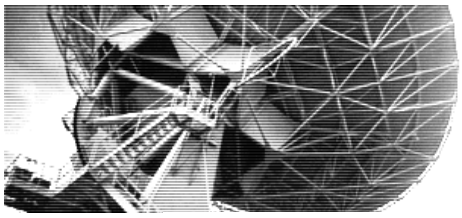

FLETCHER, HEALD & HILDRETH
Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

Feeding the broadband beast

FCC On The Hunt For Spectrum Sources

On the table: Re-purposing of spectrum

By Peter Tannenwald
tannenwald@fhhlaw.com
703-812-0404

On September 23, 2009, the FCC invited comments on the adequacy of available spectrum for broadband deployment. What an invitation to sound off! The wireless industry, which had already been agitating for more spectrum, was on the street in a flash with a campaign bemoaning how the future development of our society will be stifled, and our intellectual growth stunted, if not everyone can carry a mobile device which allows everything from banking to ordering a pizza to watching TV programs anytime and anywhere they like. Citing the enormous growth of traffic on mobile networks after introduction of the iPhone and other smartphones, they declared that the public demand is clear, and it is time to find spectrum to accommodate anticipated future explosions in demand.

The wireless industry, hungry for spectrum, asks why we need to tie up any airwaves at all with TV programming.

And if we're looking for spectrum, they said, how about that juicy block of MHz still used by the boob tube. Sure, the portion of the band reserved for TV was already pared way down as part of the digital transition, but mightn't even some of that remaining TV space be useable for broadband? You bet, they said – let's go after it. After all, some 90% of the public watches TV on a wire or satellite connection. Why do we need to tie up any airwaves at all with TV programming, when the public obviously doesn't rely on such old-fangled transmission modes?

It took only an instant for the Broadband Needs More Spectrum campaign to catch the FCC's attention. Chairman Julius Genachowski, speaking to a sympathetic audience at an international meeting of the wireless industry, declared that "the biggest threat to the future of mobile in America is the looming spectrum crisis." And senior FCC staff members have cited the mounds of money paid at spectrum auctions as evidence of the value of spectrum for wireless.

Somewhat surprisingly, the Consumer Electronics Association has nevertheless taken sides with CTIA. Hold on there — didn't the CEA and its members just reap a bonanza from the resurgence in TV sales generated by the digital transition? Nevertheless, CEA wrote to the FCC, urging it to get cracking to comply with its obligation under Section 336(g) of the Communications Act to conduct a study to determine whether TV really needs all of its spectrum. "Section 336(g)? What's that?" you ask. It's an obscure section that crept into the Communications Act years ago. It specifies the following:

> (g) **Evaluation**
>
> Within 10 years after the date the Commission first issues additional licenses for advanced television services, the Commission shall conduct an evaluation of the advanced television services program.

(Continued on page 12)

November, 2009 **No. 09-11**

Inside this issue . . .

CALM Act Looks To Tone Down TV Commercial Loudness

Amended bill incorporates new ATSC recommended practice

By Steve Lovelady
lovelady@fhhlaw.com
703-812-0517

Loud commercials are the target of legislation proposed by Congresswoman Anna G. Eshoo (D-Calif.), again. Last year Eshoo introduced a bill along the same lines, but it went nowhere. She's back again, with more success so far: the House Committee on Energy and Commerce Committee recently approved an amended version of Eshoo's bill (H.R. 1084) that would require the FCC to adopt regulations prohibiting television advertisements from being broadcast at volumes louder than the programs in which they appear. Her proposed legislation, known as the Commercial Advertisement Loudness Mitigation Act (or CALM Act), was introduced in February and amended in October, 2009.

As originally drafted in February, her bill would have required the FCC to prescribe regulations to assure that: (a) ads accompanying video programming (from broadcasters and/or MVPDs) not be "excessively noisy or strident"; (b) ads not be "presented at modulation levels substantially higher" than the programming they accompany; and (c) the "average maximum loudness" of ads not be "substantially higher" than the "average maximum loudness" of the accompanying programming.

That version of the bill was criticized on our blog (www.commlawblog.com) because the bill left vague and undefined a number of crucial terms. We also noted that it would be difficult for the FCC to come up with enforceable rules based upon the bill's requirements. After all, this isn't the first time the government has tried to address this issue. The FCC has already struggled with the problem of loud commercials, unsuccessfully, for nearly 50 years. In 1962, it commenced an inquiry into that very question. (Check it out – Docket No. 14904, 27 Fed. Reg. 12681 (December 21, 1962).) After three years of fact-finding, though, that inquiry was terminated "with little new information gained". Between 1965 and 1973, the FCC conducted spot surveys to determine whether any broadcasters were deliberately jacking up their levels during spots – but no such evidence was found.

In 1979 the FCC opened yet another inquiry into the subject. (You can look that one up, too – BC Docket No. 79-168, 44 Fed. Reg. 40532 (July 11, 1979).) After five more years of tests, public comments, industry studies, etc., etc., the FCC concluded that "due to the subjective nature of many of the factors that contribute to loudness, it would be virtually impossible to craft new regulations that would be effective." The FCC observed that "loudness" includes many factors, such as "audio processing, mood of the listener, listener's experience with the product being advertised, and method of presentation."

Undaunted, in October Rep. Eshoo submitted a completely rewritten bill with new wording that satisfies some of our earlier criticisms. The revised bill now requires the FCC to write regulations that incorporate by reference a Recommended Practice recently promulgated by the Advanced Television Systems Committee (ATSC). ATSC is the same international non-profit organization that established technical standards the FCC adopted for all DTV broadcasting. The reason ATSC developed the new Recommended Practice (technically known as "Techniques for Establishing and Maintaining Audio Loudness for Digital Television" Document A/85/2009) is to provide the television industry "with uniform operating strategies that will optimize the audience listening experience by eliminating large changes in sound levels", according to ATSC President Mark Richer.

The new ATSC standard arises from the DTV transition. The old analog methods of modulating the audio portion of television broadcasting aren't effective in the all-DTV universe. In 2007, recognizing the need for new standards for the then-impending (since-arrived) DTV broadcasting age, ATSC asked a group of specialists within its membership to study the issue. The Recommended Practice was the result. It helps solve the problem of modulating loudness between speech (the level

(Continued on page 13)

FLETCHER, HEALD & HILDRETH P.L.C.

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
***Tel*:** (703) 812-0400
***Fax*:** (703) 812-0486
***E-Mail*:** Office@fhhlaw.com
***Web Site*:** fhhlaw.com
Blog site: www.commlawblog.com

Supervisory Member
Vincent J. Curtis, Jr.

Co-Editors
Howard M. Weiss
Harry F. Cole

Contributing Writers
Denise Branson, Donald Evans,
Anne Goodwin Crump,
Kevin M. Goldberg, Dan Kirkpatrick,
Steve Lovelady, Lee G. Petro,
R.J. Quianzon, Davina Sashkin
And Peter Tannenwald

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Focus on FCC Fines

By R.J. Quianzon
quianzon@fhhlaw.com
703-812-0424

Jury hits station with a $16.5 million verdict – While this column usually limits itself to the subject of the FCC taking money from broadcasters, a recent jury award in California merits mention. In that case, an on-air contest went horribly wrong and resulted in the death of a contestant, a 28-year old mother of three.

In January, 2007, a Sacramento station ran a contest billed as "Hold Your Wee for A Wii". A Wii, of course, is a popular Nintendo video game console with an approximate retail value of $250. The contest, which was conducted in the station's studios, required contestants to drink water continuously – eight bottles of water every ten minutes – without using the bathroom. The last contestant to vomit or urinate would win the $250 Wii.

As the contest began, one of the on-air personalities questioned whether the contest could result in water poisoning or death. In addition, while the contest was running, concerned listeners called the station and warned that contestants could die. As the contest drew to a close, one of the contestants complained on the air that she was sick. One of the on-air personalities agreed that the contestant looked sick while another jeered at her that "this is what you feel like when you are drowning". Station staff members laughed. During the contest, one of the on-air personalities also joked that "they [the contestants] signed waivers and we are not responsible."

Tragically, the contestant died. Last month, a 12-member jury found the station responsible for the death and awarded the surviving family $16.5 million. The failed defense by the station was that the death was unforeseeable and that the station staff acted without consulting upper management. (In the wake of the incident the station's licensee had fired three DJ's, two on-air personalities, the show's producer, the promotions manager and the station manager.)

Most contests covered in this column involve an FCC fine for incomplete rules, supposedly inadequate prizes, or improperly conducted contests. In virtually all such cases, the problem boils down to a lack of careful planning by the station. Such planning should include attention to each and every aspect of the contest – the way it is to be conducted, the way it is to be promoted, the way winners will be determined, the availability of the promised prize(s), etc. Stations should be particularly attuned to any possible adverse effects – on the public generally, or on individual contestants – that might be caused by their contests. The California case serves as a bleak reminder of what can happen when such care is not taken.

FCC has change of heart – Two months ago, we reported in this column about a Southern California FM station that faced a $5,000 fine for forgetting to include an end-of-message code after transmitting an EAS test. The station is a non-commercial broadcaster which voluntarily serves as the local primary station for the EAS network. In that capacity, the station volunteers to send emergency messages, weekly and monthly tests to other local radio stations in order to assist in emergency preparedness.

At the end of any EAS message or test it transmits, a local primary station is required to send a signal to let downstream stations know that the message is over. Following one test, station personnel forgot to send this "end-of-message" signal and, as a result, several stations dutifully continued broadcasting the primary station's programming, advertisements and all. After an investigation, the FCC notified the primary station that it would be liable for a $5,000 fine. The station was given 30 days to pay up or defend itself.

This month the FCC seems to have had a change of heart: it cancelled the fine. However, the Feds did formally admonish the station and require that it prepare and submit a compliance report which must certified by an officer of the company.

GPS is good for more than just directions – A Colorado radio station was fined $3,200 for listing the wrong coordinates on its license for a studio-transmitter link. The coordinates were off by one minute and 38 seconds in latitude and 35 seconds in longitude – a discrepancy which amounted to about two miles. The FCC was aware of the difference because they bring along GPS devices when they conduct station inspections.

The station explained to the FCC that when they applied for the STL license, they had taken the reference coordinates from an undated survey map provided by their landlord. The FCC did not budge, specifically noting the wide availability of handheld GPS devices. The FCC also rejected the station's defenses that the coordinates were only "slightly off" and that the station was acting in good faith. (Five seconds appears to be the FCC's level of tolerance.)

In doling out the fine, the Commission observed that the licensee had filed for the STL in the Fall of 2007. While the licensee claimed to have relied on its landlord's survey for the coordinates, the licensee did not know when that survey was conducted. The clear implication of the Commission's ruling is that, in this day and age of readily-available GPS equipment, an applicant specifying a new transmitter site cannot rely on second-hand, historical sources for the site's coordinates. While such sources might turn out to be accurate, they might not – as happened here.

RMLC/ASCAP/BMI - Letters All Over The Place!

Opt-in Opportunity for Radio Broadcasters

Negotiations to adjust royalty arrangements underway

By Kevin M. Goldberg
goldberg@fhhlaw.com
703-812-0462

Some of you radio broadcasters out there might have received letters recently from one or more of the following:

The American Society of Composers, Authors, and Publishers (ASCAP)
Broadcast Music, Inc. (BMI)
The Radio Music License Committee (RMLC)

It's our understanding that these letters are being sent to broadcasters who have not already authorized RMLC to negotiate licensing arrangements on their behalf with ASCAP and BMI. RMLC is already engaged in such negotiations for a lot of broadcasters, and when those negotiations are completed, the agreed-to arrangements will set the terms on which participating broadcasters will be able to transmit – over-the-air and by Internet webcast – musical works owned by songwriters represented by ASCAP and BMI. The letters which have been arriving recently provide to anybody who hasn't signed up yet an opportunity to take advantage of those arrangements.

Any radio broadcaster that has not yet authorized the RMLC to negotiate royalty terms on its behalf can still do so.

First, a little background.

As we've discussed in the past, primarily in relation to webcasting, there exist two copyrights in any publicly-performed song. One is the copyright in the underlying "musical work", *i.e.*, the song itself (consisting of the music and lyrics). That copyright is generally owned by the songwriter (although it may be transferred to, *e.g.*, a publishing company). The other – *which is not at issue here* – is the copyright in the "sound recording", *i.e.*, the particular version, or performance, being transmitted at any particular time. That copyright, which is sometimes referred to as the "performance right", is generally owned by the recording artist performing that particular version (although, again, ownership of the copyright may be transferred to, *e.g.*, the record company).

Songwriters – the folks who own the rights in the underlying "musical work" – are for the most part represented by agencies which collect and distribute royalties for the broadcast (or webcast) of their works. These agencies include ASCAP, BMI and SESAC (the Society of European Stage Authors & Composers).

Because of prior antitrust actions taken against them, ASCAP and BMI are covered by a "consent decree" administered by a United States District Court. Every few years, RMLC – a voluntary organization of individuals representing a broad range of the radio industry – renegotiates a new rate structure for payment of royalties by radio broadcasters to ASCAP and BMI. (SESAC was not a part of the earlier antitrust action and, therefore, has separate negotiations with RMLC.) The current rate structure applicable to the ASCAP- and BMI-administered copyrights expires on December 31, 2009. It is not certain that a new rate agreement will be reached and approved by the federal court prior to that expiration date.

Stations that have already given authorization to RMLC to negotiate on their behalf are automatically covered by any rate agreement that is reached for January 1, 2010 and beyond, as well as the rate agreed upon to "bridge" the period between December 31, 2009 and the commencement of that new term.

Any radio broadcaster that has not yet given such authorization to the RMLC can still do so, in which case any agreements will automatically apply to that broadcaster as well. Broadcasters who, for whatever reason, would prefer not to authorize RMLC to negotiate on their behalf may also sign a direct agreement with ASCAP and/or BMI in which the broadcasters agree to be bound by any new, post-January 1, 2010 terms and the terms of the "bridge period".

The letters which many broadcasters have been receiving in recent weeks are intended to make it easy for anyone still interested in signing up (whether with RMLC or ASCAP or BMI) to do so.

We don't provide advice in our *Memo to Clients*, but radio broadcasters who receive such a letter from RMLC, ASCAP or BMI should feel free to contact us if you have any questions.

Senate Committee OKs Lilliputian FM Interference

Local Community Radio Act Advances In Congress

Time to say your good-byes to 3rd adjacent protection from LPFMs?

By Lee G. Petro
petro@fhhlaw.com
703-812-0453

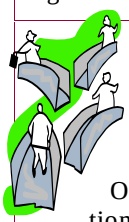
In November the Senate Commerce Committee approved S. 592 ("the Local Community Radio Act of 2009"), a bill that would repeal the LPFM third adjacent channel protection requirement contained in Section 73.807 of the Commission's rules. The bill is now teed up for consideration by the full Senate. Meanwhile, over on the House side, a corresponding bill (H.R. 1147, going by the same catchy moniker) already made it out of Committee in mid-October. Back in the March, 2009 *Memo to Clients* we wrote about both the House and the Senate bills when they first floated to the surface. As a result of the Committees' recent actions, Congressional approval of the proposed legislation is just a couple of votes from reality. And, with no sign of objection from the White House, the smart money figures that this will become the law of the land sooner rather than later.

While the bills (which, as originally drafted, were virtually identical) focus on the LPFM service, full-power FM stations should be sure to take a close look at the full impact of this likely-soon-to-be law.

As we reported back in the June, 2009, *Memo to Clients*, the Commission modified its rules in 2007 to relax considerably the extent to which LPFM stations have to protect second adjacent full service stations. That rule change was upheld in 2008 by the U.S. Court of Appeals for the D.C. Circuit. So second adjacent protection has already been seriously weakened. The Local Community Radio Act would toss third adjacent protection from LPFMs out the window – leaving full service stations fully guarded against only co- and first-adjacent LPFM interference, with only partial protection from second adjacent. (And it would not be too much of a stretch to imagine that, with Congressional elimination of third adjacent protection and the Court's blessing of the reduction in second adjacent protection, the Commission might try to eliminate *all* protection from second adjacent LPFMs.)

While the Local Community Radio Act seems geared primarily toward the paring back of protection, it ironically would create a new species of protection which could give the Commission enforcement headaches galore. The Act mandates that third adjacent protection from LPFM interference is to be retained with respect to full-service noncommercial educational FM's "that broadcast radio reading services via a subcarrier frequency". That's swell, except that SCA operation is largely unregulated and unmonitored by the Commission. In other words, the FCC currently has no way of knowing, from one day to the next, which stations happen to be using one or both SCAs for radio reading services. Since providing such a service will, under the new Act, afford a full service NCE station some greater measure of interference protection, it would not be surprising to see an upsurge in such services in the foreseeable future. It will be most interesting to see whether – and if so, how – the Commission will react to this particular piece of legislative handiwork.

The Local Community Radio Act promises to have continuing effect on the FM industry for some time to come. We will keep you updated on further developments as they arise.



FHH - On the Job, On the Go

On December 8, **Paul Feldman** will be at the TM Forum's Management World America Conference in Orlando. He'll be speaking on Net Neutrality in the Conference's keynote event, "Hype vs. Reality: What is the Role of Regulation in Delivering a 21st Century Digital World?"

On November 20, **Frank Montero** spoke at the Rainbow PUSH Coalition Telecommunications & International Affairs Symposium on a panel titled "Performance Royalties: Can Artists and Radio Get Along". Sharing the bill with Grandmaster Frank was none other than Kool Moe Dee, Grammy winner and rap legend.

On December 8, **Frank** will attend the Radio Ink Forecast Conference at the Harvard Club in NYC.

On December 11, **Vince Curtis** and this month's **Other Frank** (that would, of course, be **Frank Jazzo**) will conduct a political broadcasting seminar for the New Mexico Broadcasters Association in Albuquerque.

Peter Tannenwald reports that he was in the audience for "Dancing with the Stars". Does that boogaloo him up into *Media Darling* contention? Sorry, PT — *MD*s are on out on the dance floor, not up in the stands. Like, f'rinstance, **Vince C**, who gave excellent quote to Comm Daily, referring to Chairman Genachowski as "Mr. Broadband sitting on the eighth floor". Oh snap. **Vince**, you da man . . and you also da *Media Darling of the Month*!

Do digital streams attributable interests make?

Multiple Ownership in HD!

By Dan Kirkpatrick
kirkpatrick@fhhlaw.com
703-812-0432

Digital (a/k/a "HD") radio has yet to captivate the consuming public as much as its promoters might have hoped. Still, that technology has opened up some opportunities for creative broadcasters looking to achieve results that might not otherwise be achievable under existing FCC rules and policies. One example surfaced recently, brought to our attention (and the Commission's) by an unhappy competitor.

It seems that Viacom, licensee of as many broadcast stations as any single licensee can own in the Los Angeles market , has been using one of the HD digital streams on its KTWV(FM) in that market to provide a country music format. No problem there, it would seem. But wait. The content for that country stream is apparently nothing more than a simulcast from a Viacom station in San Bernardino, a different market entirely. A country music competitor in LA – Mt. Wilson FM Broadcasters – sees a couple of problems with that, and has asked the Commission for a ruling declaring that Viacom's arrangement violates both the FCC's multiple ownership rules and its FM allocation scheme.

Our best guess is that the FCC is unlikely to impose the requested limitations.

In adopting its HD Radio rules, the Commission recognized that the multi-stream nature of HD operation could potentially allow broadcasters to make an end-run around the ownership rules. (That could happen if, say, a licensee who had hit the ownership cap in a market were to arrange through, *e.g.*, a time brokerage deal, to secure one or more digital streams on stations owned by others in the market.) In an apparent attempt to prevent this, the Commission held that if a licensee (let's call it Licensee A) of a station in a market were to broker a multicast stream from another licensee's station in the same market, that brokered stream would count towards the local radio ownership cap for Licensee A. This would prevent a maxed-out licensee – such as Viacom – from programming using another licensee's in-market multicast channels.

But the situation in Los Angeles isn't quite that simple. According to Mount Wilson, Viacom is using a multicast stream on a station that Viacom already owns (KTWV) to simulcast the programming from another station that it owns in another market (*i.e.*, KFRG in the nearby San Bernardino market). Mount Wilson is urging the Commission to declare that, when a licensee uses the multicast stream of a station it owns to simulcast the signal of an out-of-market station it also owns, the licensee should be charged with an additional attributable interest in the multicast market.

While Mount Wilson's pique is understandable, its argument reduces to the odd and probably untenable notion that Viacom should be deemed to have multiple attributable interests in its own station. With the Commission's oft-stated desire to encourage the expanded acceptance – by both the industry and the listening public – of HD Radio, it seems unlikely that the Commission will adopt such a novel and potentially far-reaching approach to attribution of multicast streams. Still, Mount Wilson's request does raise some interesting questions, such as how the situation would differ if Viacom were to carry on its multicast stream either (a) the programming of an out-of-market station owned by an unaffiliated entity, or (b) the programming of a station it owns in a much more distant market, or (c) simply the same programming as on KFRG, but not to carry it as a simulcast.

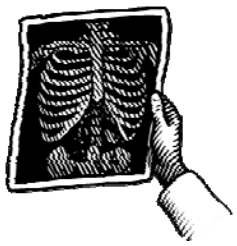
Mount Wilson raises a second question about the geographic limits on use of an HD Radio multicast stream to simulcast another station. The Commission's rules have long held that a commercial licensee cannot use a commonly owned FM translator to expand the service area of a commonly-owned full-power FM station beyond the limits of the full-power station's 60 dBu contour. The rationale of that limitation on translator usage is based in significant part on the view that such use would undermine full-power FM service and the Commission's allocation scheme.

Mount Wilson picks that ball up off the translator field and tries to score with it on the HD radio field. In Mount Wilson's view, the simulcasting of a full-power FM station on the multicast stream of another outside the first's 60 dBu contour is the same thing as using a translator for that purpose. Since such use in the translator context is prohibited, so too should the multicasting gambit be. Mount Wilson does not limit its requested prohibition to commonly-owned stations: it urges the Commission to adopt a prohibition on the use of an HD Radio multicast stream to expand the service area of any other FM station.

If adopted, Mount Wilson's suggested prohibition would prevent an owner of multiple stations within a market from using the multicast streams of the

(Continued on page 7)

"Dr. Waldman to the ER . . . STAT!"



FCC Adds Media Guru To Roster

Mission: assess "state of the media"

By Davina Sashkin
sashkin@fhhlaw.com
703-812-0458

The doctor is in – as of November 30, the day Steven Waldman officially joins the Commission as a Senior Advisor to Chairman Genachowski. Perhaps more important is the fact that Waldman will be serving as the head of what the FCC has termed "an agency-wide initiative to assess the state of media in these challenging economic times and make recommendations designed to ensure a vibrant media landscape."

Your mission, Mr. Waldman, should you decide to accept it: save newspapers, fix the media, and don't step on the First Amendment while you do it.

We're not calling him a *tsar*, but Waldman is being hailed in the press as the answer to print media's prayers and a shepherd who will protect traditional journalism and media as he guides them all (and us, too) into the 21st Century. And why not? He's a former print journalist (*Newsweek*) and editor (*US News & World Report*) who is also well known for his new media venture as co-founder of Beliefnet.com, a hugely successful religion Web site that was purchased by News Corporation in 2007.

According to the Commission, Waldman will be charged with determining how, in the face of "game-changing technologies as well as the economic downturn", the FCC may best ensure that the public interest is served while promoting the ability of "all Americans [to] receive the information, educational content, and news they seek." The impetus behind this new effort, says the Commission, was recent reports by such notables as the Knight Commission on the Information Needs of Communities in a Democracy, The Pew Project for Excellence in Journalism, and the Columbia Graduate School of Journalism, all proclaiming the dire circumstances faced by newspapers and other traditional media, and calling for a complete overhaul of the media marketplace (to include reassessment of FCC regulation). That does sound better, after all, than "Someone, anyone – please help! The economy is in the tank, newspapers are dying, and broadcasters can't get financing to build an AM station anymore."

Could the demonstrably fragile state of the newspaper industry relax some tightly-held views on the Eighth Floor?

While the processes by which this assessment is to be undertaken remain vague, we would wager they will involve the media ownership rules (which, as we noted in last month's issue, are up for their mandatory review in 2010) – and particularly the broadcast-newspaper cross ownership limits. After all, the sorry state of the newspaper business is a central focus of this inquiry, and we would be surprised if some papers didn't point out that, economically, it makes considerable sense to allow newspapers and broadcast stations to join forces in the interest of survival, particularly in markets where there exists a surfeit of other information sources. (Of course, such talk has been treated as close to heresy in some offices on the Eighth Floor, where the notion of relaxing newspaper/broadcast cross-ownership limits is not generally smiled upon. But the demonstrably fragile state of the newspaper industry may relax such tightly-held views.)

Waldman himself has reportedly said that his, and presumably the Commission's, intention is to promote innovation and to create an environment conducive to new and better business models, not to create the business directly. Of course, both Waldman and the Commission have been cautious in acknowledging that its interest in fostering innovative business models should not be interpreted as an interest in controlling news content. However, Waldman has indicated publicly that there is room for FCC interventionist policies in traditional media, because TV and newspaper and now radio are no longer simply a single delivery system – they function in a cross-platform environment, utilizing multiple technologies subject to FCC regulations (broadcast, wireless, and Internet).

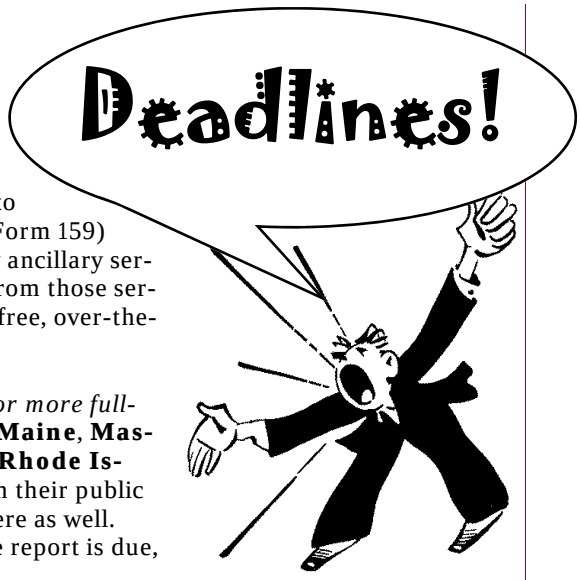
While we are conditioned to react with skepticism when the latest man on a white horse gallops into town and promises to free our clients from burdensome regulation, we wish Mr. Waldman the best in these endeavors and sincerely hope that this new initiative will provide not just a forum for the airing of grievances but also an opportunity for real on-the-ground solutions.

(Continued from page 6)

strongest station to deliver the programming from a weaker station to a larger audience. Again, the FCC's stated desire to encourage multicasting and adoption of HD Radio would suggest a reluctance to adopt such limits.

Our best guess is that the Commission is unlikely to impose the requested limitations, at least through a declaratory ruling. A (somewhat) more likely outcome would be inclusion of the issue in a future notice of proposed rulemaking in HD Radio proceeding. If and when that occurs – or if any other opportunity to chip in your two cents' worth on the Mount Wilson proposal arises – we'll let you know.

December 1, 2009



DTV Ancillary Services Statements - All *DTV licensees* and *permittees* must file a report on FCC Form 317 stating whether they have offered any ancillary or supplementary services together with its broadcast service during the previous fiscal year. If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report on Form 317 specifically asks for a list of any ancillary services, whether a fee was charged, and the gross amount of revenue derived from those services. Ancillary services do not include broadcasts on multicast channels of free, over-the-air programming for reception by the public.

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alabama**, **Colorado**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **Rhode Island**, **South Dakota**, and **Vermont** 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 **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakaota** 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 **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** 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 **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakaota** 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. As of this writing, the deadline for ownership reports (FCC Form 323) for commercial stations is January 11, 2010. Check our blog at www.commlawblog.com for updates.

Radio Ownership Reports - All *noncommercial radio* stations located in **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** 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. As of this writing, the deadline for ownership reports (FCC Form 323) for commercial stations is January 11, 2010. Check our blog at www.commlawblog.com for updates.

January 10, 2010

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 9)

Wilkommen, Bienvenu, Welcome

Christine Goepp Joins FHH As Associate

Fletcher, Heald & Hildreth is pleased to announce that Christine E. Goepp has joined us as an associate.

Christine is a 2008 graduate (*cum laude*, thank you very much) of the Georgetown University Law Center, where she was Senior Editor on the International Environmental Law Review. But that barely scratches the surface of her diverse (to put it mildly) educational background. After scoring a B.A. (with distinction, thank you very much again) in Chinese Language from the University of Hawaii in 1995, she moved on to the University of Cambridge (the one in England) for a Masters in Philosophy in 2001, and then over to the London Metropolitan University where she sat for the Common Professional Examination in Law with Distinction in 2003. And in 2004 she attended the Chinese Intellectual Property Summer Institute in Beijing. Along the way she also served as a cryptoanalytic linguist in U.S. Army Signals Intelligence, for which she trained at the Defense Language Institute Foreign Language Center, the Air Force School of Applied Crytologic Sciences and the U.S. Army Security Agency Training Center. Oh yeah, and she taught at the National Cryptologic School.

On the side, Christine restores Virginian native forests in her local community of Falls Church, and does some cooking, gardening, piano playing and oil painting. (She told us that we could make up more stuff about her if we wanted, but it doesn't look like we need to.)

At FHH she will be working on the full range of communications issues. In a previous stint with a Washington, D.C. law firm she focused on regulatory, policy and corporate matters involving telecom, broadband and media companies.

FHH welcomes Christine to the fold. She can be reached at 703-812-0478 or goepp@fhhlaw.com

(Continued from page 8)

January 11, 2010

Biennial Ownership Reports - Absent some last-minute change of heart by the FCC or intervention by a court, 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 the new FCC Form 323. 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 November 1, 2009. Please be aware, however, that the required filing date may be subject to change, as no electronic form is yet available, and the time for preparing and filing reports is dwindling.

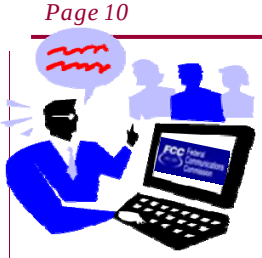
February 1, 2010

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Arkansas**, **Kansas**, **Louisiana**, **Mississippi**, **Nebraska**, **New Jersey**, **New York**, and **Oklahoma** 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 **Kansas**, **Nebraska**, or **Oklahoma** 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 **New York** or **New Jersey** 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.

Noncommercial Television Ownership Reports - All *noncommercial* television stations located in Kansas, Nebraska, and Oklahoma must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All reports must be filed electronically.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Arkansas**, **Louisiana**, **Mississippi**, **New Jersey**, and **New York** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.



Enhancing ECFS

FCC Unveils E-Filing Upgrades

By Denise Branson, Legal Assistant
branson@fhhlaw.com
703-812-0425

As part of the overhaul of its electronic systems, the Commission has launched an enhanced Electronic Comment Filing System – dubbed ECFS 2.0 – providing significantly improved access to docketed materials in the Commission's files. It's a long way from the blue and red binders, RIPS and ECFS 1.0.

Preparation for this new and greatly improved system included imaging and indexing full text comments back to 1992. As a result, the on-line public now has the ability to perform full text searches of Commission dockets using a Google search appliance and Boolean search parameters. Finding documents in ECFS has never been easier. Viewing search results is also much more user-friendly, with quick view options and the capability to download search results with links to the documents. (An extra feature: search results can be displayed with all FCC-issued documents listed separately. This speeds up searches for orders and the like that might have been released by the Commission during the course of a multi-year proceeding that attracted hundreds or thousands of public comments and pleadings.)

If you want to test-drive the system yourself, the FCC encourages you to do so.

The comment filing function has also been improved. Batch filing of comments in multiple dockets and/or with multiple attachments is now available. That means that, if you have prepared a single set of comments for inclusion in multiple different proceedings, you can do so in one fell swoop (rather than having to upload the same item over and over again in each of the separate dockets).

If you want to test-drive the system yourself, the Commission encourages you to do so. It has even created dummy dockets (00-2000 and 00-2001) for use in trying out the new system.

The FCC's electronic overhaul will ultimately reach well beyond the enhanced ECFS system. Already, for example, you may have noticed improvements in other systems (for example, CDBS now allows deletion of individual attachments). And the FCC is now communicating directly with the public on Facebook, MySpace, Twitter and Digg, through RSS feeds, and on topical sites (broadband.gov, internet.gov, FCC.gov/live). RSS Feeds can also be used to follow dockets in ECFS.

As with all things Internet, some caveats are still in order here. If you are planning to file any confidential materials, DON'T use ECFS. Rather, plan to file those the old-fashioned way, on paper, complying with the FCC's filing rules governing such submissions. Also, be aware that the new ECFS system will reject password-protected documents. Paper-filed documents will encounter a slight scan delay, but most documents filed before 4:30 p.m. will be accessible by the end of the day and documents filed after that should be available by 10:00 a.m. the next day.

That's right, you're not from Texas

Unlicensed Operator Rejects FCC Authority, FCC Rejects Unlicensed Operator's Rejection

By Davina Sashkin
sashkin@fhhlaw.com
703-812-0458

They think big in Texas, and they think independent in Texas, and so it should be no surprise that an Austin FM radio operator was not impressed when the Feds arrived at his doorstep. Some FCC agents claimed that the operator – one Raymond Frank – was lacking some piece of paper or other from some agency Back East in Washington, but Mr. Frank knew better. No "pirate broadcaster" he – no, he was operating strictly within the boundaries of the Republic of Texas, and so was not subject to the laws of the Yoonited States or any little ol' FCC. (Frank also argued that the FCC's rules violate the First Amendment. But if Frank was not a U.S. Citizen – being as how he claimed Republic of Texas citizenship and all – that argument may have been a tad inconsistent, but we digress.)

Not surprisingly, the Dallas office of the FCC's Enforcement Bureau didn't see things that way, and whupped Mr. Frank but good with a $10,000 fine for unauthorized operation.

The most interesting aspect of the Bureau's Forfeiture Order is the fact that the Bureau felt the need to respond, in detail, to Frank's claim that the FCC lacks jurisdiction over radio operations in Texas. To quote the Bureau:

(Continued on page 11)

The case that wouldn't die!!!

Forgotten, But Not Gone (until now)

Biltmore Forest comparative FM proceeding finally put to rest

By Donald Evans
evans@fhhlaw.com
703-812-0430

When last we reported on the Biltmore Forest FM case, it was 2003. The economy was booming, our mission to Iraq had been "accomplished", Barak Obama was an unknown state legislator in Illinois, and Paris Hilton and Nicole Ritchie were still BFFs. The times they do change, but what remains constant is the Biltmore Forest case, which turned 22 years of age this year. It's disconcerting when a legal case is old enough to drink alcohol and possess firearms – it can already vote, get married without parental consent, and get a taxi driver's license. But the case now seems to have come, at long last, to an end.

Readers with unusually retentive memories will recall that we administered last rites, sounded the death knell, and sat shiva for this case after its last visit to the Supreme Court in 2003.

Biltmore Forest Broadcasting FM, Inc. (BFB) had been one of 14 original applicants who filed for this Class A FM station outside Asheville, North Carolina in 1987. After a decade-long comparative hearing, the FCC's original grant was reversed by the Court of Appeals, and the case went into the pool to be auctioned in 1997. Auction irregularities led to further appeals by disappointed auction bidders (including BFB) all the way to the Supreme Court. Along the way there was a settlement agreement that was rejected by the Commission, two different interim operators of the station, and a senatorial hold on the confirmation of Chairman-designate Bill Kennard by the late Jesse Helms (who was backing one of the applicants). Electromagnetic confusion reigned one day when two different operators on the licensed channel were broadcasting at the same time in the same city. Applicants sued each other in civil court; applicants died of old age; applicants divorced and re-married.

Eventually, however, the FCC's errors were forgiven by the Court of Appeals, the Supreme Court denied cert, and we declared the case dead.

It turned out that the rumors of its demise were greatly exaggerated. When the winning applicant went to assign its license to someone else, another disappointed applicant challenged the assignment, raising issues about the licensee that had been unknown prior to the grant of the license. Despite the gross untimeliness of the new charges, the FCC simply refused to finally resolve the matter, eventually driving the licensee to enter into a six figure settlement agreement with the protester. Again the case seemed to be ready for the archives. Not so fast.

Shortly before the six-year statute of limitations expired, BFB (represented by your author) filed a complaint with the Court of Federal Claims in Washington, alleging that the FCC had breached its contract with BFB by not awarding the license to the highest qualified bidder. The theory was that, while the license could no longer be granted to BFB, the FCC should at a minimum be forced to pay BFB damages for the agency's breach of the auction contract. Though the courts were sympathetic and did seem to acknowledge that a contract existed, controlling precedents divested the Claims Court of any jurisdiction over the contract claim – even though the only other court with jurisdiction could not award money damages. BFB duly presented its novel argument to the Federal Circuit Court *en banc* and then the Supreme Court, but justice, unfortunately, was not served.

Since the International Court of Justice at the Hague does not take jurisdiction over FCC rulings, the Biltmore Forest applicants have now exhausted all known avenues of appeal. The stake has finally been driven through the heart of this case. May it rest, again, in peace.

(Continued from page 10)

We also note that Texas is a "State" of the United States of America, and it and its residents are subject to the laws of the United States. According to the to the [*sic*] Texas Historical Commission, Texas was annexed to the United States as the 28th state on December 29, 1845; Texas seceded from the United States and joined the Confederate States of America on January 28, 1861; and Texas officially was readmitted to the Union on March 30, 1870, following the period of Reconstruction. *See* http://www.thc.state.tx.us/triviafun/trvgov.shtml. Because Texas is a State, Mr. Frank's invocation of the Foreign Sovereign Immunities Act is misplaced.

Presumably the Bureau felt that, by relying for this historical review on the "Fun Facts" page of the Texas Historical Commission website, the Bureau could not be accused of any kind of Yankee Revisionism. Yee haw.

(Continued from page 1)

Such evaluation shall include –

1) an assessment of the willingness of consumers to purchase the television receivers necessary to receive broadcasts of advanced television services;

2) an assessment of alternative uses, including public safety use, of the frequencies used for such broadcasts; and

3) the extent to which the Commission has been or will be able to reduce the amount of spectrum assigned to licensees.

Of course, the broadcasting industry wasted no time responding. They mounted a strong campaign, featuring the Association of Maximum Service Television, large group station owners, public broadcasters, minorities, and anyone else interested in helping. Holy smoke, the broadcasters said, we just spent billions transitioning to high quality digital television. The public has spent and is continuing to spend mega-bucks on new TV sets. What are you going to do – throw all that stuff on the recycling pile just a few years after everyone bought it? And don't forget how valuable broadcasting is, in terms of both entertainment and information. Without national television, our society would lose its thread of common daily experience, fractionalizing our nation as everyone ends up watching channels matching only their niche interests. Our democracy will perish from the earth as critical sources of news and information are extinguished, and our nation will be left to founder in emergencies when all the wired systems collapse from flood, fire, and earthquakes.

The Commission should be striving to maximize the benefit obtained from every bit of spectrum capacity, rather than making judgments based on who will pay the most for the opportunity.

Public broadcasters noted multi-channel digital TV broadcasting is providing much more bang for the buck, allowing their stations to double and re-double the educational offerings delivered to the public. Hispanic broadcasters noted the growth of their service, including new networks. Low power stations, which no longer have their own organization to petition the FCC, cannot believe that their local and niche services might be silenced.

In other words, lobbyists are having an absolute feeding frenzy.

FHH filed comments for one client noting that the entrenched interests might be framing the discussion in 20th century instead of 21st century terms, because each side is promoting its own interests, leaving the argument to be framed as an "either/or", zero-sum game in which one side must lose if the other wins. That makes the FCC a referee, a role it should be reluctant to assume, given its past speckled track record. Its decisions usually end up in a judicial quagmire, with rules tailored better to the prior decade (when the rulemaking started) than to the current decade (when the rules must be applied).

In a digital world, all signals are made up of bits and bytes, so why can't we do almost anything we want with any spectrum? Perhaps a better approach would be to see how much spectrum can be used for "everything," not "something." If the FCC is guided by the public interest, it should be striving to maximize the benefit obtained from every bit of spectrum capacity rather than making judgments based on who will pay the most for the opportunity. (Opportunity for what? It warrants mentioning that, in many cases, spectrum buyers are paying not only for the chance to provide service, but also for the chance to block out competing service providers.)

Increased access to broadband will undoubtedly spread education and access to information, with great value to our society, even though accompanied by scams and porn on the side. But broadcasting also plays a critical and highly valuable role in our society and is a more efficient way to deliver common content to a large number of people than transmitting the same content to multiple users each of whom uses spectrum to access a server. Why can't we do it all at the same time?

Will the FCC be able to envision the potential of developing technologies rather than the limitations of existing technologies, so that it can truly realize maximum efficiency by letting spectrum multi-task instead of single-task? The lobbying crowd is not likely to help the FCC along that path, and, unfortunately, those with the most money can afford to pay people to visit the FCC day after day after day, pounding home the message that what they want is surely most beneficial and important. If the FCC hears a half-way decent argument often enough, it is difficult for them to avoid starting to believe it. But in a digital world, the entire framework is different, because it is so much easier to mix and match. Can and will the FCC step up to the 21st century plate? Stay tuned.

(Continued from page 2)

for which most audiences set their volume control) and other sounds within the programs, as well as between programs and commercials and from channel-to-channel, without excessively reducing the expanded dynamic range (over 100 dB) that DTV programming offers. To be effective, the new Recommended Practice applies to the entire chain of the television program system (*i.e.*, program production, broadcast, delivery of the programs through cable and satellite systems, and output by TV sets owned by consumers).

The adoption of ATSC's Recommended Practice has enabled Eshoo to focus her bill considerably, simply by incorporating that Practice by reference.

While the revised bill appears to correct the problems we saw in the earlier versions, it is still not completely worry-free.

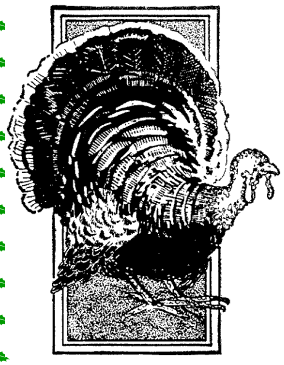
First, the revised bill would make mandatory standards which the ATSC apparently intended to be voluntary (why else call it a "Recommended Practice"?). Adoption of ATSC-established "recommended practices" is, of course, generally good policy and certainly to be encouraged. But such "recommended practices" are technically issued to provide "guidance" and to identify "production, distribution and transmission practices needed to provide the highest quality audio soundtracks to the digital television audience". If the bill becomes law, what was a matter of recommended "guidance" will become a matter of statutory imperative.

Second, there is the matter of the cost of complying with these technical requirements. Rep. Eshoo's revised bill provides for a one-year period after the effective date of the new FCC regulations, for broadcasters, cable and other multichannel video providers to comply. The bill also provides for the FCC to grant waivers to entities demonstrating that obtaining the equipment to comply with the new rules will result in "severe financial hardship". This raises an obvious and important practical question: about exactly how expensive the new equipment will be?

Our third concern is that the Recommended Practice specifically alludes to "the possibility that compliance with this Recommended Practice may require the use of an invention covered by patent rights". There is already a nasty fight over patent license fees between DTV set manufacturers and the holders of key patents required to comply with the ATSC's standard for DTV adopted by the FCC. A similar fight could be in store if compliance with the Recommended Practice requires purchase of equipment covered by patents.

The CALM Act bill, as revised, passed out of the House Committee on Energy and Commerce on November 19, 2009. There has been no word on when the bill might be brought to a vote by the House. Rep. Eshoo does have the bi-partisan support of 82 co-sponsors for her bill in the House. But there does not yet appear to be any companion legislation introduced in the Senate. (Last time around Sen. Schumer introduced companion legislation on the Senate side. Who knows whether we'll see that again.)

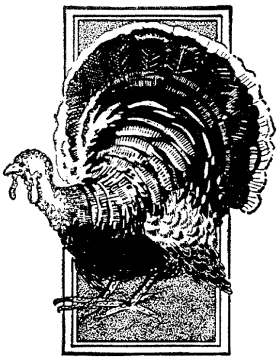
The legislative process is difficult to handicap, so there's no telling what the prospects are for the CALM bill. But by incorporating the ATSC standards, Rep. Eshoo has substantially increased the likely usefulness of her bill should it ever be enacted into law.



Holiday Schedule Reminder

Fletcher, Heald & Hildreth, P.L.C.
will be officially closed on
December 24-25 and January 1.

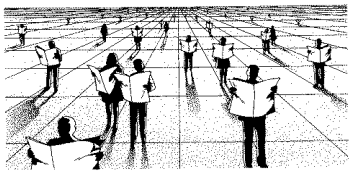
Have safe and happy holidays!



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

Updates on the News

Form 323 Update – If you've been reading our blog (www.commlawblog.com), you already know that there's been plenty happening on the Form 323 front. Since it's a fast-moving target, we figured we wouldn't bother to prepare a stand-alone article for this month's *Memo to Clients*, but rather hit a couple of the highlights here and refer our readers to the blog for continuing timely updates. So here's the scoop. As of last month, the deadline for the new commercial broadcast Ownership Report (Form 323) was December 15, to which it had been moved from the original November 1 filing date announced, ever so arbitrarily, by the Commission last May. Of course, back then they didn't have the revised form ready to roll, so picking a date, any date, was kind of a crapshoot, but what the heck. Of course, by early October the form *still* hadn't been released by the Commission, so the date got moved to December 15. As we reported last month, in mid-October the Office of Management and Budget signed off on the FCC's draft revisions, which theoretically teed up the form for immediate deployment. Initially, the Commission indicated that the form would be available for use on or about November 16, but then that got moved back to sometime the week of November 16, and then later still. As of this writing (November 30) it's still a no-show. The webpage which the FCC has dedicated to Form 323 merely refers searchers to the OMB website, where a "draft Form 323, for reference purposes only" may be viewed.



Oh yeah, what with the additional delay in finalizing the new form, the Commission moved the filing deadline to January 11, 2010.

Meanwhile, we at Fletcher Heald filed a Motion for Stay with the Commission (just before the deadline got moved from December 15 to January 11), suggesting that, in view of the many serious, still unresolved, problems, it would be in everybody's interest for the Commission to put deployment of the new form on hold indefinitely to give the Commission time to resolve those problems. So far, no word on that from the Commission.

Next, we filed a Petition for Reconsideration, laying out in considerable detail the major league flaws underlying the way in which the changes to the form were developed by the Commission. No word back from the Feds on that yet, either. (If you're interested in reading either the Motion or the Petition, you can find links to them at www.commlawblog.com – search for "Form 323".)

We have heard conflicting rumors about what might be going on inside the Commission with respect to Form 323. Word is that the new form was being beta-tested, and that some problems may have been encountered. We have also heard that there may be some sentiment among some folks at the FCC to re-think the issue of mandatory FRN disclosure for each and every individual who holds any kind of "attributable interest" in a licensee. (That disclosure requirement is probably the most sensitive aspect of *L'Affaire 323*, because in order to get the FRN which would have to be disclosed, all those individuals would have to cough up their social security numbers into the gaping maw of some FCC database.) Commissioner McDowell, for one, expressed surprise that any such requirement was even considered: according to one published report, he was "very troubled" that the Commission was asking for social security numbers, and he went so far as to say that, had he known that such a measure was being considered, he "would not have endorsed" it. McDowell's surprise that social security number disclosure turned out to be an element in the new Form 323 underscores the troubling (and, we think, fatal) lack of adequate notice which characterized the development of Form 323 over the last six or seven months.

Bottom line for right now: January 11, 2010 is still the official deadline for the new form, but stay tuned for further developments. This continues to be a moving target.

Keep your mind on your driving, keep your hands on the wheel – As we have reported in recent months, the FCC has adopted a very generous view of its jurisdiction. Childhood obesity, violence, parenting – they're all areas in which the Commission (would that be the "Federal Whatever Commission"?) thinks it has something to say. And now we can add yet another entry to the FCC's already burgeoning résumé: Safe Driving Advocate. In November it convened a workshop on "distracted driving". The goal was to "explore technology innovations and applications that may eliminate or significantly reduce the problem of distracted driving." Ideally the Department of Transportation (not to mention the 50 or so state transportation agencies) will not be miffed that the FCC is elbowing into their turf. We recommend that the Commission adopt Paul Evans's classic tune "Seven Little Girls" as its theme here.

Who remembers the DTV transition? – A year ago, you couldn't go more than maybe 30 seconds without being assaulted with word of the DTV transition. Well, the transition came, it went, and society appears to have survived and moved on. According to the Denver Post, the last of the DTV converter coupons (Converter coupons? Talk about a trip down Memory Lane!) expired in mid-November, putting a merciful end to that much-hullabalooed aspect of the much-hallabalooed transition. According to the Post, of the 64.1 million coupons distributed by NTIA in connection with the transition, just over half were redeemed, leaving (by some rough estimates) more than $500 million in the government's coffers. But hey, why dwell on the past, when we now have All Things Broadband to deal with?