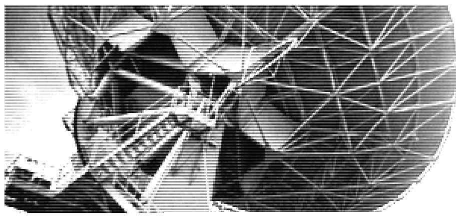

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Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

Planning starts for:

EAS - The Next Generation

Comments on emergency alert system overhaul invited

By Davina Sashkin
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Attention, anyone interested in the Emergency Alert System (EAS) – and that would include current EAS participants as well as wannabes. The Next Generation of EAS is in the works – and now's your chance to influence it. The Public Safety and Homeland Security Bureau (PSHSB) has invited comments on possible changes to any or all of Part 11 of the Commission's Rules. This invitation comes in anticipation of a rewrite of the EAS rules which will be necessary to accommodate the Common Alerting Protocol (CAP) standard.

The new EAS systems are intended to cross technological boundaries.

CAP standard? Surely you remember back in 2007, when the FCC notified all EAS participants that they must be prepared to accept CAP-based EAS alerts 180 days after FEMA publishes the applicable CAP technical standards. (We covered this in the June, 2007 *Memo to Clients*.) FEMA recently announced its intention to publish those standards as soon as the third quarter of 2010, so time is now of the essence for the FCC to get all of its EAS ducks in a row.

So what is this CAP thing, really?

According to the FCC, CAP is as "an open, interoperable, data interchange format for collecting and distributing all-hazard safety notifications and emergency warnings to multiple information networks, public safety alerting systems, and personal communications devices." It's part of the federal government's deployment of the Integrated Public Alert and Warning System (IPAWS). The goal of IPAWS is to allow officials who have to respond to emergencies – think FEMA, the National Weather Service, State Governors, other public safety officials – to get the word out to the public about emergency situations as efficiently and comprehensively as possible. In the old days, such officials generally had to rely on the broadcast EAS system. Now, in addition to EAS, the CAP approach will ideally enable them to send a single, geo-targeted alert simultaneously across multiple platforms, including cellular, internet, satellite and cable television providers. Instantaneous, ubiquitous notification to everybody, anywhere. The CAP approach will even enable special formatting of alerts for non-English speakers and persons with disabilities.

In other words, it's EAS all grown up for the digital age.

Unlike many of the FCC's efforts in the traditional silo model, the new EAS systems are intended to cross technological boundaries and, thus, impact everyone from broadcasters to cellular phone operators to MVPD providers. Commercial television broadcasters are already required (by the 2006 WARN Act) to incorporate CAP-enabled EAS equipment as part of their digital transition (a requirement the FCC later clarified to include digital NCE TV stations as well). There is at present no similar obligation for radio stations, but it's reasonable to assume that a requirement is in the works. We encourage radio operators in particular to participate in the molding of new EAS rules: since it seems an odds-on mortal lock that radio operators will be looking at significant changes in their EAS obligations, it

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Gender Out, Ethnicity In

Commission tweaks policy on nondiscrimination in advertising contracts

By Steve Lovelady
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It's really never too late to admit to a mistake. And so it is that, more than two years after the fact, the FCC has issued an Erratum making a seemingly major change to language originally announced in the Commission's Diversity Order. (That Order was adopted by the Commission in late 2007, but was not released until March, 2008.) The mistake? When the Commission said "gender" in the original order, it didn't really mean "gender"; it meant "ethnicity".

Gender – ethnicity . . . ethnicity – gender . . . you say "tomato", I say "tomahto". That's the kind of mistake that just about anybody could make, right?

The changed language appears in the policy designed to discourage the advertising business practice of including "No Urban/No Spanish" clauses when placing commercials on stations. (For a refresher course on the no-discrimination policy, check out the 10/24/08 item on our blog at www.CommLawBlog.com.) The policy, as originally articulated in the Diversity Order, required broadcasters to certify, in their next license renewal applications, that their advertising contracts don't discriminate on the basis of race or gender. Now the FCC says that it really meant that the certification should specify nondiscrimination on the basis of ***ethnicity*** rather than gender.

We confess that, when the Diversity Order was first issued, we were a bit perplexed as to why the FCC was insisting that broadcasters' certifications refer to "race or gender". After all, the new policy was based on concern about alleged "No Urban/No Spanish" advertising orders, ***not*** "No Urban/No Female" orders. So when the Erratum explains that the change is necessary to "more accurately reflect the Commission's clear intent", it's hard to argue – even if it makes you wonder (a) how, exactly, the mistake got through in the first place and (b) why it's taken more than two years to acknowledge and correct it.

The Erratum offers no explanation about why the change is being made now (as opposed to, say, April, 2008) – but we can speculate. The required certification is to be included in Form 303-S, the broadcast renewal application form. Since the most recent broadcast renewal cycle had just wrapped up in early 2007 – less than a year before the Diversity Order was adopted – and the next wasn't going to start until 2011, the Commission probably didn't feel any pressure to revise the form to include the certification back then. But now, with the first renewal applications of the next cycle due in little more than a year, the Commission may be starting to focus on nitty-gritty details like how, exactly, the certification should be worded.

The precise wording of the certification is not unimportant. Of course, we know from the Diversity Order that, come renewal time, each broadcaster will be expected to certify that: (a) the broadcaster's advertising contracts do not discriminate on the basis of race or gender (oops, make that race and ethnicity); and (b) such contracts contain nondiscrimination clauses. But the Commission still hasn't bothered to explain exactly what it expects such "nondiscrimination clauses" to say.

In the wake of the Diversity Order, we took at stab at crafting a nondiscrimination clause to address the problems targeted by the Commission. (Again, check out our 10/24/08 blog post for more information.) The trouble is, we really don't know for sure whether that good faith effort will be satisfactory to the Commission come renewal time. In fact, we know for sure that our original suggested language will definitely ***not*** be satisfactory, since our language – which was based on the

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Focus on FCC Fines

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Running a contest? Disclose, disclose, disclose – This column frequently reports about stations who wind up paying fines for contests that are improperly run. A contest involves a number of separate elements, any one of which can give rise to complaints. Caution in all respects should be the watchword when it comes to running a contest.

First and foremost, although your contest will likely produce a happy contest winner, the by-product is a whole bunch of unhappy contest losers. In addition, given that the disappointed contest losers had the spare time to enter and participate in a contest, they probably have the time to fire off an angry e-mail to the FCC if they feel aggrieved by some perceived injustice or irregularity. Stations are required to properly publicize and fully disclose all of the rules of their contests so that contest losers (and winners in some cases) are fully advised of the rules. It is also advisable to create and retain a paper record reflecting when and how the rules were publicized – to submit to the FCC if the government starts prying around into a contest.

An Idaho FM station ran into trouble when it ran a contest and an upset contest loser thought the game was fixed. The complainant alleged that the winner was somehow chosen by one of the station's sponsors. The station explained to the FCC that the winner was chosen on a completely random basis, as specified in the contest's rules. In addition, both the station and the winner submitted affidavits indicating that the winner selection process was random. The FCC accepted the evidence and tossed out the claim that the game had been rigged.

Alas, the FCC didn't stop there. Instead, the FCC delved into how the contest rules were announced and ended up fining the station $4,000 for shortcomings in those announcements.

The prize in this contest was an "ultimate garage" filled with a car, tires, a video game, a grill, a refrigerator, a shed and more. Winning the ultimate garage spurred plenty of interest – lots of listeners showed up to take a chance. The complainant was upset when he found out that the Ultimate Garage could only be won by just one person. It seems that the listener had gotten the impression that contest participants would have the opportunity to win prizes from the garage item-by-item.

The FCC looked at the rules that the station announced and found a couple of instances where the station did say "win it all". However, the FCC decided that a couple of mentions were not enough. The FCC fined the station, in part, for failing to adequately explain that only a single winner would take the garage and its contents home.

The FCC also fined the station for not adequately explaining the elimination process it was using to select a winner. FCC rules require stations to fully and accurately disclose the material terms of a contest. The FCC felt that the station's "elaborate" selection process for its winner needed to be disclosed in more detail than the licensee had provided.

Running a contest? Be sure to award your prizes, soon – A station continues to battle the FCC on the issue of whether seven months is too long to award a prize to its listeners. It will probably not surprise you to learn that, so far, the station is losing the battle.

The FCC proposed a $4,000 fine against the station for waiting more than a half year to give a winner its prize. The station took the position that the FCC's rules require only that stations award contest prizes "promptly", and that if the FCC wants to define "promptly" as less than seven months, a full-blown FCC rulemaking proceeding would be required. The station's argument failed.

Next, the station claimed that FCC rules do not specify that a prize award deadline must be disclosed as part of the station's announcements. The FCC countered that its list of terms required to be disclosed by a licensee is intended to be illustrative, not exclusive. The FCC helpfully reminded the station that contest announcements should generally include: how to participate; eligibility restrictions; entry deadline dates; whether prizes can be won; when prizes can be won; the extent, nature and value of prizes; the basis for valuation of prizes; time and means of winner selection; and tie-breaking procedures.

Stations should be certain to fully disclose every aspect of their contests. With every contest there will be disappointed contest losers who may feel the need to direct their disappointment toward the station. In some instances there are also disappointed winners – for instance, a winner frustrated at having to wait seven months to collect the prize – who may also choose to vent at the station. When a complaint does make its way to the FCC, a station can defend itself by demonstrating to the FCC that the station properly disclosed all of its contest rules and that the contest was conducted as advertised.

"Openness" uber alles

OMB Offers Agencies Guidance On Use Of Social Media

By Kevin M. Goldberg
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Some people say that you can have big government, and you have can have open government, but you can't have big open government. The Obama Administration is trying to disprove them.

In April the Office of Management and Budget (OMB) issued a memorandum advising the heads of executive departments and many federal agencies on how they may use various social media consistently with the Paperwork Reduction Act of 1995 (PRA). OMB is trying to encourage such use to promote interaction between the government and the people.

This is part of the Administration's oft-stated commitment to increase "transparency" and "openness" in government. That commitment was evident in no fewer than three Presidential directives issued on President Obama's first full day in office, and has been reiterated several times since. The problem is that such lofty aspirations cannot ignore existing laws – nor should they, particularly when the existing laws were put on the books to promote the interests of the people over those of the bureaucracy.

The trouble is that the PRA arrived long before social media took hold.

The PRA, for example.

The PRA was designed to provide a check on the burdens imposed on the public – individuals, small businesses educational and nonprofit institutions, etc. – by government-mandated information collection efforts. The PRA requires that, before undertaking an "information collection", agencies subject to the Act must first obtain OMB approval. They do this by demonstrating that the proposed collection will achieve the "greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the federal government." While OMB rejection of a proposed information collection tends to be the exception rather than the rule, such rejections have been known to happen. And at a minimum, the drill of seeking OMB approval forces the agency to articulate precisely why it thinks its proposed information collection is warranted.

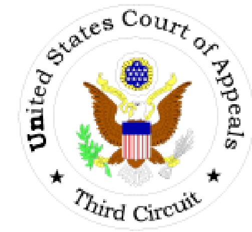
The trouble is that the PRA arrived long before social media took hold. As a result, it has been unclear whether an agency would have to jump through the PRA/OMB approval hoops if it wanted to engage in 21st Century online social interaction. Hold chat sessions, create a blog on which members of the public could post comments, promote wikis, etc., etc., etc.? Does an agency really have to get OMB's approval for any and all of these activities?

The unsurprising answer, as it turns out, is "no" – for the most part. In its April memorandum, OMB gives the green light to a wide array of such activities. According to OMB, generalized requests for unstructured responses are beyond the reach of the PRA. So webinars, chat sessions, blogs, wikis, feedback requests, and the like are all permissible without prior OMB approval. But the more specific and structured such opportunities for interaction become, the more likely it is that they *will* be subject to the PRA prior approval requirement. For example, an agency may solicit the public's feedback as long as that solicitation gives responders the opportunity to answer some or all of the questions in the way that they choose. But if the feedback solicitation takes the form of a series of specific, identical questions, the PRA would likely apply. Perhaps the best way to describe it is to say that the more the agency action seeks general "suggestion box"-type information collection mechanism, even on the web, the less likely it is to trigger the PRA burdens.

This relatively loose reading of the PRA should be welcome news to the Commission, which has invested major resources in re-vamping its online accessibility. (If you doubt that, check out www.reboot.fcc.gov, just as one obvious example.) As a result, you can expect to see more use of social media to identify trends within an industry, brainstorm ideas for potential new regulation or de-regulation or gain a better understanding of the needs and desires of the public in broader areas. You'll be able to go to agency websites and provide your two cents' worth, interact with other interested parties and the agency itself and (at least in theory) help shape the general direction in which an agency moves from anywhere, cutting out the middleman in the process.

Interestingly, while the OMB memorandum is obviously geared to making it easier for agencies to receive input from the public, OMB does not address the converse. The concepts of "transparency" and "open government" seem, after all, to suggest that the inner workings of the government should be plainly visible from the outside. While it is certainly desirable for members of the public to be able to let an agency know what they're thinking, that opportunity is of minimal value unless the public is also given a clear view of how the agency uses – or doesn't use – that input. Think of the Wizard of Oz: while it might have made Dorothy feel good to be able to speak with the Wizard at all, it was obviously much more important for her to be able to do so when the curtain had been drawn back so that she could see the Wizard in action. Ideally, the Administration's commitment to openness will lead it to pull back the curtain on internal agency operations at some point.

Nonconstitutional endgame in sight?



CBS v. FCC: Circuit Seeks Supplemental Submissions

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Last month we reported on the latest development in the long-running saga of the FCC, CBS, Janet Jackson's right breast, and the 2004 Super Bowl half-time show. The Commission was then back up in front of the U.S Court of Appeals for the Third Circuit, arguing its case there (for the second time). During that argument, the Third Circuit panel seemed much more reluctant than their colleagues on the Second Circuit to address concerns about the constitutionality of the FCC's indecency policy (although the Third Circuit seemed clearly to have such concerns). In an order issued shortly after the argument, the Third Circuit directed CBS and the Commission to file briefs by May 18 responding to a number of specific questions that suggest that the Court may be looking to avoid the constitutional questions and decide the case on other grounds.

The question of "willfulness" may be the deciding point in the case this time around.

As we mentioned last month, one of the issues the Third Circuit raised both at oral argument and in its 2008 decision that initially overturned the FCC's fine was whether any violation of the indecency rules by CBS was, or was required to be, "willful". If the Court's recent Order is any indication, the question of "willfulness" may be the deciding point in the case this time around.

In its post-argument order, the Third Circuit noted that the FCC had fined CBS because, despite CBS's "acute awareness of the risk of unscripted indecent material," CBS "consciously and deliberately" broadcast the half-time show without taking "reasonable precautions to ensure that no actionably indecent material was broadcast." The Court has now asked the parties to discuss what level of *mens rea* would be required by such a standard, and whether the Commission had applied the same standard in its earlier decision in *Young Broadcasting* (the so-called "Puppetry of the Penis" case). The Court asked the parties to discuss, as a preliminary matter, the necessary *mens rea* solely on its own terms, without any reference to the level of *mens rea* that may be required by the Constitution or statute.

[*Mens rea*? For those of you who didn't go to law school, or who did but have happily and understandably forgotten much of that experience, *mens rea* is a Latin term which means "guilty mind". Generally, it refers to the state of mind of the accused: for example, was the alleged wrong-doer acting intentionally (in which case it may be appropriate to bring the law down on his/her head) or merely negligently (in which case no penalty may be called for). Historically, the Commission's view has been that pretty much any conduct by a broadcaster is "willful", meaning that the requisite *mens rea* is present to permit issuance of a forfeiture.]

The parties will also have to answer questions of the interpretation and application of the Commission's statutory authority to impose fines. The Commission can generally impose fines under two sections of the Communications Act. Section 503(b)(1)(B) authorizes the FCC to impose forfeiture penalties against any party that "willfully" violated the Communications Act or any Commission rules. Section 503(b)(1)(D) allows imposition of forfeitures where the Commission determines that a party has violated one of three specific sections of the Criminal Code (including the section governing obscene or indecent broadcasts). The language of Section 503(b)(1)(D) does not mention willfulness or any other type of intent.

The Court has directed the parties to address what *mens rea* is required for the FCC to impose a forfeiture under either of these two sections, and specifically whether CBS could be liable under the "willful" standard in 503(b)(1)(B) if it did not intend to broadcast the specific indecent material at issue in the case (*i.e.*, the flash of Ms. Jackson's breast). In a question the answer to which could have important implications for the Commission's enforcement regime generally, the Court also asks whether the Commission's interpretation of these sections of the Communications Act is entitled to deference by the Court.

Finally, in what may be a sign of the direction of the Court's thinking, the Court asked whether the FCC, in imposing its fine on CBS, had relied on Section 503(b)(1)(D) at all, and if not, whether the Commission is foreclosed from relying on that section now. In the Court's words, "If [the Commission cannot rely on Section 503(b)(1)(D)] and CBS cannot be held liable under §503(b)(1)(B)'s willfulness standard unless it intended to broadcast the specific material found indecent, is the FCC's *Forfeiture Order* invalid, such that the appropriate remedy is to grant the petition for review without remand?"

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What goes up . . .

2010 Reg Fees – Trending Down!

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If it's Spring, it's time for the FCC to propose new regulatory fees that will be payable in late Summer. And sure enough, the Commission has released its annual Notice of Proposed Rulemaking laying out a tentative fee schedule. The Commission invites comments on its proposals, but if you think you might want to throw in your two cents' worth, you'll have to act fast. The deadline for comments on the proposed fees is ***May 4, 2010***; reply comments may be filed through ***May 11***.

The good news is that, unless you're a UHF TV licensee (or a VHF licensee in certain markets), you're probably not going to have a problem with the proposed fees. All AM and FM license fees are proposed either to go down or to stay at last year's levels. All VHF license fees for Markets 11-25 and Markets from 51 on down would also go down (as would the fees for all VHF CPs). No change is proposed for translators/ boosters – FM or TV – or LPTVs; ditto for broadcast auxiliary licenses. UHF CPs would go up (but only by $75), as would AM CPs (by $20), while FM CPs would go down by $20.

The Commission is proposing to do away with its postcard notification system.

All you full service TV operators – heads up. The Commission has previously exempted digital TV operations from reg fees because the DTV transition was still underway. As we all know, the transition was completed as of June 12, 2009, so we can kiss goodbye to the digital exemption. And while reg fees will be determined by the status of your authorization as of October 1, 2009, note that a special temporary authorization for DTV operation in effect as of that date will count as a "license" for fee calculation purposes this year.

A table reflecting the proposed 2010 reg fees is printed on the opposite page. The numbers in parentheses reflect the amount of the proposed changes from last year's fees – and as a visual aid, we have indicated proposed fee increases in red, and proposed reductions in cool blue.

The proposed fees are just that – proposals. We won't know the final fees until sometime this summer, although historically the final fees tend not to stray too far from the initial proposals. We also do not yet know when the fees will be due, although that tends to be in September (or possibly August). Look for an announcement sometime in mid- to late Summer.

One last highlight of the NPRM. The Commission is proposing to do away with the postcard notification system by which it has, for several years, alerted broadcast licensees of their primary fees. The postcards will still go out this summer, but starting in 2011, media licensees would be on their own to determine the fees they owe. (This is part of an effort by the FCC to become "more electronic and less paper-oriented".) If you would like to comment on this particular proposal, the Commission is going to leave the comment/reply comment period open until ***September 30, 2010*** for that limited purpose.

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It's pretty easy to guess how CBS and the FCC will answer that question. What remains to be seen, however, is where the Court ultimately comes out. Whichever way the Court is leaning on these issues, the Order does suggest that it is perhaps somewhat reluctant to reach the constitutional issues presented by the case. Indeed, the Court's questions seem to present a path by which it could overturn the FCC's decision without even addressing whether the broadcast itself was indecent.

Even if the Court does not reach the constitutional issues, however, its decision could have a significant impact not only on the Commission's indecency enforcement regime, but on its forfeiture regime more generally. Little if any attention has been paid by the courts to the issue of *mens rea* in Commission enforcement actions. The Third Circuit's obvious interest in precisely that issue could lead the Commission into some unexpected rough waters.

The parties' responses to these questions, which are due May 18, should provide some interesting reading.

FEE CATEGORY	PROPOSED FY 2010 Annual Regulatory Fee (USD)
TV VHF Commercial Stations	
Markets 1-10	**78,000 (+$425)**
Markets 11-25	**60,525 (-$25)**
Markets 26-50	**40,675 (+$3,100)**
Markets 51-100	**22,725 (-$225)**
Remaining Markets	**5,875 (-$75)**
Construction Permits	**5,875 (-$75)**
TV UHF Commercial Stations	
Markets 1-10	**25,300 (+$1,050)**
Markets 11-25	**24,850 (+$3,325)**
Markets 26-50	**13,750 (+$400)**
Markets 51-100	**8,225 (+$625)**
Remaining Markets	**2,025 (+$75)**
Construction Permits	**2,025 (+$75)**
Low Power TV, TV/FM Translators/ Boosters	**400 (No Change)**
Other	
Broadcast Auxiliary	**10 (No Change)**
Earth Stations	**230 (+$20)**
Satellite Television Stations	
All Markets	**1,250 (-$25)**
Construction Permits	**640 (-$10)**

Commercial Radio Stations						
Population Served	**AM Class A**	**AM Class B**	**AM Class C**	**AM Class D**	**FM Classes A, B1 & C3**	**FM Classes B, C, C0, C1 & C2**
<=25,000	**650 (-$25)**	**550 (NC)**	**475 (-$25)**	**575 (NC)**	**625 (-$25)**	**800 (-$25)**
25,001 -75,000	**1,300 (-$50)**	**1,075 (NC)**	**725 (-$25)**	**875 (NC)**	**1,250 (-$75)**	**1,400 (-$50)**
75,001 -150,000	**1,950 (-$75)**	**1,350 (NC)**	**950 (-$50)**	**1,450 (NC)**	**1,725 (-$100)**	**2,600 (-$125)**
150,001- 500,000	**2,925 (-$125)**	**2,300 (NC)**	**1,425 (-$75)**	**1,725 (NC)**	**2,650 (-$150)**	**3,400 (-$150)**
500,001 -1,200,000	**4,225 (-$175)**	**3,500 (NC)**	**2,375 (-$125)**	**2,875 (NC)**	**4,225 (-$225)**	**5,000 (-$225)**
1,200,001- 3,000,000	**6,500 (-$250)**	**5,400 (NC)**	**3,575 (-$175)**	**4,600 (NC)**	**6,875 (-$375)**	**8,000 (-$350)**
>3,000,000	**7,800 (-$300)**	**6,475 (NC)**	**4,525 (-$225)**	**5,750 (NC)**	**8,750 (-$500)**	**10,400 (-$450)**
AM Radio Construction Permits	**420 (+$20)**					
FM Radio Construction Permits	**630 (-$20)**					

Mark your calendars

HD Radio Power Increase Recon Deadline Set

By Dan Kirkpatrick
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Back at the end of January, the Media Bureau announced that it was amending the rules to give a leg up to HD Radio. (We covered that announcement in the February *Memo to Clients*, and also on our blog at www.CommLawBlog.com.) Now, more than two months later, the Bureau's Order has been published in the Federal Register This starts the 30-day clock for anyone seeking reconsideration or review of the revised rules. Petitions for reconsideration or applications for review are due no later than Monday, ***May 10, 2010***.

The Media Bureau continues to accept requests for STA to increase digital power.

As we reported back when the January Order was released, the new rules will allow dramatic increases in operating power for IBOC digital FM service: most stations will be allowed to increase their digital power by 6 dB upon a simple notification to the Commission, and increases up to 10 dB over current levels may be possible for many stations. The January Order also adopted a detailed complaint process, although that process is not particularly user-friendly and may not be all that a potential victim of interference would have hoped.

While Federal Register publication starts the recon clock, it does ***not*** mean that the new rules are now effective, nor does it tell us precisely when the rules will become effective. Because of the intricacies of the Paperwork Reduction Act, the new rules require approval by the Office of Management and Budget (OMB). The rules cannot become effective until the *later* of (a) 30 days after Federal Register publication of the Order (*i.e.*, by May 10), or (b) when the new rules have been approved by OMB and notice of that approval has been published in the Federal Register. Although the Commission has submitted its request for approval to OMB, OMB has its own separate comment period which will not wrap up until May 4. It's anybody's guess as to how long OMB approval may take – sometimes OMB acts quickly, other times not so much.

In the meantime, however, the Media Bureau continues to accept requests for STA to increase digital power. If you're interested in seeking such an STA, check out the guide the Bureau has provided for that purpose (you can find a link to that guide in our 4/8/10 blog post).

(Continued from page 1)

only makes sense that they should be involved in the planning of those changes as early in the process as possible. Cellular providers participating in the Commercial Mobile Alert System (CMAS) likewise should embrace the opportunity to shape rules which have never before been applicable to the industry.

The PSHSB invitation for comments casts a very wide net. Essentially, it asks for any and all suggestions about how any aspect of the EAS rules might be modified in connection with the shift to a CAP-based alerting approach. Interestingly, the PSHSB is ***not*** a formal notice of proposed rulemaking (NPRM) (even though a fine print reference in the Federal Register version might suggest otherwise). That's because the Commission is not now in a position to offer any concrete proposals about its own rules – and won't be in such a position until FEMA gets the ball rolling by formally adopting CAP standards. Once FEMA's standards are in place, the FCC (and other agencies) will have to hustle to overhaul their systems to assure that they can interact and interconnect with the CAP system. That's when we can expect to see an extensive and detailed NPRM.

And when that happens, we can expect the rulemaking to be expedited to the max. The new CAP-friendly EAS system is targeted to be in place – with all industry participants able to accept CAP-based alerts – within 180 days of the formal publication of FEMA's CAP technical standards. And for the FCC – an agency not known for its ability to make quick decisions – the 180-day deadline can be expected to be a challenge, especially since the precise starting date won't be known until FEMA gets around to publishing its standards. But since FEMA has indicated that that could happen sometime from July-September, the FCC can at least start pulling together some preliminary thoughts now. And that's the process the PSHSB invitation is designed to get rolling.

Comments are due ***May 17, 2010***; reply comments are due ***June 14, 2010***. Please contact us if you would like assistance in submitting comments.

Concentrated alphabet soup?

Plans Advance To Consolidate Licensing Systems

ASR+COALS+CDBS+ELS . . . = CLS

By Denise A. Branson, Paralegal
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The FCC is determined to improve all of its electronic filing systems and combine them into a single Consolidated Licensing System (CLS). A Roundtable Panel of industry experts, including FHH's own Peter Tannenwald, has been enlisted to participate in a Workshop to help the Commission through that process. The panel will address such issues as: industry- and user-specific electronic filing issues; data availability and searching; consistent terminology; functionality/features; error checking; notifications; system deployment; and any exceptions. The workshop was originally planned for April 7, but was postponed because of a bomb scare. It has since been rescheduled for May 6.

The systems currently included in this review are: the Antenna Structure Registration System (ASR); Cable Operations and Licensing Systems (COALS); Consolidated Database System (CDBS); Experimental Licensing System (ELS); International Bureau Filing System (IBFS); and Universal Licensing System (ULS). It is anticipated that the General Menu Reports System (GENMEN) will also be included in CLS, and that the Wireline Competition Bureau's manual filing system will be transitioned into CLS. (These systems are maintained separately by the various Bureaus, but have common data points.)

The CLS is expected to streamline access to electronic filing and underlying data. Potential new features include a Single Sign-On, a CLS Manager, and Consolidated Commission Forms. CLS is also expected to be a "Green" system with improved application processing time.

The Single Sign-On (SS-O) design is expected to provide access to all applications, licenses, and authorizations associated with an FRN. SS-O would also enable access to a CLS Manager which could display application- and authorization-related alerts. Additionally, the SS-O feature would provide one-stop shopping for the licensee to receive courtesy reminders, notifications, and alerts regarding all its authorizations and applications.

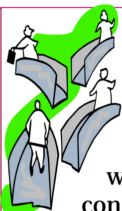
The FCC's game plan envisions a "Consolidated Commission Form" to streamline virtually all application processes. This would include a "Main Form" to collect information applicable to all license and application types, followed by sub-forms to collect Bureau-specific information. This is an expansion of the approach currently used by the Wireless Bureau in its Form 601.

At the end of the CLS path? Nothing less than the end of paper filings

Implementing such an approach will entail considerable complicated effort – including consolidation of many forms and adjustments of rules and procedures. Bottom line: don't expect implementation any time soon. In fact, the FCC expects the implementation to occur gradually over the course of years, with new features added on as elements of the system are deployed. Implementation will occur in phases; CDBS is expected to be dealt with in the first phase.

And at the end of the CLS path, we should find nothing less than the end of paper filings. The Commission has already reduced the number of paper filings to a relative minimum, but the official End of Paper will mark a significant milestone in the evolution of the Commission's processes.

If you have ideas about how to improve the FCC's electronic filing systems, the FCC wants to hear about them. A CLS page has been established on the FCC's Reboot page (http://reboot.fcc.gov/reforem/systems/cls) through which it is collecting public ideas and questions. During the Workshop, the public will be encouraged to comment and ask questions in person or remotely using the Web-Ex tool (https://fccevents.webes.com/fccevents/onstage/g.php?t+a&d=990665734 – registration is required). Further, the FCC has established a docket (MD Docket 10-73) in which it intends to release a Notice of Proposed Rulemaking inviting additional comment after the Workshop.



FHH - On the Job, On the Go

On May 14-16, **Kathleen Victory** and **Peter Tannenwald** will be attending the National Translator Association annual convention in Reno.

On May 23-25, **Kevin Goldberg** and **Dan Kirkpatrick** will be attending the Media Finance Focus conference in Nashville. On May 23, **Kevin** will be speaking about compliance with the statutory copyright license applicable to webcasting. Two days later, **Dan** will be speaking on a panel concerning media ownership.

On June 17, **Paul Feldman** will be speaking on net neutrality at OTTCon in Atlanta.

Beyond net neutrality

Broadcasting In The Wake Of *Comcast*

By Lee G. Petro
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While most attention on the aftermath of the *Comcast* decision has tended to focus on the decision's impact on net neutrality and the implementation of the National Broadband Plan (NBP), the seismic wave from *Comcast* and its aftershocks could reach well beyond those obvious targets. Local TV broadcasters, in particular, might want to pay attention to how *Comcast* might play out in their corner of the regulatory universe.

For example, the NBP contemplates that spectrum currently in use by TV stations might be re-purposed for broadband. To wrest that spectrum away from the television operators who now hold it, the Commission has suggested that it might work some kind of deal in which: (a) the spectrum would be "voluntarily" relinquished by the broadcasters; (b) the recaptured spectrum would then be auctioned off; and (c) the broadcaster would be entitled to a portion of the auction proceeds.

The FCC's ability to secure spectrum commitments from broadcasters is likely diminished by Comcast.

But the FCC's authority to cut this kind of deal in any event is far from clear. While the Commission is unquestionably authorized to conduct spectrum auctions, that authority does not obviously extend to cutting deals to kick-back auction proceeds to private parties. And any hope that such deals might be seen as "ancillary" to other authority is dimmed by *Comcast.* That in turn means that the FCC's ability to secure spectrum commitments from broadcasters is likely diminished. Why, after all, would a broadcaster commit to turning in its spectrum if the FCC is not in a position to guarantee any repayment that might be part of the deal? As a result, the Commission should not expect much enthusiasm from broadcasters unless and until the Commission can demonstrate that it will be able to make good on any payment deals it may try to cut.

Another possible ripple effect of *Comcast* on the broadcasting terrain: let's not forget that Comcast, the folks who landed the knock-out punch on the FCC in the eponymous *Comcast* case, are also the folks who are currently trying to get the FCC to approve a massive merger with NBC Universal. Now that Comcast's ability to restrict, legally, Internet traffic contrary to the FCC's preference has been established (thanks to the D.C. Circuit), the FCC (and other governmental authorities) may not be especially gung-ho about giving Comcast even greater control of more media than it already holds. If Comcast's practice of jiggering with its subscribers' Internet access is deemed potentially anti-competitive, the Feds might be expected to be reluctant to increase any perceived competitive advantages for Comcast.

Of course, in light of such concerns, the Powers That Be (whether that might be the FCC, DOJ or Congress) might attempt to extract "voluntary" commitments from Comcast and NBC, much as they did in connection with the Sirius/XM merger. Could the Commission then impose conditions that look remarkably like net neutrality requirements – even though the FCC might not have the authority to impose such requirements industry-wide? Conceivably, since the FCC's clear authority to act on the merger request would arguably provide it the related authority to impose conditions on any grant of that request. Such conditions could have an impact on competition in both the online media *and* the cable industries, not to mention the broadcast business – in all of which Comcast plays a major role.

On the other hand, even if the Commission were to offer grant of the merger in return for concessions or commitments from Comcast, who's to say that Comcast would accept the deal? Presumably, Comcast would not do so unless the deal made good business sense.

Another possible impact zone from *Comcast*: retransmission consent. As has been widely reported, the cable industry has filed a petition for rulemaking seeking overhaul of the current retransmission consent process. Thus far the FCC has appeared to be receptive to the idea. But a large number of fixed broadband service providers are cable companies, and those companies can now restrict internet traffic (thanks to *Comcast*), giving them a potential competitive advantage. How eager will (or should) the Commission be to give the cable industry a further leg up over competitors in the retrans consent process?

At this point we can only guess about how any or all of this will shake out. But it is important to recognize that the impact of *Comcast* is not likely to be limited to issues of net neutrality. In any event, television broadcasters should keep a wary eye on their own situation. They may still be looking at a decidedly unattractive future: packed tighter than ever in the broadcast band, stiffed by the FCC on any kick-back payments from spectrum auctions, and losing a steady source of revenue to the network, which just merged with the largest cable company.

Taking the path of least resistance

Proposed 2011-2015 Webcasting Rates Up For Discussion

By Kevin M. Goldberg
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When it comes to setting the royalty rates and related terms governing webcasting, the Copyright Royalty Board (CRB) rules. It does so through formal proceedings which result in rates/terms applicable for five-year periods. This time around, the CRB appears to be acknowledging that the private sector might have a better handle on things than does the CRB. Rather than propose a new, CRB-developed structure for 2011-2015, the CRB is looking to impose overall terms and conditions identical to those reached in privately-negotiated settlement agreements developed in 2009.

The CRB's approach is a concession to the shortness of life and the difficulties of the rule-making process. Last time around, the CRB's proceedings dragged on so much that its ultimate decision didn't make it into the Federal Register until May, 2007, almost a year and a half *after* the term to which that decision applied (*i.e.*, 2006-2010. When it finally was issued, the decision was almost immediately panned by just about all concerned. It was appealed (without much success). Legislation aimed at deep-sixing it was introduced (also without much success).

This time around it looks like the CRB has learned from its last experience.

And eventually, the parties to whom the CRB's ruling was meant to apply took matters into their own hands. In 2009 they negotiated alternative royalty rates and playlist reporting requirements which allowed them to effectively side-step the ruling.

This time around it looks like the CRB has learned from its last experience. The first step of the 2011-2015 rate-making process required a three-month negotiation period between all parties. The idea, presumably, was that the CRB will encounter far less resistance if it adopts an approach to which those subject to the approach have already agreed. The CRB appears to have hit the nail on the head, as these initial negotiations have borne fruit for some webcasters.

The CRB is now effectively proposing to adopt the terms of two of the 2009 agreements as the official rules governing the 2011-2015 term after parties to those agreements suggested that their agreed-to terms might usefully be applied to all similarly-situated webcasters. The main difference: where the 2009 settlement agreements were elective (*i.e.*, parties could choose to be subject to the agreements or not), the agreed-to terms will now govern all webcasters in the relevant category.

The particular agreements relate to (a) participating commercial broadcasters and (b) noncommercial educational broadcasters streaming on the web. (Commercial broadcasters and noncommercial webcasters remain free to enter into their own individual, private, and voluntary agreements in lieu of the regulations but, of course, the entire purpose of a statutory licensing scheme is to relieve copyright users of that burdensome task.)

The full terms proposed by the CRB may be found in the notice of proposed rulemaking published in the Federal Register on April 1. You can also find summaries of the agreements on which those terms appear to be based (*i.e.*, the settlement between SoundExchange and the NAB regarding commercial broadcasters and the settlement between SoundExchange and noncommercial educational webcasters) on our blog at www.CommLawBlog.com.

Note that these are still just ***proposed*** rules. Final adoption by the CRB is probably several months off, but you can never really tell. In any event, the new rules won't go into effect until January 1, 2011.

We'll follow up on this with regard to any further developments with regard to the 2011-2015 terms and conditions for commercial broadcasters, noncommercial educational webcasters, as well as any developments in the other proceedings of interest to the webcasting community (primarily noncommercial, but not educational, webcasters). Stay tuned.

Revised Form 323 Available - April 9, 2010

Bureau announces July 8, 2010 deadline for filing November 1, 2009 information

It's official!! The Media Bureau has announced that, as of April 9, 2010, the revised Form 323 to be used by commercial broadcasters for their biennial Ownership Reports is available for use. Disappointingly (but, given its track record in this matter, not surprisingly), the Bureau's public notice does not bother to address any of the serious problems that have plagued its efforts to revise the form. Instead, the notice imposes a deadline of ***July 8, 2010***, for the completion and submission of biennial Ownership Reports for all commercial broadcast licensees. Oh, and it also reminds us that the information to be submitted on that report must reflect the reporting licensee's ownership ***as of November 1, 2009***.

The Bureau encourages everybody to file "as early as possible".

Blunt talk about marijuana spots

Reefer Madness: The Dope On "Joint" Sales Advertising

By Harry C. Martin
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Back in the day, the mere broadcast of a song which *might* have something to do with drugs could bring the Feds down hard on a station. You old-timers might remember back that far. (You young 'uns should check out 28 FCC2d 409 and 31 FCC2d 377 if you have any questions.)

What a difference a couple of decades make! Now not only can you play songs about marijuana, but you might even be able to *advertise* the stuff. Is this a great country or what?

There are, of course, all sorts of catches, so read on.

Marijuana is a controlled substance and its sale or distribution is prohibited under Federal and state narcotics laws. However, last October the Department of Justice announced formal guidelines governing its enforcement policy with respect to medically-prescribed marijuana in those states where medical use of the drug is now legal. (About a dozen states have legalized medical marijuana so far.) In those grass-friendly states the DOJ has ceased prosecutions of legitimate growers and distributors of marijuana intended for medical use.

Legalizing some weed sales has, logically enough, opened up the possibilities for trying to promote such sales through advertising. And sure enough, a number of broadcasters have been asked to run spots for distributors of marijuana, including doctors' offices and retail outlets. Unlike cigarette advertising, there is no FCC rule or policy that prohibits such advertising (although the Commission has long demonstrated a serious antipathy to drug use and distribution generally). In view of the DOJ enforcement policy, it appears that the current Administration is not likely to impose extra burdens on legitimate, state-sanctioned marijuana use – which suggests that advertising dope for such use should not cause problems (just as promotion of gambling in jurisdictions where it's legal has long been approved).

Sure enough, a number of broadcasters have been asked to run spots for distributors of marijuana

However, anyone considering acceptance of medical marijuana ads should pay careful attention to factors such as the following:

- The distribution of marijuana for medical purposes must be permitted by state law in the area served by the station.
- Stations whose signals reach portions of states where medical marijuana has not been legalized may still be subject to Federal prosecution.
- A station accepting such ads must do a minimum of due diligence to make sure the advertiser is legitimate and not a drug trafficker masquerading as a medical dispensary.
- Advertising copy should be carefully screened to make sure it promotes use of marijuana to be dispensed under a doctor's prescription. Local counsel should be consulted if there is any question about whether the ad describes an activity that might be considered to violate a state's medical marijuana law.

There is risk involved in accepting medical marijuana ads even if these guidelines are followed. A mistake regarding the bona fide nature of an advertiser, or about interpretation of your state's medical marijuana law, could result in legal trouble. A drug conviction, even for an inadvertent violation, could have serious implications at FCC license renewal time. And remember, the FCC itself has not yet formally addressed this question – even though the DOJ has clearly signaled a disinclination against bringing the law to bear against medical users who have their state's blessing.

So the likelihood of being criminally prosecuted for advertising a product that is now legal (at least for medical uses) throughout your state and service area appears to be relatively small. But remember, applicable Federal anti-narcotics laws have ***not*** changed. All that's changed is the DOJ's enforcement policy. A violation of a state's medical marijuana law could still have adverse legal consequences at both state and Federal levels, and ultimately at the FCC.

Watts Up, Doc?

Proponent: Throw More Power At Ambient Interference Problem For AM Stations

By Richard Swift
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Richard Arsenault is back with another idea to help AMers. Mr. Arsenault is the gentleman who just a couple of months ago urged that a considerable number of Class B and D AM stations be permitted to start presunrise operation at 5:00 a.m. (regardless of when sunrise actually happened to be). (We described that proposal in last month's *Memo to Clients*.) His latest proposal would affect ***all*** AM stations by allowing all AM stations to increase their daytime power tenfold (10 dB) (or at least fourfold, by 6 dB, if the 10 dB won't fly).

His logic really can't be faulted. Mr. Arsenault believes that, while the AM 0.5 mV/m contour is theoretically protected – and, therefore, listenable – in fact nonbroadcast interference routinely overwhelms service out to that protected contour. The result is an often unlistenable cacophony where there should be sweet AM signal. The interference emanates from sources like power lines and a broad array of electronic devices. Arsenault asserts – and who can seriously challenge him on this? – that things will only get worse. As a result, listeners who should, in theory, be able to receive reasonably strong AM signals will increasingly hear noise.

Proposal: A substantial across-the-board daytime power increase to drown out the static.

His solution? A substantial across-the-board daytime power increase to drown out the static. As he sees it, a tenfold power increase would allow all stations to break through all but the worst interference, thereby giving the AM aficionado a fine selection of strong stations in place of the interference-wracked options currently available. And the beauty of his vision is that, if all AM stations increase their respective powers at the same time, they will not interfere with one another any more than they do now, since the relative strengths of their signals will be unchanged.

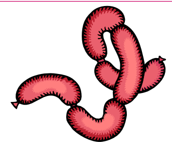
Thinking practically, Arsenault suggests that a six-month grace period be established to allow stations the time necessary to implement the upgrades. No application would be necessary – just an after-the-fact notification to the Commission of the degree of power increase and the date of implementation. The opportunity to take advantage of the power upgrade opportunity would run for five years.

Arsenault acknowledges that "there are details that will need to be addressed before implementation", but that his petition "should open discussion on this concept".

While the notion of a 10 dB (or even 6 dB) across-the-board daytime power increase may be attractive to many, if not most, AM licensees, it has at least one major drawback: in order for it to work, ***all*** stations would have to upgrade themselves. Otherwise, stations choosing, for whatever reason, not to increase power would be drowned out *not* by nonbroadcast background RF, but by their bulked-up AM confrères. And it's easy to see why some AM folks might choose not to ramp up: the cost of new equipment alone might be prohibitive, not to mention the likely increase in power costs. After all, cranking up your power by a factor of six or ten will require significantly greater power. (By way of simple illustration, a station currently operating at 50,000 watts would, with a tenfold power increase, get cranked up to half a million watts!)

The FCC invited comment on Arsenault's last petition for rulemaking, although it's far from clear that that proposal will get very far beyond that procedural step. We will let you know if the Commission invites comments on Mr. Arsenault's latest.

Hot Links, Big Ink!!!

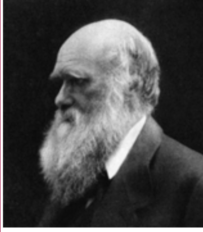


You want links? We've got your links, right here. This past month posts on www.CommLawBlog.com have been linked on the following sites:

Radio World, twice (here and here); Radio; The Hollywood Reporter; the Internet Society—New York Chapter; TheLicensingPlate; FierceWireless; Ars Technica; the Semaphore Group; and multiple times on TVNewsCheck.com. There may have been others — it's so hard to keep track.

And how about ink!! The following FHH attorneys were quoted this past month in trade press reports : **Harry Cole** (on the return of Form 323), **Paul Feldman** (on Net Neutrality), **Dan Kirkpatrick** (more on Form 323), **Mitchell Lazarus**, **Harry Martin** (on marijuana ads), **Frank Montero** (on the Performance Rights Act) and **Peter Tannenwald** (on the Media Bureau's order to amend 10-year-old LPTV applications).

Media Darlings? Who ***isn't*** a media darling around here?



Evolve or die

Turn-of-the-Century LPTV/TV Translator Applications Must Go Digital

By Peter Tannenwald
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In last month's *Memo to Clients* the Updates in the News column noted that the Spring Cleaning bug had hit the Audio Division. The Audio folks summarily dismissed a boatload of FM translator applications that had been sitting around, unprocessed, for about ten years. As it turns out, the same was true of the Video Division as well – but with a twist or two.

Here's what we know for sure: the Video Division has identified approximately 750 LPTV/TV translator applications, all but a small handful with file numbers showing that they were filed back in 2000 and all proposing analog facilities. The Media Bureau has issued a public notice listing all those applications and advising that they ***must*** be amended by ***May 24, 2010***, "to specify digital operations". Applications which have not been so amended by that date "will not be processed", a delicate turn of phrase which we take to mean that those unamended apps will be summarily dismissed.

The applications were originally filed in response to a "filing window" in 2000. The Commission expected that the applications would ultimately be subject to auction, so applicants were required to file only minimal technical information: FCC Form 175 (the FCC's pre-auction form) and an abbreviated version of Form 301-CA (for Class A stations) or Form 346 (for LPTV/TV translator stations). The goal was to get just enough technical information to enable the FCC to determine which applications were mutually exclusive and, thus, would be heading to auction. No filing fees were required.

But now the Commission is looking for much more: the amendments mandated by the latest public notice must include a complete Form 301-CA or 346 and will be considered "major changes". They must be complete, and now a $705 filing fee must be coughed up for each amendment.

The twists?

The FCC's rules specify that a "major" amendment results in assignment of a new file number. The rules also say that applications are filed on a first-come, first-served basis, with each filing taking priority over any conflicting application filed on a later date. Back in 2000, applications filed during the window were all treated as if they were filed on the last day for prioritization purposes – so it didn't make any difference whether you filed on the first day of the window or the last. But if each amendment is assigned a new file number on the day it is submitted, the implication is that the first applicant to amend in 2010 would prevail over any later amenders, even if the later amenders were timely back in 2000 and, thus, presumably entitled to compete in an auction. If that's really how the Commission plans to proceed, it could set off a race to be the first to amend.

That approach – which is ***not*** specifically laid out in the Division's public notice – seemed a bit unusual, upsetting the expectations of those who filed in 2000 – so we dug into the question a bit more and finally got a clarification. Yes, each application may be assigned a new file number on the day it is amended. ***But*** the file number will not necessarily be determinative of any priority because mutual exclusivity among the applications on the list will again be evaluated as of the last day of the amendment period (*i.e.*, May 24), at least if they don't create any new mutual exclusivities that did not exist before. In other words, all amendments filed by May 24 will be prioritized as if they had been filed on that day. So it may be safe to wait until May 24 after all – but since the FCC has not formally announced that this is, in fact, how it will proceed, do you really want to roll those dice?

It may be safe to wait until May 24 – but do you really want to roll those dice?

Another consideration to bear in mind is that although the public notice says that the listed applications must be amended "to specify digital operations", it appears that that's not the only kind of amendment that can be filed. Because the mandated amendments will be treated as seeking "major changes" – as the public notice says – just about ***any*** aspect of the application is fair game for changes: channel, transmitter site, and city of license. In effect, each amendment will be treated as an application for a new station and can include anything that could be included in a completely new application.

And at least *some* such amendments must be contemplated here, because the rules have changed a boatload in the ten years or so since most of the applications were filed. For example, the Commission has stopped issuing new TV authorizations above Channel 51 – but a number of the listed applications specify operation on now-forbidden channels. They must be amended to a lower channel or be consigned to the trash heap. Ditto for folks who had filed for communities within 75 miles of large markets – a zone from which new station applications are excluded. Some applicants, apparently unaware that the same exclusion zones existed in 2000,

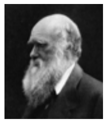
(Continued on page 15)

FM ALLOTMENTS PROPOSED – 3/19/10-4/22/10

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (*i.e.*, Drop-in, Section 1.420, Counterproposal)
TX	Jewett	79 miles SE of Waco, TX	232A	10-65	Comments: 5/17/10 Reply: 06/01/10	Drop-in
CA	Amboy	143 miles SW of Las Vegas, NV	284A	10-63	Comments: 05/17/10 Reply: 06/01/10	Drop-in

Notice Concerning Listings of FM Allotments

Consistent with our past practice, Fletcher, Heald & Hildreth PLC provides these advisories on a periodic basis to alert clients both to FM channels for which applications may eventually be filed, and also to changes (both proposed and adopted) in the FM Table of Allotments which might present opportunities for further changes in other communities. Not included in this advisory are those windows, proposed allotments and proposed channel substitutions in which one of this firm's clients has expressed an interest, or for which the firm is otherwise unavailable for representation. If you are interested in applying for a channel, or if you wish us to keep track of applications filed for allocations in your area, please notify the FHH attorney with whom you normally work.



(Continued from page 14)

specified operations inside the zones. The FCC never examined the technical acceptability of any of the applications. Had it done so, those within the exclusion zones would have been dismissed. If they do not amend to move out of those zones now, they will be toast.

So the story is that if you have an application on the list, you have until May 24 to amend to specify digital operation, clean up and complete the full application form, comply with all current interference requirements, and contribute a non-refundable $705 to the U.S. Treasury – or your application will be out of luck. If you are not on the list, you can still file an application for a new station, since applications outside the 75-mile exclusion zones may be filed at any time under current rules; but any applicants for new stations must protect all applications on the list unless and until the old applications are actually dismissed. Old applicants do not have to protect their own old proposals, so they have more flexibility in what they can put in their amendments.

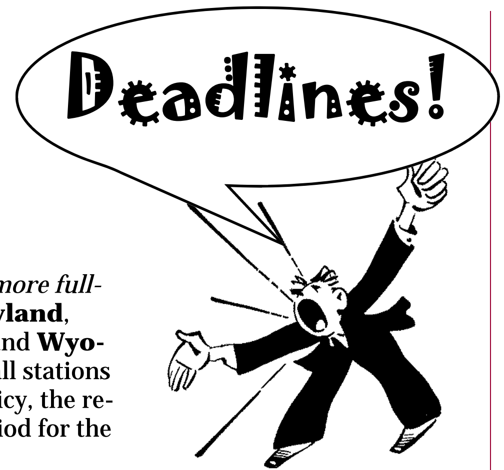
The Division's effort to clear out its closets of a bunch of applications that can't be processed in their current state is understandable. All the listed applications specify analog service, which is so Last Century. The FCC has in effect initiated a partial mandatory transition to digital operation for LPTV stations by deciding that even though existing stations still have no digital deadline, no more construction permits will ever be granted for new analog stations. Moreover, LPTV applications haven't been real money-makers for the Commission auctionwise – in past LPTV/TV Translator auctions, applicants have demonstrated a reluctance to go beyond the minimum bid, if they showed up to bid at all. So the pending applications do not represent a potential treasure trove in unrealized auction revenue for the FCC.

Faced with these circumstances, the Commission opted to require applicants to re-engineer, amend, and pay a hefty filing fee. The result may well be that many drop out, thinning the herd and increasing the chances for settlements among those who remain in the game.

When the dust settles after May 24, few enough applicants may remain to allow orderly processing.

But if the Division is hoping to get rid of some, possibly most, of these applications, why not just toss them – like the Audio Division did in similar circumstances? One distinction between radio and TV: the Video Division does not face the kind of struggle the Audio Division faces between FM translators and low power FM stations, which are different classes of station with different rules with competing interests. On the video side, LPTV and TV translators are treated as essentially the same service for engineering purposes, with stations having the freedom to switch their category at will. Therefore, it is not necessary to put the brakes on one class of station to preserve spectrum opportunities for the other.

Some of the LPTV applicants have already dismissed their applications, and many are likely not to amend. When the dust settles after May 24, few enough applicants may remain to allow orderly processing, settlements, and grants in rural areas where there is a demand for more network repeaters and local programming services.



May 7, 2010

Future of Media - Comments are due in the FCC's proceeding examining in very broad terms the "future of media" in the digital age.

June 1, 2010

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Nevada**, **New Mexico**, **Ohio**, **Utah**, **Virginia**, **West Virginia** and **Wyoming** 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 **Arizona**, **Idaho**, **Nevada**, **New Mexico**, **Utah**, or **Wyoming** must file EEO Mid-Term Reports electronically on FCC Form 397. This report must include copies of the two most recent EEO Public File Reports for the employment unit.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Michigan** or **Ohio** must file a biennial Ownership Report on Form 323-E. All reports must be filed electronically.

Noncommercial Television Ownership Reports - All *noncommercial television* stations located in **Arizona**, **Idaho**, the **District of Columbia**, **Maryland**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia** or **Wyoming** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

July 8, 2010

Ownership Reports - All *licensees* and *entities holding an attributable interest in a licensee* of one or more *AM*, *FM*, *TV*, *Class A television*, and *LPTV* stations must file an initial biennial ownership report on the revised FCC Form 323. For the first time, sole proprietorships and partnerships composed entirely of natural persons (as opposed to a legal person, such as a corporation) must file reports. All reports must be filed electronically.

July 12, 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 year. 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 televisio*n 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.

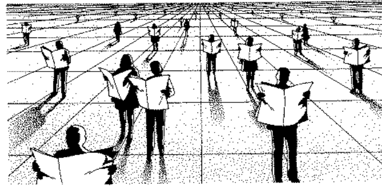
Website Compliance Information - *Television* station licensees must place and retain in their public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

Issues/Programs Lists - For all *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues must be placed in the station's local public inspection 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.

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

Updates On The News

Jefferson Radio revisited – About a million years ago (actually, it was just five years ago, in early, 2005 – it just seems like a million years ago), the Media Bureau approved the sale of several stations out in Oklahoma. Not particularly noteworthy, except that the 100% owner of the seller happened to have been convicted of a number of criminal offenses, including election law violations and perjury. With grant in hand the buyer and seller closed the deal pronto, but then the full Commission, apparently reacting to a PR campaign seemingly designed to question the propriety of the grant, announced that it was going to review the Bureau's decision. (We wrote about this in the March, 2005 *Memo to Clients*.)



Fortunately for buyer and seller, the Commission did not rescind their grant or make them un-do the closing. Fortunately, that is, because it has taken the Commission more than five years to complete its review. The good news (at least for the parties to the application) is that the Commission has decided to let the grant stand . . . but not before taking a couple of swipes at the Bureau.

The Bureau was acting pursuant to the *Jefferson Radio* doctrine. That doctrine governs the rare-to-the-point-of-extinction situation in which Really Serious Questions have been raised about an incumbent licensee's qualifications to remain a licensee. Historically, the Commission would not let licensees in such situations sell their stations. The thinking was that, if the licensee is not qualified to hold its license, then it doesn't have anything to sell – so let's decide the qualifications questions first before we decide whether to let him take the money and run. The *Jefferson Radio* doctrine carves out some limited exceptions, mainly involving sellers in failing health – as long as the wrongdoer won't be realizing any profit from the sale.

As it turns out, the 2005 sale did put some profit in the seller's pocket. That was a no-no, the Commission now concludes. But the Commission still blesses the deal because, among other things, to do otherwise would create a "potentially serious disruption of service to the public". Oh yeah, and the Commission also acknowledges that any further inquiry into the seller's qualifications would be hampered by the fact that, back in December, 2007, a Federal court had determined that the seller has dementia and would be incompetent to assist in his own defense.

The Commission seems to be saying, "let's just move along, folks, the show's over, nothing to see here."

So the *Jefferson Radio* doctrine is still alive and kicking. But you have to wonder exactly why it is that the Commission itself took the extraordinary action, five years ago, of insisting on reviewing this case at all.

Now on sale – last year's rules! – The Commission has announced that the latest printed edition of its rules is now available through the Government Printing Office. The broadcast rules (Part 73) are contained in a volume that runs from Parts 70 to 79, for the mere pittance of $93.80. Throw in the volume that includes, among other things, the procedural rules (in Part I) – for another $93.80 – and your library is looking more complete. Or really splurge and go for the full five-volume set for a total price of $385.

But wait. Did we mention that these volumes (whose availability was announced by the FCC on April 2), reflect the rules only as of September 30, 2009 – that would be six months earlier. Like nothing has happened in the intervening six months? While it's always nice to have good hard copies of printed matter available – they look great on bookshelves in the GM's office, don't they? – we might point out that, if you're looking for an actual up-to-date source for the Commission's rules, you might want to try the GPO's e-CFR website (short for "Electronic Code of Federal Regulations"). You can find a link to that site in the "FCC Resources" listing on our blog at www.CommLawBlog.com (look for the link to "FCC Rules"). That will take you to an official GPO site where the rules are current to within 48 hours. Plus, you can search the text of the rules online if you're looking for specific words or phrases.

Or you can ship off your $400 and hope that the hard copies get delivered before they get much more out of date.

Life in the trenches – Apparently, every year an Employee Survey is conducted at the FCC. Who knew? The 2009 survey was conducted in December, and the results were released last month. Some highlights:

- *The right tool for the job* – Fewer than 40% of the respondents agreed (strongly or otherwise) that "[m]y work unit is able to recruit people with the right skills."

- *Life in a meritocracy* – Only 26.1% of the respon-

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FCC's own language in the Diversity Order – referred to "race and gender", rather than "race and ethnicity". We know now that that was wrong – but how was anybody to know that before the recent Erratum, since the Commission had been very clear up to that point that it was targeting discrimination against "race and *gender*"?

In any event, anyone who has been trying to assure their ability to certify accurately that they have complied with the FCC's nondiscrimination policy – whether by sticking our suggested contract language or somebody else's into their advertising contracts – would do well to take the time, now, to substitute "ethnicity" for "gender" where appropriate. And if you previously sent out letters to all your advertisers indicating that the nondiscrimination language should be deemed to be a part of all agreements previously entered into, you might want to send out another batch of similar letters, this time substituting (you guessed it) "ethnicity" for "gender".

Is it really advisable to impose a blanket prohibition which seems to bar, or at least discourage, all ethnicity-based advertising?

And now that the Erratum has re-focused everybody's attention on the nondiscrimination certification requirement, we offer a couple of questions to ponder.

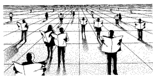
First, when the renewal application certification language is finally adopted by the Commission, how will it deal with the fact that, from 2008-2010, the agency's direction had been to avoid discrimination based on "race and gender", *not* "race and ethnicity"?

Second, how are we to interpret the fact that the Commission has removed "gender" from the mix, rather than simply inserting "ethnicity" along with "race" and "gender". Doesn't that seem to send the somewhat distasteful message that advertising contracts that discriminate based on gender are OK?

Third, while we may all agree that ethnic discrimination can be a bad thing, is it really advisable to impose a blanket prohibition which seems to bar, or at least discourage, *all* ethnicity-based advertising? For example, if an advertiser wants to target a particular ethnic community with spots in that community's native tongue, wouldn't it be perfectly reasonable to limit the run of those spots to stations broadcasting in that language? So if you have an ad in Chinese, directed (obviously) to a Chinese-speaking audience, wouldn't you want to be able to specify "Chinese language radio only, no English or Spanish or Arabic"? But wouldn't such a limitation run afoul of the nondiscrimination policy as it currently stands? Is this really what the Commission wants?

Fourth, where do noncommercial stations fit in here? The Diversity Order (at Paragraphs 49-50, if you're inclined to check) referred only to "advertising" contracts. As we all know, NCE stations air "enhanced underwriting announcements", not ads. But many might argue that it's all pretty much the same thing. Plus, NCE stations use the same Form 303-S as commercial licensees for their renewals. Our guess is that NCE licensees are subject to the nondiscrimination policy, but the Commission hasn't said so expressly.

And finally, exactly how does imposing the new certification requirement on all broadcasters (including broadcasters who may themselves happen to be the victims of the "No Urban/No Spanish" practices) have any effect at all? Isn't it the advertiser (and its ad-buying agency) – and *not* the broadcaster – who is the real source of this practice? If an advertiser (or its agency) is willing to discriminate, what is to prevent it from lying to the broadcast station? In other words, irrespective of a licensee's certification, the underlying discriminatory practices may still be going on outside the Commission's reach.



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dents agreed (again, strongly or otherwise) that "[i]n my work unit, steps are taken to deal with a poor performer who cannot or will not improve." Significantly more than 37% ***dis****agreed*, 15.2% of them strongly.

- *Role models 'r' us* – The Commission did fare a bit better with the statement "My organization's leaders maintain high standards of honesty and integrity". Agreers/strong agreers amounted to 60% on that one – but a surprising 16.2% disagreed, with 9.2% disagreeing strongly — meaning that 9.2% of the respondents feel strongly that their leaders are not particularly honest or over-encumbered with integrity.
- *Fair and balanced* – "Arbitrary action, personal favoritism and coercion for partisan political purposes are not tolerated." Gee, that should be a no-brainer, right? Apparently not. A bare majority (51%) agreed (strongly or otherwise) with that, while nearly 20% disagreed, 9.2% disagreeing strongly. Not a real confidence-builder there.
- *Our safety, your concern* – And finally, the statement which garnered more overall "positive" responses (90.4%) than any of the other 82 questions, with fewer than 1% disagreeing at any level: "I would be disciplined or punished if I assaulted somebody at work."