Fletcher, Heald & Hildreth

Memorandum to Clients

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Ownership Report 2011

Form 323 Deadline Extended to December 1, 2011
FCC mum about June, 2010 re-interpretation
of Social Security Number question

By Harry F. Cole
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Has it really been two years already?

The Commission has announced that the time has come for the next round of biennial Ownership Reports (Form 323) for commercial broadcasters. And get this, the initial public notice about the upcoming deadline for filing pushes that deadline back a month, to ***December 1, 2011***.

Note that the last round of Form 323s was filed in July, 2010, which (contrary to the whole "biennial" aspect of things) isn't really a full two years ago. As long-time readers may recall, that initial round was originally scheduled for the fall of 2009, but got postponed several times. (You can read a collection of our posts about the FCC's 2009-2010 Form 323 travails at our blog – www.CommLawBlog.com – just search for "Form 323".)

Form 323 requires all commercial licensees to file reports by a uniform nationwide deadline, once every two years. The next reports were to be due November 1, 2011, reflecting ownership data as of October 1, 2011. Apparently responding to concerns that one month is not enough time to compile data and submit a report, the FCC has extended this year's filing deadline to December 1, 2011. This is a one-time extension and does not apply to reports due in 2013 and subsequent years (at least for now).

Inside this issue . . .

The ownership information to be reported must still reflect the reporting entity's relevant information as it stands of October 1, 2011. Reports may be filed any time between October 1 and December 1; they must be filed electronically on Form 323, using the FCC's electronic CDBS system. A filing fee must be paid at the time of filing.

The Commission's terse notice doesn't get into the nitty-gritty specifics of Form 323, but merely refers interested readers to the form's instructions and to the FAQ page about the form on the Commission's website. We'll be on the look-out for some clarifications at both of those locations in coming days, though, since neither the form itself nor the FAQ page addresses an important change that the Commission committed to back in late June, 2010.

The change involved the question of including separate FCC Registration Numbers (FRNs) for each individual and entity reflected in each report, whether or not that individual or entity was in fact the licensee or even in a position to wield anything akin to control of the licensee.

We won't bore you with the details of the back-and-forth we had with the Commission on that touchy point – you can read all about it on our blog. All you – and apparently, the folks at the Commission – need to recall is that we here at FHH (on behalf of ourselves and a number of clients) asked the U.S. Court of Appeals for the D.C. Circuit to tell the FCC that the Commission could not lawfully impose the FRN requirement as that requirement had been described up to that point. The Commission fussed a bunch, delayed the filing deadline to give itself a chance to tweak things, but eventually tried to stick to its FRN guns. We went back to the Court. The Court ordered the FCC to respond to our arguments.

A funny thing happened at that point. After it was ordered to respond but before it did so, the Commission revised the FRN language in Form 323. It then explained to the Court that the form, as revised, made it "clear" that "users are not required to provide SSN-based FRNs for the July 8 filing if they object to the submission of their Social Security Numbers". (Note that that gloss on the revised form might not have been 100% consistent with the language of the revision, at least in the minds of some folks, but that's the way the FCC explained it to the Court.) The Court, in turn, interpreted the FCC's statement to say that "no individual attributable interest holder will be required to submit a Social Security number to obtain an FRN [*i.e.*, FCC Registration Number] for the July 8, 2010,

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Range War 2011

Wireless vs. Broadcast: Chalk One Up for Wireless

FCC moves to protect broadband licensees from TV Ch. 51

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Perhaps frustrated at the slow pace of Congressional cooperation in passing incentive auction legislation to allow it to take a meat cleaver to the TV spectrum and serve up a chunk to wireless operators, the FCC is starting to chip away at TV with an ice pick. The first move is to put Channel 51, currently the uppermost TV channel, on ice, imposing an immediate freeze on applications for new stations and improvements in existing stations on that channel.

As we wrote back in March, Channel 51 is immediately adjacent to the 698-746 MHz band (formerly TV Channels 52-59), which have been reallocated to wireless services. Channel 52 has been auctioned, and the winning bidders don't like the idea that the high power used by TV stations might blast their smaller wireless devices into oblivion. They asked the FCC to, in effect, create a guard band on the TV side of the border rather than the wireless side by stopping any growth on Channel 51.

The FCC has obliged, with a combination of steps that freeze and thaw at the same time, apparently intended both to stop growth on – and encourage abandonment of – TV Channel 51.

Remember that while the FCC is considering how much of the TV band it can chop off for wireless use, it has already frozen growth in the entire TV band. No new applications or channel changes are allowed for full power stations, and no new applications are being accepted for low power TV stations on any channel. All of this is to ensure a fixed database when the FCC is ready to use the cleaver.

But clearing Channel 51 has risen to a higher priority than having a fixed database, so the scramble is on.

Full power TV stations on Channel 51 are invited to get out of Dodge right now and move to any lower channel they can find. Their rulemaking petitions to amend the TV Table of Allotments and their applications for construction permits to change channel will get the warm fuzzy treatment. On the other hand, pending applications for new LPTV stations on Channel 51, most of which were filed in 2009 and 2010 and were being processed up to now, have been given the liquid nitrogen treatment and flash frozen – although before the freezer door is shut and locked, they, too, can avail themselves of a temporary thaw in the form of a 60-day window to change channels. Channel-change amendments are normally major changes that were previously forbidden, but they will now be classified as permissible minor changes for those who can find a lower channel.

Existing full and low power stations authorized on Channel 51 may continue to operate undisturbed – undisturbed, that is, except for the long, dark shadow now cast on their long-term future. They will be permitted to file minor change applications, but only if they do not propose to cover any new area they did not cover before. That will place a considerable damper on LPTV stations that are used to hopping round and inching toward larger markets.

The new dance floor is strictly limited to Channel 51 stations and applicants. Anyone on any other channel remains subject to all the old processing rules: full power stations may not change channels, LPTV applications will be processed but no new applications will be accepted, and any station may file for a minor change even with an expanded service area.

There are some things we still don't know. One is whether any priority will be given to Channel 51 abandoners. Obviously, full power stations may move to new channels and exterminate secondary LPTV stations in their way, both incumbents and applicants. But

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Focus on FCC Fines

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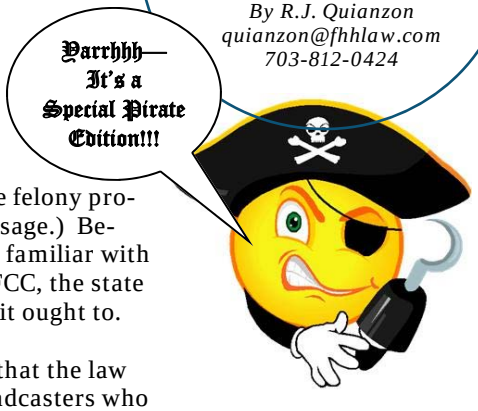
The month of August (and a bit of the end of July) saw the FCC cite more than a dozen pirates around the country for illegally operating radio stations. Most of the illegal operations were using FM frequencies, but a few were also on the AM side. Most pirates were hit with the $10,000 fine that is the FCC's standard for such misfeasance. However, in one instance the FCC doubled the fine for a pirate who refused to let the FCC enter her home to inspect the transmitter. In almost all of these cases, the FCC also noted that the pirates were ignoring sternly worded letters from the government.

But pirates beware!!! The Feds aren't the only ones on your tail: this month, the New York state legislature passed a law looking to add its own enforcement muscle toward stopping pirates.



It will soon be a Class A misdemeanor in New York state to broadcast on AM and FM frequencies without a license. (Initial versions of the law proposed making repeated pirate operations a felony; however, the felony provisions were removed before passage.) Because state lawmakers are not as familiar with broadcasting as the folks at the FCC, the state law may reach a bit farther than it ought to.

Of particular concern is the fact that the law appears to apply to licensed broadcasters who inadvertently allow their license to expire. Don't laugh – that's not a far-fetched scenario. Every renewal cycle a small but still non-trivial number of licensees fail to file for renewal of their licenses, the result being that their licenses expire. Oops. When such cases come to the Commission's attention, its SOP is to issue a fine (for unauthorized operation), require that the station obtain an STA to continue to operate, and insist on the filing of a renewal application. The renewal is eventually processed and granted, and life goes on. The decision by New York legislators to make it a misdemeanor to broadcast "without authorization or having first obtained a license from the [FCC]" should provide a serious added incentive for broadcasters in the Empire State to keep track of their license renewal obligations.

Across the Hudson River from New York, New Jersey has a similar statute making the act of pirate broadcasting a "crime of the fourth degree". However, the New Jersey law does not attempt to define the frequency bands. Instead, Title 2C:33-23.1 of the New Jersey Criminal Code relies on the Feds by making radio transmission a crime "unless the person obtains a license, or an exemption from licensure, from the [FCC]." Florida also has a law against pirates that closely mirrors the New Jersey law. Under Section 877.27 of the Criminal Code in Florida law, however, the violation is a third degree felony.

New York's decision to join Florida and New Jersey in criminalizing broadcast piracy was widely supported by the New York State Broadcasters Association. Class A misdemeanors in New York can result in up to a year in the slammer. The threat of time behind state bars rather than – or in addition to – some federal penitentiary may serve as a deterrent to some pirates and help to keep the airways clear for law-abiding broadcasters. However, enforcement by state officials has yet to be refined and, in the case of New York, the language of the new criminal code may need to be adjusted. As always, licensed broadcasters and their listeners are a grass roots line of defense against pirates: state and federal crime busters tend not to monitor the airwaves looking for pirates. Rather, enforcement efforts tend to be initiated by broadcasters who become aware of pirates the hard way – when the interference complaints from listeners start to roll in – and who then call in the authorities.

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what about existing LPTV stations that do not have to abandon Channel 51 but want to skeedaddle while the skeedaddling is good? Will they be allowed to claim that they are effectively subject to displacement and, thus, eligible to move now? If so, will their applications take priority over ungranted earlier-filed applications for new LPTV stations or changes in existing stations, the way that displacements from Channels 52-69 do? Will Class A stations be treated any differently from LPTV stations? Will amendments to pending Channel 51 LPTV applications take priority over pending applications on lower channels? And what about granted but unbuilt construction permits for new LPTV stations on Channel 51? May they build on 51? If they prefer to move, may they do so as a minor change the way pending applicants may do?

And you thought that the TV database was going to be held in place pending further notice. It looks more like the hopscotch game has begun.

We've told you before and we're telling you again . . .

www.CommLawBlog.XXX?

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As any right-thinking broadcaster should know by now, it's important to register – in the federal trademark system – your call signs, slogans and any other station identifiers you've used and rely on to create your station's identity. It's not like I haven't harped on that before – I've written about this very issue at least three times before. (Don't believe it? You can find them all on our blog at www.CommLawBlog.com.) Still, I suspect that there are some of you out there who resist my urging – so this time, I'm going to turn to one of the oldest tricks in the book to get your attention:

PORN!!! SEX!!! NUDITY!!!

Sorry about that, but this is really important, because yet another reason for registration has entered the scene: you don't want your call sign associated with an adult-oriented website, do you?

It could happen.

Would you want to get complaints about the content on www.[fill-in-your-trademark-here].xxx?

The organization responsible for the system used in naming Internet sites – that would be the Internet Corporation for Assigned Names and Numbering (ICANN) – recently established a new "top level domain", *i.e.*, the last part of your basic internet web address. Think ".com", ".org", ".gov", ".edu".

Now you can add ".xxx", a domain that will be reserved for "adult-oriented websites".

This is all part of an attempt to make the Internet "safer" for younger users by sequestering "adult" sites in a neighborhood of their own – like an Internet red light district. With all such sites herded into one common domain, so the theory goes, parents should be able to block access to them all more easily than would otherwise be the case.

Some porn purveyors may prefer the arguable cachet that a ".xxx" domain might provide (although a number of such purveyors opposed the ".xxx" approach as discriminatory). But suppose you're ***not*** a porn purveyor, and you've got no interest in having your Nicer-Than-Nice, high quality, super-popular site lumped in with adult-oriented sites? What's to stop unscrupulous folks from trying to piggyback off your site's stellar reputation and insane popularity by registering, say, "www.CommLawBlog.xxx" because they think that the allure of the well-established "CommLawBlog" mark will attract droves of browsers to a CommLawBlog porn site? (I'm sorry I had to put that image in your head.)

Or even if you don't already have a website, what if you have a well-established identity in your particular community? Would you want to start getting calls from concerned customers complaining about the content they just noticed on www.[fill-in-your-trademark-here].xxx?

The easiest – and generally least expensive – way to prevent these scenarios would appear to be to preemptively register "www.[Your Trademark].xxx". Of course, .xxx domain names are restricted to "adult-oriented websites", a universe which consists of individuals and entities that provide sexually-oriented information, services or products intended for consenting adults or for the community itself.

But there ***is*** a way to play defense, at least for those of us who have registered our trademarks. Here's how that works.

A "sunrise" registration period for .xxx domain names will run from September 7 through October 28. During that period, any adult-oriented business that owned a domain name or trademark as of February 1, 2010, can register that trademark or domain name as a .xxx domain name (assuming that the business agrees to abide by certain rules and policies). So, for instance, "Playboy" could reserve Playboy.xxx during the "sunrise", but an adult-oriented business that had neither domain name nor registered trademark by February 1, 2010 could not.

During that "sunrise" registration period, individuals and entities ***not*** engaged in adult-oriented services can defensively "block" the registration of any .xxx domain name that incorporates registered trademarks owned by them. The trademark in question must have been registered prior to September 1, 2011, at the national level, but need not be a U.S. registration. (In other words, the registration must be issued by some country; mere state registration won't do.) Note that this blocking mechanism does ***not*** work with respect to unregistered marks, misspellings of registered marks, or mere domain names. Obtaining a defensive "blocking" registration does not commit you to operating an actual site; rather, anyone who clicks on the defensive domain name will be directed to a standard webpage advising the visitor that the site name has been reserved.

After the "sunrise" period closes down, an 18-day "landrush" registration opportunity – from November 8-26 – will be available, but only to any adult-oriented business, regardless of whether it would have been eligible to file during the "sunrise" period. If two or more applications filed

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The FCC digs its regulatory heels in

Public Inspection File Inquiry Arrives at OMB

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We have movement on the local public inspection file front!

The proceeding the FCC kicked off last April – inquiring into (among other things) whether there really is any need for the public inspection file requirements of Sections 73.3526 and 73.3527 – has now been bucked over to the Office of Management and Budget. This opens up one final 30-day period during which comments on the requirements may be submitted (to OMB). The deadline for comments is ***September 15, 2011***.

Why another round of comments? It's all part of the Paperwork Reduction Act (PRA) process. In PRA parlance, the public file requirements constitute "information collections". Because of that, the FCC can't impose those rules without approval from OMB, which approval can extend for no more than three years. Once the three-year clock tolls, the FCC's got to go back to OMB and request an extension of the previously-issued approval if the FCC wants to keep the requirements in place. As part of that extension process, the FCC must: (a) give everybody a 60-day opportunity to submit comments to the Commission; (b) review those comments and prepare a "supporting statement" addressing the comments; and (c) ship the comments and its supporting statement to OMB. Then OMB must provide a 30-day comment opportunity of its own. That's where we are right now.

As far as we can tell, the Commission never gets around to explaining why this particular "information collection" is necessary.

If you want to read the FCC's supporting statement, you can find it at the OMB's website, or you can find a link to it on our blog (www.CommLawBlog.com). We'll address some of its highlights below. In addition to the supporting statement, the Commission has posted a downloadable Zip file containing approximately 516 comments that were filed. (We've put a link to that file on the blog as well. To get to the file, click on the link and scroll down to the "Public Inspection File Comments" link.) Don't be daunted by that number – more than 90% consist of the same 191-word four-paragraph letter urging the FCC to retain the public file requirements. (While we suppose that it's theoretically possible that 470+ individuals may have independently come up with precisely the same combination of 191 words in precisely the same order, we suspect it more likely that some form of AstroTurf® operation may have been at work here. Not that there's anything wrong with that . . .) We'll get to those letters, too.

Mixed in with the robo-comments are 30+ comments mainly from broadcasters and state broadcast associations. They generally oppose the continued imposition of all or most of the public file requirements.

Let's take a look at the FCC's supporting statement first.

As appears to be par for the course for such statements, this one bears no signature or other attribution to any particular official or office within the Commission. Such anonymity seems strange in this day and age of Transparency and Accountability. But OMB doesn't seem to care, so why should we?

In its statement, the Commission is supposed to explain why this particular "information collection" is "necessary". As far as we can tell, the Commission never gets around to doing that. Oh sure, it rambles on about how the public file "allows the public to monitor [broadcasters'] public interest performance", and how "public participation is a key component of the broadcast license renewal system". It claims that the public file "allows the public to meaningfully participate in the [license] renewal process", and moans that the "citizens' role in the licensing process would be diminished" without, in particular, the issues/programs list aspect of the rules.

But the PRA doesn't ask the Commission to describe how a rule might be useful; rather, it requires the Commission to "include an explanation of *how the agency HAS USED the information* that it has collected" (those are our emphases, not the PRA's). So let's get past the platitudes and look at the actual historical record. As we pointed out in comments filed on behalf of a number of FHH clients (yup, you can find them in the FCC's Zip file), the FCC has had decades of experience with the broadcast renewal process and the public file rules. Those rules have been in their current form for about 25 years. Do the math: that's at least three full license renewal cycles for ***all*** 12,000–15,000 broadcast licenses, for a total of about 40,000 separate license renewals. And yet, as far as we know, the availability of materials in public files has not led to *any* denials of renewal – or otherwise factored meaningfully – in any of those 40,000 or so instances. That should not be surprising, since (according to the broadcasters who commented) few if any members of the public ever actually inspect the public files.

So why exactly is the public file rule "necessary" to the Commission? The Commission doesn't say, probably because, after decades of experience, there is no reason to

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Overall Backhaul Overhaul Update

New Backhaul Rules Adopted, More on the Way

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We wrote last summer about how the proliferation of wireless devices has created a corresponding need for wireless backhaul capacity – "backhaul" being a term that refers generally to the "middle mile" links that move end-user traffic between cell towers and the core network. Traditionally, backhaul was carried on copper wires or fiber, but that 20th Century approach isn't necessarily the most practical, particularly in rural and remote locations. In those situations, a wireless approach, using point-to-point links on microwave frequencies allocated by the FCC for "fixed service", does the trick better. The FCC has now adopted the proposals it put forth a year ago to facilitate the use of fixed service spectrum for wireless backhaul. In a concurrent notice of proposed rulemaking (NPRM), the Commission seeks comment on additional wireless backhaul matters.

During the meeting at which the Commission adopted the new rules, Chairman Genachowski admitted that when he first heard about the proposals to change the fixed service rules, his eyes "glazed over." Now, however, the subject is generating a lot of enthusiasm at the FCC. At the meeting, Genachowski and the other Commissioners rhapsodized that more flexible fixed service rules will increase rural buildout, spur 4G deployment, create jobs, and stimulate technical innovation.

If you're a BAS or CARS licensee, make sure your information in ULS is correct

Specifically, the new rules will:

- Allow fixed service wireless into the 7 and 13 GHz bands currently occupied by broadcast auxiliary services (BAS) and cable TV relay service (CARS). Broadcasters and cable operators use BAS and CARS to transmit video programming, both over fixed links (e.g., from TV studio to transmitter) and through TV pickup operations (those news vans with telescoping antennas on top). While sharing among fixed users is feasible, mobile and fixed operations don't mix as well. News gathering vehicles must respond to breaking news quickly, without stopping to formally coordinate with other spectrum users, while fixed service systems need protection from interference to assure a high level of reliability.

  The FCC divided the baby along demographic lines: it authorized fixed service operations in the BAS and CARS bands only in areas that have no TV pickup licenses. That's half of the nation's land mass, but only 10% of its people. Allowing sharing in these areas may encourage rural buildout, as the FCC hopes, but will not go far to ease the congestion in urban areas caused by millions of data-hungry smartphones and tablets.

  The fixed wireless industry is therefore likely to continue exploring other workable spectrum arrangements, such as sharing with government spectrum at 7125-8500 MHz.

****** NOTE: If you're a BAS or CARS licensee, make sure your information in ULS is correct, so that the Commission does not authorize an overlapping fixed service link. We provided tips on how to do that in the February, 2011 Memo to Clients – and you can find the same tips at www.CommLawBlog.com. The new rules also require registration of TV pickup receive stations. ******

- Permit adaptive modulation. The Part 101 rules governing fixed service operation require a minimum payload capacity (in megabits per second) for fixed links. Sometimes, though, passing atmospheric conditions interrupt a signal at this data rate, a condition called a "fade." The connection is lost and the system has to be resynchronized, which can take several minutes. The Fixed Wireless Communications Coalition (FWCC) asked the FCC to allow "adaptive modulation", a process which temporarily slows the data rate during a fade so as to keep the connection intact. The FCC agreed, but with a catch: for efficiency, a fixed link using adaptive modulation must maintain the minimum payload capacity 99.95 percent of the time, or all but four hours of the year. This is a design requirement, not a performance requirement: links must be designed to comply, but the FCC will not require reporting of actual adaptive modulation use.

- Eliminate the "final link" rule. Broadcasters have generally been permitted to use fixed Part 101 fixed service stations as part of the process of delivering programming to their transmitters – provided, that is, that fixed service stations not be used as the final RF link in that process. The Commission has now re-thought that rule, concluding that there may be significant benefits to be realized from eliminating it, with no associated costs. Result: the "final link" rule is now history.

The FCC rejected a proposal to allow fixed service licensees to deploy smaller "auxiliary" transmitters, all sharing the same spectrum as the primary station and all located within that primary station's coordinated service contour. Proponents claimed that this would lead to more efficient use, or re-use, of the spectrum. Not so fast, said the Commission, which wasn't convinced that primaries and auxiliaries could really co-exist without causing interference . . . or that the

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2011 Reg Fee Deadline Announced: September 14, 2011

Get out your calendars . . . and your checkbooks! The Commission has *announced the deadline for filing this year's regulatory fees.* And that deadline is (drum roll, please): ***11:59 p.m. ET on September 14, 2011***. (Ahem -- that would be the date our colleague Davina Sashkin predicted in her post on www.CommLawBlog.com a couple of days ***before*** the FCC's official announcement . . . not that we're looking for any credit or anything just because she had it right.) As Davina reported there, the payment window opened as of August 12, 2011 (when the Fee Filer system started accepting reg fee payments), for those of you who might be interested in (a) avoiding any last-minute rush, and thereby also (b) avoiding the 25% late fee that gets tacked on for folks who miss the deadline. Of course, the 2011 reg fees (which we reported on in last month's *Memo to Clients*) won't technically become "effective" until September 9, since the order establishing those fees didn't make it into the Federal Register until August 10. But it appears that the FCC isn't going to let its knickers get wadded up about that kind of hyper-technical detail when cash coming into the Commission's coffers is involved.

You can find a table of broadcast-related fees on our blog, and in last month's *Memo to Clients*. The entire list of fees for *all* services is included in Attachment C at the end of the Commission's order.

As we have previously cautioned, the Commission has stopped sending out any hard copy "pre-bills" to remind you that reg fees are due. If you want to know what the Commission thinks you owe, there's a handy feature in Fee Filer that should give you the information that would, in the olden days, have been included in the "pre-bill". But as we have also previously cautioned, heads up there – the Commission has been known to make mistakes, so "trust but verify" should be the order of the day. And in that vein, let's not forget that the Commission does ***NOT*** routinely include the fees for auxiliary licenses in its own determination of fees owed – even though it still expects you to pay reg fees for such licenses. So don't forget to inventory all your auxiliaries before you start the payment process, just to be sure that you're paying everything you owe.

Enjoy the rest of your summer.

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spectrum isn't already extensively re-used, and re-useable, under existing rules. Plus, the "auxiliary" proposal would create a "perverse" – that's the Commission's word, not ours – incentive for applicants to propose excessive power for their primary stations, since the bigger the primary contour, the more auxiliaries could be crammed into it. And anyway, a variety of other bands (think LMDS, 24 GHz and 39 GHz) already available could be used for the types of operations contemplated for "auxiliary" stations. Bottom line: a big negatory on the auxiliary proposal.

Finally, in the concurrent NPRM, the Commission has requested comment on:

- ? Allowing smaller Category B antennas in the 6, 18, and 23 GHz bands (three-foot, one-foot, and eight-inch antennas, respectively). Smaller antennas potentially cause more interference because they disperse energy more broadly, but are cheaper to manufacture, install, and maintain, and typically generate fewer zoning objections. There are no proposed changes to the more stringent Category A antennas, which are required wherever Category B antennas would cause interference.

- ? Exempting licensees from payload and loading requirements in non-congested (mostly rural) areas – specifically, in areas where Category B antennas are allowed. The goal is to lower costs and increase investment in rural broadband deployment. In congested areas, the Commission proposes exempting licensees that can make a special showing that: (a) the efficiency standard is preventing deployment; (b) there are no reasonable alternatives; and (c) relaxing the standard would result in tangible and specific public interest benefits.

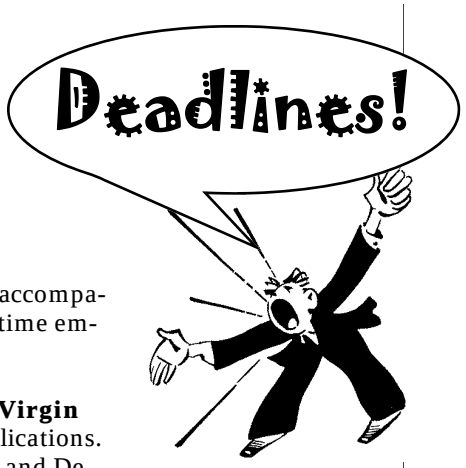
- ? Allowing wider channels, or channel "stacking," in the lower 6 and 11 GHz bands, as proposed by the FWCC. Where traffic demand is high, wider channels would result in lower costs, improved reliability, elimination of intermodulation issues, and increased spectrum utilization. The Commission seeks comment on allowing 60 MHz channels in the lower 6 GHz band and 80 MHz channels in the 11 GHz band.

- ? Revising waiver standards for microwave stations that point near the geostationary arc to conform to International Telecommunications Union (ITU) regulations.

- ? Defining the term "minimum payload capacity" as used in the efficiency standard rule. To accommodate application of the rule to Internet protocol radios, the Commission proposes rules, put forward by Comsearch, defining the term to include only capacity that is available to carry traffic, excluding overhead data used by the network itself, such as error correction and routing information.

The newly adopted rules will become effective 30 days after publication in the Federal Register. Check back with CommLawBlog for updates on that front. Comments on the issues teed up in the NPRM are due on ***October 4, 2011***, and reply comments on ***October 2***5.

September 14, 2011



Annual Regulatory Fees — All non-exempt FCC licensees and permittees are required to pay their annual regulatory fees no later than 11:59 p.m. ET on September 14, 2011. Late-filers face a 25% penalty, so meeting this deadline is particularly important.

October 1, 2011

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

Post-Filing Announcements - *Radio* stations located in **Florida**, **Puerto Rico**, and the **Virgin Islands** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on October 16, November 1, November 16, December 1, and December 16.

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

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Noncommercial Television Ownership Reports - All *noncommercial television* stations located in **Iowa** or **Missouri** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in Alaska, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, or **Washington** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

October 10, 2011

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the third 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 that the FCC now requires the use of FRN's and passwords in order to file the reports. We suggest that you have that information handy before you start the process.

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

December 1, 2011

Biennial 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 a biennial ownership report on the FCC Form 323. Please recall that sole proprietorships and partnerships composed entirely of natural persons (as opposed to a legal person, such as a corporation) must file reports, as well as other licensee entities. All reports must be filed electronically.

License Renewal Applications - *Radio* stations located in **Alabama** and **Georgia** must file their license renewal

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believe that the rule really is necessary.

Another thing the Commission is supposed to provide is an explanation of its estimates of the "burdens" and "costs" imposed by the rule. In its initial notice back in April, the Commission provided a bunch of numbers supposedly reflecting those estimates, but no explanation of how it arrived at those numbers. Several commenters pointed that out – only to be told, in the Commission's supporting statement, that those commenters obviously didn't understand what the Commission was doing. No kidding, Sherlock – but that lack of understanding arose from the fact that the FCC hadn't bothered to explain its numbers. Unfortunately, nothing in the supporting statement sheds much more light on the genesis of the Commission's figures. Suffice it to say, though, that the FCC is sticking by its position that stations generally devote between 100 -200 hours a year to maintain their public files – although how the Commission gets to that number is still not explained – and that the cost of that burden is $0.

In general, it's safe to say that the Commission does not appear to have been swayed by any of the comments urging abandonment of public file rule.

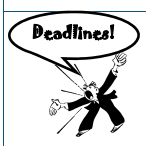
As for those commenters who supported retention of the rule – that would be the 470 or so like-minded folks who opted to use the scripted response and another dozen or so who ad-libbed independently – one thing can be said: while all those commenters wax eloquent about the incredible overriding importance of the public file, none of them provides any evidence to support their claims. If the public file really were an essential device to these folks, you'd think that at least some of them would have been able to provide specific illustrations of how they have historically used that device. Of course, since the FCC's own records contain no such instances, it's not surprising that the commenters came up empty-handed as well.

So the comments provide no indication at all that the public file requirement in fact has ever come into play in the FCC's licensing activities. The Commission cites not even one case in which the agency's exaggerated expectations for the file have ever intersected with reality. And the best that the supporting commenters can do is say that, gee, making broadcasters maintain public files is a swell idea, regardless of whether anybody ever looks at them. That doesn't seem like a particularly compelling case for allowing the FCC to continue to impose those rules.

One interesting observation. The FCC's materials were apparently submitted to OMB on August 16. The expiration date for the current OMB approval of the public file rules is September 30, 2011. So what? As it turns out, the PRA (that would be 44 U.S.C. §3507(h)(1)(B)) specifies that, if an agency wants an extension of an outstanding approval, the agency "shall" submit its extension request "no later than 60 days before the expiration" of that outstanding approval. So it looks like the FCC was a couple of weeks late with its submission to OMB. And since the PRA is a statute, the 60-day deadline it imposes is not something that could ordinarily be waived by a mere agency (*i.e.*, the FCC or OMB). How the Commission's apparent lateness may affect things remains to be seen.

The ball is now in OMB's court.

Again, comments are due at OMB by ***September 15, 2011***.



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applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Post-Filing Announcements - *Radio* stations located in **Alabama** and **Georgia** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on December 16, January 1, January 16, February 1, and February 16.

License Renewal Pre-Filing Announcements - *Radio* stations located in **Arkansas**, **Louisiana**, and **Mississippi** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on December 16, January 1, and January 16.

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.

Noncommercial Television Ownership Reports - All *noncommercial television* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **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.

National EAS Alert Test Coming Into Sharper Focus

By Matt McCormick
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With the first National EAS Test just ten weeks away, more details regarding the exercise are emerging. The test is set for Wednesday, November 9 at 2:00 pm EST. (If you happen to have been in a sensory deprivation tank for the last several months and are drawing a blank on the whole National EAS Test question, check our previous posts on www.CommLawBlog.com to get caught up.)

At the appointed time, the Federal Emergency Management Agency (FEMA) will send out a "live" Emergency Action Notification (EAN) code activating the EAS for "a national emergency". To forestall panic, the alert will include an audible "this is a test" notice. It's a little iffy, though, whether the "live" EAN video message transmitted will be able to flash "this is a test" on video screens, which might be problematic for deaf or hearing-impaired viewers. FEMA and the FCC are working with EAS participants on possible technical solutions to mitigate the impact of this limitation.

It's a little iffy whether the "live" EAN video message transmitted will be able to flash "this is a test" on video screens.

Some of nitty-gritty details nailed down thus far are:

- The test will conclude with transmission of an End of Message (EOM) code rather than an Emergency Action Termination (EAN) code. This means that EAS participants will *not* need to reconfigure their EAS encoder/decoder equipment.
- The "location code" for the test will be Washington, D.C. The FCC presumes that most encoder/decoder devices will automatically forward an EAN with a Washington, D.C. location code without reconfiguration. But EAS participants unsure whether their device will do so need to check with either (a) the manufacturer of the box or (b) FEMA's Integrated Public Alert and Warning System Office at IPAWS@dhs.gov. Better to tie that detail down sooner rather than later.
- The test will last approximately three minutes. (Author's comment: Really? After the President – or whoever is speaking – goes through the standard script (repeat after me: "This is only a test. If it had been a real National Emergency, you would have been instructed ...."), he'll have about two minutes and fifteen seconds left. What's next – a national "Sweet Caroline" sing along? An abbreviated version of John Cage's *4'33"*?)
- FEMA is working with selected states, EAS participants and manufacturers to conduct statewide pre-tests. A national pre-test will *not* be conducted. To find out if your state is among those doing a test-in-advance-of-the-test, check with your state's EAS contact) or FEMA's IPAWS Office.

Stay tuned for further details as Test Day nears.

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biennial filing deadline or for any imminent non-biennial filing of Form 323." And, based on that interpretation, the Court denied our petition.

None of that history is reflected in the form's instructions or on the FAQ page, at least as of this writing. But the fact of the matter is that, in its explanation to the Court, the Commission clearly indicated that nobody would be required to submit a Social Security Number-based FRN if he/she objects to such submissions, regardless of the basis for any such objection. To the extent that the form's instructions and the FAQ may seem to say otherwise, those indications can and should be disregarded (unless, of course, the Commission is inclined to schlep down to the Court again to explain why what it told the Court in 2010 should no longer apply in 2011).

Keep an eye out – particularly on www.CommLawBlog.com – for any further wrinkles that might pop up on this front in coming months.

Remember that the filing requirement applies to full power TV, commercial radio, and all Class A and low power TV stations, but ***not*** TV or FM translators or low power FM stations. Noncommercial educational AM, FM, and TV stations must file biennial reports, but they use FCC Form 323-E and must file on staggered dates corresponding to the state where they are licensed rather than the uniform nationwide date that applies to commercial stations.

The FCC's DIRS wants to hear from YOU

It's Hurricane Season: Who You Gonna Call?

As this is being written, the East Coast has suffered a significant earthquake and a hurricane in less than a week (and, in the middle of Hurricane Irene, New York encountered a separate earthquake) – and it's still relatively early in the hurricane season. All of which means that it's a good time to remind broadcasters of the FCC's Disaster Information Reporting System (DIRS) – and to encourage them to update their contact information with DIRS regularly (if they've previously enrolled in the program), or to get with the program and sign up now, if they haven't already. Hundreds of broadcasters nationwide have enrolled in DIRS, but there appear to be a significant number still standing on the sidelines.

DIRS enables the FCC to keep tabs on which stations are up and running during, and immediately after, a disaster or large-scale emergency. It also enables the Commission to move quickly to help broadcasters get back on-air if they're knocked off by the emergency conditions. In emergencies and disasters, obviously, it's in everybody's interest to have broadcasters up and operating so that they can provide emergency-related information and updates to the public.

If you're a communications provider (a broad universe that includes broadcasters), you can easily sign up for the program online at the FCC's website (you can get started at http://transition.fcc.gov/pshs/services/cip/dirs/dirs.html, the DIRS homepage). You give the Commission some basic contact information, and you get a user ID and user password. When emergencies occur and the FCC activates the system (participants will be advised by email of any activation), you can then use the system to alert the FCC to the status of your operation – and, if you happen to need any help from the FCC, you can let them know that as well. (FEMA and FCC emergency response personnel use DIRS reports to coordinate needed assistance – including such necessities as fuel and generators – in the aftermath of natural disasters.)

Participation in DIRS is purely voluntary. Even if you sign up, you don't necessarily have to submit reports. But experience (think Katrina, for one unfortunate example) indicates that when disaster strikes, it is at least helpful, if not absolutely crucial, to have a common point for the collection and dissemination of information about what's going on in the stricken area and its environs. And don't forget, the DIRS is available for all kinds of emergencies, not just hurricanes.

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during the 18-day "landrush" seek the same domain name, they will go to a closed auction. Following the "landrush", on December 6, .xxx domains will be available to any adult-oriented business on a first-come-first-served basis.

The ICM Registry, the company which is behind the .xxx domain name and which will operate the .xxx registry, has prepared this handy video laying out these processes. You can find a link to it on our blog.

So the .xxx domain name reservation process is really opened to only two types of entities: (1) Adult-oriented businesses and (2) non-adult-oriented businesses or individuals holding registered trademarks.

Left out in the cold are non-adult-oriented businesses and individuals that haven't registered the trademark(s) that they would prefer not to see incorporated in a .xxx domain name. And at this point these folks have no way to get in from the cold: there is absolutely no way to obtain a federal trademark registration between now and the October 28 close of the "sunrise" period because trademark registration applications generally take about six months to process.

Now do you see why it's a good idea to register your call signs, slogans, etc.? If you had taken care of that little chore back when my first blog on the subject appeared, you'd at least have a way to protect yourself now.

As it is, the only thing that non-adult-oriented businesses or individuals without registered trademarks can do at this point is wait and hope that no enterprising cybersquatter picks their call sign (or other identifiable mark) to use in a .xxx site name. Should that happen, there are still avenues available to dislodge the offending use of the name, the primary such avenue being the ICANN Domain-Name Dispute-Resolution Policy. But that involves the filing of a lawsuit or initiation of an arbitration process that requires fairly elaborate showings. It's not necessarily an easy, or quick, or inexpensive process.

One thing is for sure, though: if you have registered your call sign, major slogans or other identifiers as trademarks, the dispute resolution process is much easier than if you haven't. Registration won't guarantee a slam dunk victory for you, but it will definitely give you a distinct advantage. So even if you haven't registered your marks yet, it would still be a good idea to do so sooner rather than later.

The registration process really isn't all that expensive, either. To trademark a basic call sign, slogan or other identifier of your station carries a $275.00 filing fee. And the legal fees usually associated with registering a basic radio or TV call sign that's already in use tend to be relatively modest – particularly when compared with the $5,000 or more that it is likely to take to get a cybersquatter kicked off a .xxx domain.

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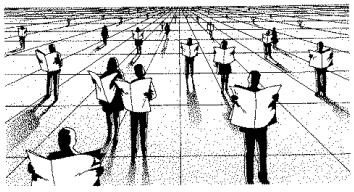
Stuff you may have read about before is back again . . .

Updates On The News

Spectrum Quest (Home Edition) – The hunt for "available" spectrum can be brutally hard. That unpleasant reality was highlighted in the Commission's recent Quest for Spectrum as it sought to sort out the Low Power FM/FM Translator problem.

In prepping for the LPFM/FM translator order, the dedicated Media Bureau staff went to extraordinary lengths to try to divine what channels might be available, and where, to accommodate demand for new LPFM and FM translator stations in more than 150 markets. Just what lengths, you ask? In the Commission's words (as we reported in last month's *Memo to Clients*):

> [T]he Bureau centered a thirty-minute latitude by thirty-minute longitude grid over the center-city coordinates of each studied market. Each grid consists of 931 points – 31 points running east/west by 31 points running north/south. Grid points are located at one-minute intervals of latitude and longitude. The Bureau analyzed each of the 100 FM channels (88.1 MHz – 107.9 MHz) at each grid point to determine whether any channels remain available for future LPFM stations at that location. Only channels that fully satisfy co-, first- and second adjacent channel LPFM spacing requirements to all authorizations and applications, including pending translator applications, are treated as available.



If you think that all sounds easy – or if you think you could have done better – here's your chance. The Commission is making available to the Great Unwashed the spectrum availability analysis program the Bureau used, along with the coordinates used in preparing each market analysis. Talk about fun for the whole family! Now you can spend hours exploring the potential availability of frequencies for LPFM stations at locations throughout the United States! Just click on the Commission-provided link (we've got it posted on www.CommLawBlog.com), download and unzip the files, and off you go. (The Commission cautions that you check out the Readme.txt file first – it'll help guide you through the contents.)

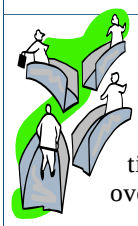
Good luck.

"I see dead doctrines" – The Fairness Doctrine is dead. Really. The Commission has gone to great pains to assure us of this – by issuing an order formally excising several vestigial references to the Doctrine (and its progeny) that had managed to linger on in the rules. The order also deleted rules relating to the "broadcast flag" and the complaint process relative to cable service tiers. We can all breathe easier now.

Hold on a minute. The Fairness Doctrine was tossed out more than two decades ago (by the Commission, with the blessing of the courts); it's been dead since then. And the other two regulatory areas targeted in the order had likewise been scrapped years ago: the "broadcast flag" rules were thrown out by the D.C. Circuit in 2003, and the Commission's authority to regulate cable service tiers had died (through a "sunset" provision of the law) in 1999. So in truth, the recent regulatory exorcism was, like most exorcisms, more ritual than reality.

But to hear Chairman Genachowski tell it, taking the Wite-Out® to a couple of pages of the FCC's rules that have been totally ignored for decades should "clear[ ] the path for greater competition, investment and job creation". Really? If none of these rules has been applied by the Commission in years, and if (given the relevant court rulings and "sunsetting" provisions) the Commission *couldn't* apply them even if it wanted to, how could the deletion of these rules affect anybody? How exactly do competition, investment and jobs flow from a ministerial action that could and should have been taken years ago? The Commission also touted the deletion of these rules as reflecting the agency's "robust regulatory review process". But how "robust" can that process be if it failed for years to identify these long-dead provisions?

Regulatory review and regulatory reform are, for sure, laudable undertakings. But any attempt to characterize the recent deletion of a couple of references to already-long-gone rules and policies as either "robust regulatory review" or meaningful "reform" contorts those terms beyond recognition. If the Commission wants to be taken seriously as an agency committed to "regulatory review" and "reform", it might want to be more careful in how it throws those terms around.



FHH - On the Job, On the Go

On August 19, **Frank Montero** and **Dan Kirkpatrick** travelled to sunny San Juan to present a seminar on the license renewal process to Puerto Rico Radio Broadcasters Association. (By the way, Dan has an excellent webinar on renewals that he has already presented to a number of state broadcast associations. If you're an association – or if you're a licensee with renewals coming up – and would like a comprehensive overview of the renewal process, you may want to arrange to have Dan work his webinar magic for you.)

And coming up in September, we have the NAB Radio Show in Chi-town. If you're going to be in the Windy City for the festivities, keep an eye out for **Frank Jazzo**, **Scott Johnson**, **Harry Martin**, **Matt McCormick**, **Frank Montero**, **Jim Riley** and **Howard Weiss**, all of whom will be attending. **Howard** will be featured on the "Radio Regulation Boot Camp" panel on September 15 (from 3:00-4:30 p.m.). Don't miss him!