from continuing to rely on the last batch of such apparently subjective and unreliable data (*i.e.*, the 1998 collection) for the last 14 years.

The Commission is now, at long last, asking how it can best update its approach to fee calculations, including (but not limited to) the FTE data on which it relies. In doing so, the FCC is also looking more broadly to establish "overarching goals" to govern its reg fee program. The goals currently envisioned by the Commission are fairness, ease of administration, and sustainability. (Comments on those goals – and any others that might come to mind – are specifically requested in the *NPRM*.)

As far as the specific fee calculation mechanisms go, the FCC is looking at three general areas for possible change. First, it could jigger with the allocation of FTEs within each

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FHH - On the Job, On the Go

Westward Ho! In mid-September, a passel of FHH regulars will make the trek out to Big-D for the NAB Radio Show in Dallas. Who's going to be there? It might be easier to ask who *isn't* going to be there. The FHH team moseying on down to the Lone Star State will include (deep breath): **Frank Jazzo**, **Scott Johnson**, **Dan Kirkpatrick**, **Steve Lovelady**, **Matt McCormick**, **Frank Montero**, and **Howard Weiss**. **Frank M** and **Scott** are scheduled into town on September 18; look for the rest to show up a day later.

Be sure to hang around until Friday, September 21. That's when **Frank J** will appear on a panel, along with the FCC's **Bobby Baker**, covering an area sure to be of intense interest in this election year: "Election 2012: PACs, Politicians, Paperwork and Practical Advice".

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ivi TV may try to make such an argument to the Second Circuit, or possibly even the Supreme Court. And maybe one of the two, or some other court (such as the Ninth Circuit, which may be the site of the next dust-up between BarryDriller.com and the broadcast networks), might eventually agree, although we wouldn't recommend holding your breath until that day comes.

Whether the law will eventually adopt a coherent approach to the online delivery of video programming – an approach that might accommodate the ivi TVs and the Aereos of the world, as well as others yet to be identified – is uncertain at this point. But that doesn't mean that the players already on the field can't adjust their playbook to the law as it currently stands. As we report elsewhere in this issue (more specifically, in the story on the opposite page), FilmOn.com – an online quasi-cable service relying on a very ivi TV-like approach to the law – has reportedly agreed to a permanent injunction prohibiting it from retransmitting certain broadcast content. But at the same time, the FilmOn.com folks have launched BarryDriller.com, an Aereo look-alike. While ivi TV might continue to fight for its interpretation of Section 111 in the courts, it would seem that switching to the Aereo model might be a better strategy, at least in the short run.

The real question, though, is where the long run will take all of this. As my colleague Kevin Goldberg has cogently (and persuasively – to me, at least) argued in articles in the April and May, 2011, *Memos to Clients* (and on our blog as well), what we really need here is a fundamental change, a change that brings the various copyright and cable-regulation laws into line with the viewing habits of 21st Century television watchers. Kevin has noted that there have been inklings that such changes may be in the early stages at both the FCC and the Copyright Office. In view of the speed (think glacial, but with a flat tire) with which the government has thus far reacted to such things, it's probably unrealistic to expect near-term change. But we can at least hope that the process has started.

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bureau. Second, it could update and adjust FTE allocation percentages among the bureaus. And third, it could reallocate FTEs among the fee categories within each of the core bureaus. (If those all sound somewhat duplicative, that's what we thought, too. The *NPRM* spells out the intricacies of each of those areas over four-and-a-half single-space pages of bureaucratese, if you're inclined to wade deep into the weeds on this.)

The bottom line here was perhaps best described by Commissioner Pai:

> In 1998, each industry segment largely still played in its own sandbox – telephone companies offered telephone service, cable operators offered cable television, and so on. But today's currency is convergence: Telephone companies have entered the video market, cable operators are winning voice customers, satellite operators offer competitive radio, television, and broadband services, and wireless providers have unleashed a mobile revolution few if any saw coming.
>
> The Commission must strive to keep pace with this swiftly changing industry – especially when, as here, Congress has affirmatively told us to do so in Section 9 of the Communications Act.

The extent to which any revision in the Commission's approach – whether broad-brush or finely-tuned – might alter any particular reg fee for any particular regulatee is far from clear. But since reg fees are now a permanent fixture, it would be nice if the calculation of those fees were based on (a) some formula that makes sense and (b) data that are not, by the FCC's own admission, subjective and unreliable. The *NPRM* is a welcome step in that direction.

Again, comments on the *NPRM* are due by ***September 17, 2012***. Reply comments are due by ***October 16***.

Out of the ashes of one MVPD wannabe rises another

FilmOn.com Is Dead (or so it appears). Long Live BarryDriller.com!

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To paraphrase T.S. Eliot, this is the way the MVPD wannabe ends, not with a bang but a whimper. . . and a $1.6 million settlement payment.

You remember FilmOn.com. They're the folks who were going to revolutionize the video biz by legally delivering broadcast signals via the Internet . . . until they got immediately sued for copyright infringement by the major broadcast networks.

"Oh, you mean Aereo, right?", you reply.

That would be the Barry Diller-financed entity that captures broadcast signals via a series of individual antennas, stores them on individually assigned remote DVRs and allows subscribers to watch programming in (almost) real time or via delay over the Internet. But, no, they're not who we're talking about here. Aereo still exists and (as we reported in last month's *Memo to Clients*) has even won the first round in its legal battle against the broadcasters, surviving a motion for preliminary injunction.

"Oh, right . . . you're talking about ivi TV?", you protest, referring to the wannabe "first online cable system". No, not them either (but you're close).

Though ivi TV may be on its last legs, it still technically exists. ivi TV initially sought (in federal court in the State of Washington) a declaratory judgment that its service does not violate the Copyright Act. It lost. Meanwhile, ivi TV was sued by the major broadcast networks, who won. They sought – and received – a preliminary injunction against ivi TV from the U.S. District Court for the Southern District of New York. Not one to be stopped by a little injunction, ivi TV appealed that decision to the U.S. Court of Appeals for the Second Circuit, but lost that round as well. (*See* the related story on Page 1.)

FilmOn.com is very similar to ivi TV. Started in 2010, it's an online system claiming to fall within the Copyright Act's definition of "cable system". Like ivi TV, FilmOn.com was almost immediately sued by the major broadcast networks and, like ivi TV, it was quickly on the back foot. Within a couple of months of its launch in late 2010, Filmon.com was hit with a temporary restraining order prohibiting it from infringing "by any means, directly or indirectly" any copyrighted material. That slowed the service down, but did not stop it immediately.

And now – almost two years later – FilmOn.com has reportedly agreed to a permanent injunction that will apparently require it to stop streaming the signals of the four major networks – at least until FilmOn boards BarryDriller.com (more on that in a moment). Oh, yeah, according to trade press reports, FilmOn.com will also be ponying up about $1.6 million to settle the case.

But that's not the end of the story. After all, when you're funded by billionaire Alki David, you're not going to go away simply because a federal court tells you to. (Possibly instructive anecdote: David is the gentleman who reportedly offered $1 million to the first person who would streak in front of President Obama with "Battlecam.com" – another David enterprise – written across the streaker's chest.) So, like a phoenix rising from the ashes, "BarryDriller.com" has emerged. BarryDriller.com is David's new project (which is reportedly being funded by a related company called "AereoKiller, LLC"). BarryDriller.com is said to be "Aereo-like". Though there are differences (BarryDriller.com will charge subscribers about half of what Aereo charges and claims that it will pay broadcasters for their content), BarryDriller.com is certainly like Aereo in one sense: it had been in business for just a few days before it got sued by Fox.

> *Such a ruling would set up a "circuit split" that might induce the Supremes to wade into the thicket.*

If nothing else, the BarryDriller.com suit is interesting for one reason: its locale. The suit was filed in the U.S. District Court for the Central District of California (because BarryDriller.com was retransmitting KTTV, the Fox affiliate out of Los Angeles). Different city = different court = different governing precedent. While Judge Allison Nathan of the U.S. District Court for the Southern District of New York was bound by the Second Circuit's Cablevision DVR decision in ruling for Aereo last month, the Cablevision decision doesn't have the same weight in the wild, wild west. I've said from the start that the endpoint for the Aereo case would be the United States Supreme Court if at least one federal court outside the Second Circuit were to reject the rationale of the Cablevision decision. Such a ruling would set up a "circuit split" that might induce the Supremes to wade into the thicket and sort things out. If nothing else, BarryDriller.com may have accelerated that process by giving the networks the opportunity to sue David and company in California, where the Ninth Circuit is the top federal dog.

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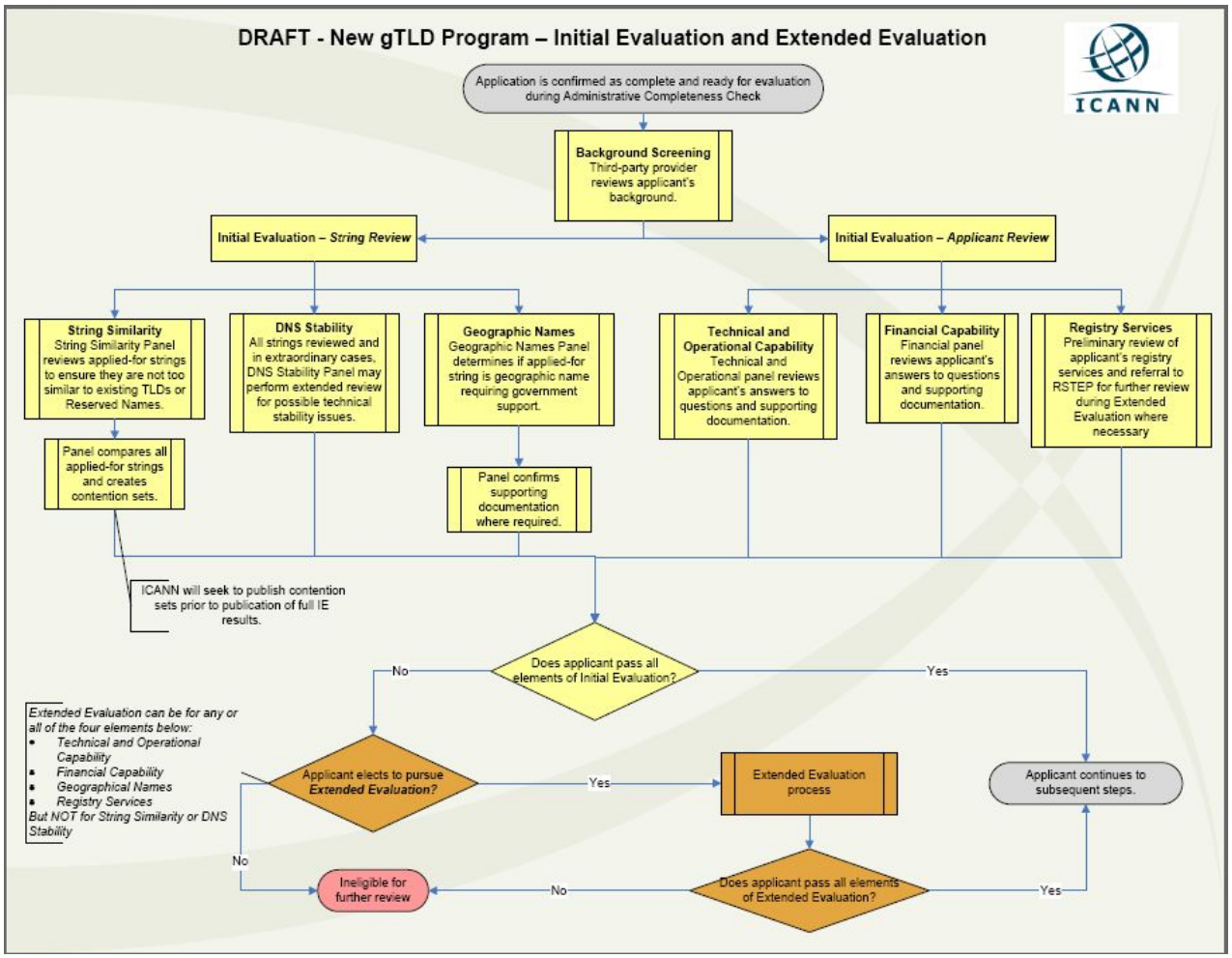
.NEWS	Hidden Bloom Amazon EU dot News Limited DotNews Inc. PRIMER NIVEL Merchant Law Group Uniregistry
.RADIO	Tin Dale, LLC European Broadcasting Union BRS MEDIA Afilias Limited
.VIDEO	Lone Tigers Amazon EU Top Level Domain Holdings Limited Uniregistry.

ICANN has numerous Evaluation Panels reviewing applications now. The review process is complex. It includes a wide range of technical and other factors, such as whether an applicant can handle the technical and financial requirements of running an Internet registry. (An Internet registry is the database for a gTLD, a critical part of the Internet infrastructure.) How complex is the review process? Very. By way of illustration, the impressive graphic below reflects the evaluation process as laid out in ICANN's 338-page gTLD Applicant Guidebook.

Applicants who survive that initial review process may also face objections filed by governments and third parties. Such objections can be based (among other grounds) on the assertion of "legal rights" claimed by companies holding trademark interests in certain terms. One proposed gTLD to watch on that score is ".BET". Four companies have applied for .BET to run registries serving the gambling industry. Whether Black Entertainment Television will file a "legal rights objection" is anyone's guess.

In future articles we'll be taking a closer look at some of the applications (and applicants) for the more general gTLDs (like .RADIO). Check back on www.CommLawBlog.com for more information.



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show on that score, running a fee search at the link in the preceding paragraph will clue you in. Exemptions are available to licensee entities that are tax-exempt under federal or state law. To be FCC reg fee free, you've got to send the FCC documentation proving that you're tax exempt. Such documentation could include the 501(c)(3) letter you got from the IRS or certifications from your state government confirming your tax exempt status. You can submit your documentation by email to ARINQUIRIES@fcc.gov, by fax to 202-418-7869, or by mail to

> FCC, Office of the Managing Director
> 445 12th Street, S.W., Room 1-A625
> Washington, DC, 20554

It should go without saying that, in addition to the documentation itself, you should also include enough information to permit the FCC to know precisely which stations would be subject to the exemption.

To be FCC reg fee free, you've got to send the FCC documentation proving that you're tax exempt.

Further on the topic of exemptions, our colleague **Frank Montero** has chipped in the following:

> A lucky few are exempt from having to pay annual reg fees – specifically licensee entities that are tax-exempt under federal or state law. To be FCC reg fee free, you've got to send the FCC documentation proving that you're tax exempt.
>
> Since tax exemption tends to be a perpetual status, you might think that, once you have submitted your documentation, you'd be reg fee free forever (unless, of course, the FCC were to be notified at some later point that you had lost your exempt status).
>
> Not so fast.
>
> It seems that even where licensees have dutifully submitted proof of tax exempt status in previous years, the FCC has occasionally had difficulty keeping track of those exempt non-profits. For years in some cases, many non-profits have received from the FCC an annual regulatory fee bill even though (a) they have notified the FCC (sometimes repeatedly) of their tax exempt status and (b) the FCC has acknowledged and confirmed that status. In those cases, these non-profits have been forced to devote time and money to an annual ritual of resubmitting to the FCC proof of their non-profit status.
>
> I have non-profit clients who have had to perform this ritual four or five years in a row. It's as if there is no long term memory at the FCC's fee collection apparatus. If it were just a few isolated instances, that'd be one thing – but this appears to have been a chronic, if inconsistent, problem that has been with us possibly since the FCC first started collecting regulatory fees. It doesn't happen to all exempt licensees, but it does happen, in many cases repeatedly, to some. Why the FCC seems unable to keep track of this type of information for all affected licensees from one year to the next is a frustrating and costly mystery.
>
> So the lesson is, even if you are a tax exempt entity, and even if you notified the FCC of your exempt status at some point in the past, and even if the FCC has acknowledged any and all of your previous submissions, **do NOT assume that the Commission knows or remembers that you are exempt from *this year's* FCC regulatory fees**. Be sure to check on your status and don't be surprised if it feels like déjà vu all over again.

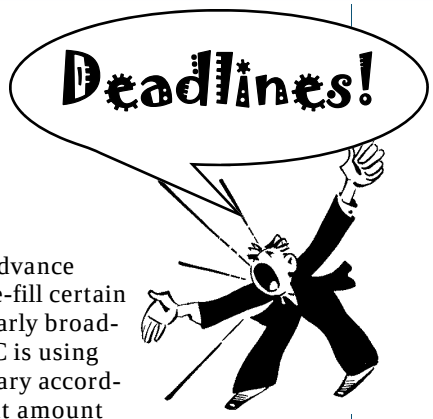
More, mainly general, information is available at the FCC's Reg Fee page. Again, though, the reliability of all the information on that page is less than certain. For example, included among the links along the upper left side of the page is one identified as "AM & FM Search Fee". We're not including the URL to that page here because, as it turns out, the search page (at least as of noon on August 29, 2012) is titled "2011 AM & FM Radio Station Fees Search Page", which suggests that it might not be the most reliable source for 2012 fees.

(Continued from page 3)

brought in D.C., a favorite venue for challenging agency actions generally. But the Fifth Circuit's decision is now good law in the Fifth Circuit (*i.e.*, Texas, Louisiana, and Mississippi). That means that anybody in any of those states who gets hit with an FCC forfeiture order has a difficult choice: he can either (a) pay the fine and then pursue his claims in the Court of Appeals, or (b) wait for the FCC to sue him, but in so doing effectively waive any non-factual arguments.

The Stevenses seem to have run out of options, but we hope some future litigant will prompt the courts to straighten out the procedures and clarify how the recipient of a Forfeiture Order is supposed to defend himself.

September 13, 2012



Regulatory Fees - All non-exempt licensees must pay annual regulatory fees to the FCC. Fees are due no later than 11:59 p.m. ET on September 13. Fees must actually be *received* by the FCC prior to that time; otherwise, they will be subject to a 25% late payment penalty, possible processing fees, and potential holds on any pending applications. As in previous years, all regulatory fee filings must originate in the FCC's online Fee Filer system. Payments then may be made by credit card, ACH debit, wire transfer, or check. Use of a credit card is generally the safest and most efficient method, as other methods require varying degrees of advance planning and possibilities of payments' going astray. Please note that while Fee Filer may pre-fill certain information, it does not necessarily include all authorizations for which fees are due, particularly broadcast auxiliaries. Radio station licensees should also note that this is the first year that the FCC is using 2010 Census population figures for calculating regulatory fees. Since fees for radio licenses vary according to population, radio licensees should double-check whether the fee type code and payment amount have changed since last year as a result of revised Census figures.

October 1, 2012

Radio License Renewal Applications - *Radio* stations located in **Iowa** and **Missouri** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Television License Renewal Applications - *Television* stations located in **Florida**, **Puerto Rico**, and the **Virgin Islands** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Radio Post-Filing Announcements - *Radio* stations located in **Iowa** and **Missouri** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on October 16, November 1, November 16, December 1, and December 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be placed in the public file within seven days.

Television Post-Filing Announcements - *Television* and *Class A television* stations located in **Florida**, **Puerto Rico**, and the **Virgin Islands** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on October 16, November 1, November 16, December 1, and December 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly. Also, once complete, a certification of broadcast, with a copy of the announcement's text, must be uploaded to the online public file within seven days.

Radio License Renewal Pre-Filing Announcements - *Radio* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on October 16, November 1, and November 16.

Television License Renewal Pre-filing Announcements - *Television* and *Class A television* stations located in **Alabama** and **Georgia** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on October 16, November 1, and November 16. Please note that, with the advent of the online public file, the prescribed text of the announcement has been changed slightly from that of previous renewal cycles.

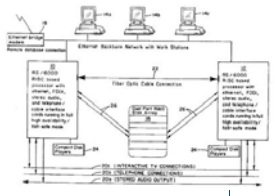
EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington**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

Noncommercial Television Ownership Reports - All *noncommercial television* 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 (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Iowa** and **Missouri** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

(Continued on page 11)

Setback for the patent trolls?



USPTO to Take Another Look at Mission Abstract Patents

By Harry F. Cole
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Our friends at Mission Abstract Data (and, in turn, their friends at Digimedia and IPMG AG – as is our custom, we'll refer to them all collectively as MAD) got some disappointing news from the U.S. Patent and Trademark Office (USPTO) late this month. A USPTO Patent Reexamination Specialist has issued orders granting requests for reexamination of the two patents on which MAD has been relying in its efforts to convince radio broadcasters to enter into licensing arrangements with MAD in order to avoid patent infringement liability. We've included links to the USPTO's orders on our blog at www.CommLawBlog.com.

We won't revisit the history of MAD's efforts. You can get a reasonably good idea from our past coverage of those efforts (in, for example, the last two *Memos to Clients*). And in keeping with our repeated disclaimer about our acknowledged lack of patent law expertise, we also won't delve deeply into the nitty-gritty of the order.

But we have read the orders, and were struck by the fact that the USPTO specialist concluded that "substantial new question[s] of patentability" have been raised as to both MAD patents.

While the mere raising of questions doesn't rise to the level of final conclusions, we suspect that it can't be a good sign for anybody hoping to rely on any patents subject to such questions. We'll just have to wait and see how the further reexamination proceeding comes out.

When might that be? Not until early 2013, at the soonest – or so it would appear. According to the USPTO's order, MAD has until late October (*i.e.*, two months after the issuance of each of the orders) to file responses to them, should it so choose. (It's hard to imagine that MAD would choose not to respond.) And then, should it so choose, the party who requested the reexaminations gets another two months after that to respond to anything that MAD lobs in. A quick glance at the calendar indicates that the pleading cycle would thus wrap up just before Christmas. Once you factor in some time for the USPTO folks to enjoy their holidays, read through the various submissions, and crank out a further order, you've got to figure 2013 is the magic number.

The reexamination orders could also have an impact on MAD's lawsuit in the U.S. District Court in Delaware. That litigation has been stayed since last year, when the USPTO announced its first reexamination of the MAD patents. Once the initial reexamination was completed this past spring, MAD promptly asked the court to lift the stay. That request is still pending (at least as of August 30). Now that the USPTO has cranked up the reexamination process relative to one of the MAD patents — and the broadcast defendants in that suit have already so notified the presiding judge there — the court may be more inclined to leave the stay in place. We shall see.

(Continued from page 10)

October 10, 2012

Children's Television Programming Reports - For all *commercial television* and *Class A television* stations, the third quarter reports on FCC Form 398 must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we would recommend checking. Please note that the FCC requires the use of FRN's and passwords in order to file the reports. We suggest that you have that information handy before you start the process.

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 uploaded to the public inspection file.

Website Compliance Information - *Television* and *Class A television* station licensees must upload and retain in their online 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.

Issues/Programs Lists - For all *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues during the past quarter must be placed in the station's public inspection file. Radio stations will continue to place hard copies in the file, while ***television and Class A television stations must upload them to the online file***. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

When disaster strikes . . .

FCC Reminder: Video Emergency Information Must be Provided for Persons with Hearing and Vision Impairment

By Steve Lovelady
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Another sign of the season – the hurricane and wildfire season, that is. The Commission has issued its by-now-annual public notice reminding video distributors *everywhere* – not just in areas prone to particular types of disasters – of their obligation to make all emergency information accessible to people with vision and hearing disabilities. As broadcasters, cable/fiber system operators and satellite television services have learned from past experience, there are no exceptions to this requirement, and no excuses will be accepted for less than full compliance – even in areas well away from the zones directly affected by the emergency conditions. And let's be clear: this requirement is over and above routine closed captioning or video description obligations. Existing, everyday procedures to meet those obligations may not be enough during an emergency.

Section 79.2 of the FCC's rules requires that all video distributors make "emergency information" "accessible" to those with vision or hearing disabilities (the latter by closed captioning or other visual means). "Emergency information" is defined by the Commission to mean information

> about a current emergency and that is intended to further the protection of life, health, safety, and property, *i.e.*, critical details regarding the emergency and how to respond to the emergency.

*ALL emergency information aired by video distributors **must** be made accessible to the vision and hearing impaired **without exception**.*

Emergencies covered by the rule include such natural disasters as tornados, earthquakes, hurricanes, floods and wildfires. The rule also covers man-made disasters such as discharges of toxic gases and industrial explosions.

The Commission has emphasized that this rule allows for ***no*** exceptions, even in cases of quickly breaking news about emergency conditions. Importantly, the rule reaches not only scripted presentations, but ad lib statements made in the course of live news coverage. In 2005, several TV stations learned this the hard way. After reviewing days' and days' worth of recordings of the stations' coverage of wildfires, hurricanes and tornados, the Commission doled out hefty five-figure fines for what appeared to some to be relatively minor instances on non-compliance.

Example: One TV station was fined because, during coverage of wildfires, it aired an interview with a representative of the American Lung Association who gave the unsurprising advice that viewers should stay indoors, run their air conditioners with a filter, and avoid exercise. The station's failure to include visual presentation, by captioning or otherwise, of that advice contributed to a $20,000 fine. (We've provided links to other examples on our blog at www.CommLawBlog.com.)

The FCC's latest public notice also stresses the wide geographical range of the requirement. The obligation to provide emergency information to the sight and hearing disabled applies not only to the immediate geographical area(s) in which the emergency is occurring, but also to areas of the country which might be logical emergency evacuation routes and in which evacuation shelters might be locatined. Consistent with this concept, "emergency relief assistance formation" includes, for purposes of the rule, announcements about where evacuees from the danger zone may obtain.

According to the public notice, some national events can be of local interest and subject to the requirements of Section 79.2, regardless of the seeming lack of any "local" impact. It does not, however, provide any guidance to stations on figuring out when an emergency might fit into this category.

What steps are video providers expected to take?

For audience members who are blind or visually impaired, emergency information that is provided in the video portion of a regularly scheduled newscast or a newscast that interrupts regular programming must be accompanied, in the main audio portion of the programming, by an aural description of the video presentation . For example, on-screen images or graphics (*e.g.*, a list of available emergency shelters) must be accompanied by a voice-over describing the video action or reading the text of the on-screen material.

Emergency-related screen crawls that are not part of a regular or unscheduled newscast must be accompanied by an aural tone to alert visually impaired people to tune to another information source, such as the radio. The Commission recommends frequent repetition of that tone, at least as often as the information in the crawl is repeated.

To reach people who are deaf or hard of hearing, Section 79.2 requires either closed captioning, or other methods of providing the audio portion of the emergency information in a visual presentation. Any such presentation may not, however, block the closed captioning. Conversely, any closed captioning is not allowed to block another form of visual presentation such as a crawl.

Network affiliate TV stations in the top 25 markets have a significantly greater burden in this area. Those stations are *required*, by hook or by crook, to arrange for closed captioning services. The Commission cuts such stations a little slack by allowing them time for the captioning personnel to

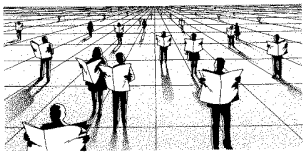
(Continued on page 13)

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

Updates On The News

Court blesses RMLC/BMI deal – We notified you in the June *Memo to Clients* that BMI and the RMLC had reached an agreement in principle regarding the rates to be paid by broadcasters for the right to publicly perform musical works. Back then we were able to lay out the basic agreement, even though we also had to caution readers that the deal was subject to approval by the United States District Court for the Southern District of New York.

The RMLC has now announced that, on August 28, Judge Louis Stanton of that District Court approved the agreement, making the rates and terms specified in the deal effective through 2016.



The highlight from our perspective is not just a presumed lowering of the rates for most stations (due in no small part to an industry-wide $70.5 million credit against 2010-2011 payment), but a simplified calculation method based on gross revenue. That puts an end to the old calculation method that was tied to a base fee, a method that many in recent years considered to be way out of date and extremely cumbersome. As indicated in the RMLC announcement, radio stations should already have reaped the benefit of the 2010-2011 credit, as it was being applied to their BMI accounts starting in June 2012.

Kudos once again to Bill Velez and his crew for great work in representing radio broadcasters.

Meanwhile, back at the FM translator application backlog . . . In March, the FCC announced the process by which the pile of several thousand FM translator applications, still pending since the infamous 2003 filing window, would be trimmed down. (You can read our punchy, nicely abbreviated recap of the FCC's 35-page order in the March, 2012 *Memo to Clients* or on our blog at www.CommLawBlog.com.) As we reported then, the process the FCC plans to use to thin the herd involves "information collections" (as they are known in Paperwork Reduction Act parlance). Such collections must be approved by the Office of Management and Budget (OMB) before they can be implemented.

A recent notice in the Federal Register, OMB has given its thumbs up to the Commission's process. (The imprimatur was technically handed down on July 24.) This clears the way for the FCC to get the culling started. Look for a public notice in the near future setting deadlines and the like. The Commission has been under considerable pressure to move things along on the LPFM front, and clearing the FM translator backlog is an essential first step. Because of that, we won't be surprised if things start to happen pretty fast at this point. Folks with FM translator applications pending from the 2003 window should familiarize themselves with the FCC's process as outlined back in March (if they haven't done so already), determine how that process affects their applications, and be prepared to act in short order. Check back on our blog for updates.

(Continued from page 12)

travel to the station, but in the meantime any emergency information being broadcast must be made accessible to the disabled by some method. The method of providing this information can be somewhat crude, such as holding up a whiteboard with handwritten information.

Additionally, depending on affiliation and market, some stations are allowed to use the electronic newsroom technique (ENT). Such stations must insure that their ENT systems caption non-scripted materials; if the systems don't caption such materials – whether automatically or as a matter of choice by the station – the station must nevertheless make all emergency information disabled-accessible in some manner.

The bottom line is this: ***ALL*** emergency information aired by video distributors ***must*** be made accessible to the vision and hearing impaired ***without exception***. This includes information provided before, during and after the emergency. For example, weather alerts (including watches and warnings) and emergency preparation information about impending storms – including school closing announcements and changed school bus schedules; announcements about circumstances (downed power lines, washed out bridges, etc.) during the storm; and the availability of relief assistance after the storm. It must ***ALL*** be made available both visually and aurally. The substance of even an off-hand remark, if it contains any relevant information, must be conveyed in a way that makes it accessible to the vision and hearing disabled.

Perhaps most importantly, the FCC emphasizes that it is the responsibility of the local station to make sure that ***all*** emergency information is accessible, regardless of whether the station is viewed over the air or on cable or satellite.

And lastly, the Commission devotes an entire page of the public notice to letting the public know how to file a complaint against video providers who don't follow the rules. Now would be a good time to confirm that your contact information on file at the FCC is current and accurate: the public notice informs consumers to first contact their video provider directly for a quick resolution of the problem. Since 2010 all video distributors have been required to file their contact information with the FCC so that any audience member experiencing a problem with closed captioning can reach out to you directly. (We reminded readers of that requirement way back in the May, 2010 *Memo to Clients*.) Even if you're confident that the FCC has the correct contact information for your operation, it wouldn't hurt to check, just to be sure.